Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01409/2014

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
23 July 2015	**2 September 2015**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GARFIELD MARK EARL BENNETT

Respondent

Representation:
For the Appellant: Mr I Richard, Senior Home Office Presenting Officer.
For the Respondent: Ms D Revill, instructed by Peer & Co. Solicitors.

DETERMINATION AND REASONS

1. The Secretary of State appeals, with permission, to this Tribunal against the determination of the First-tier Tribunal (Judge Troup) allowing the appeal of the respondent (whom we shall "the claimant") against the decision on 17 June 2014 to make a deportation order against him. We heard submissions from Mr Richards on behalf of the Secretary of State; we did not need to call on Ms Revill.

2. The regime applying to deportation appeals is markedly altered by the Immigration Act 2014. This appeal is of what may be termed a transitional

nature: because of the date of the decision, the appeal is indeed against the decision to make a deportation order, and the claimant has available to him the grounds set out in s 84(1) of the Nationality, Immigration and Asylum Act 2002 before its amendment by the 2014 Act. The provisions of sections 117A-117D of the 2002 Act, however, apply to the Tribunal's consideration of the appeal.

3. The appellant arrived in the United Kingdom as a visitor with leave to enter for six months in 1994. He has had no subsequent leave. That appears not to have troubled the authorities until 2007, when he was served with notice of illegal entry.

4. The claimant has been convicted of five separate sets of offences in the period 2002 to 2008, most of which were alcohol related. They were as follows:

12 February 2002	Excess alcohol	Fined
24 October 2003	Common assault	Community rehabilitation order
18 August 2006	Excess alcohol, no insurance and no driving licence	Fined and disqualified from driving for three years
7 June 2007	Failing to provide a specimen for analysis	Community order – 12 months. Disqualification five years
2 December 2008	Driving whilst disqualified	Four months
	Excess alcohol	Four months
	Perverting the course of justice	10 months

5. In the light of the most recent offence the claimant was subject to a deportation order made on 14 April 2009. It was revoked when he claimed asylum. The claim was apparently wholly unmeritorious but enabled the claimant to stay in the United Kingdom for a further three years before the asylum application was refused. He did not appeal against the refusal on 18 April 2012. After the refusal of asylum the deportation action was pursued, and the claimant succeeded in an appeal against the deportation order on the basis of ongoing contact proceedings with his children. He was granted leave to remain until 29 October 2013, apparently for that purpose. During the course of that leave he applied for further leave. The respondent refused it and made a new deportation order.

6. The claimant has six children, by four different women. The oldest were born on 10 May 2000 and 22 August 2000 and so are now 15 years old or nearly so. All his children are British citizens.

7. Given that the claimant's criminality is the motive for the Secretary of State's deportation decisions, it is necessary to consider in to which of the categories established by legislation and immigration rules the claimant

falls. It is now common ground that because his longest sentence of imprisonment for a single offence was 10 months he is not a "foreign criminal" within the meaning of s 32 of the UK Borders Act 2007. Further, under para 398 of the Statement of Changes in Immigration Rules, HC 395 (as amended), the applicable wording is that in sub-paragraph (c) and the relevant part of that paragraph therefore reads as follows:

> "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
>
> …
>
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a 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, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A."

8. The judge considered the material before him, which included evidence of rehabilitation from alcohol dependence, no offences since 2008, and a "close and continuing relationship" with some at least of his children. The judge's primary conclusion was that "the appellant's offending has not caused serious harm and he is not now a persistent offender with a particular disregard for the law". In those circumstances he considered that the claimant was not subject to deportation, and that his appeal therefore fell to be allowed on the basis, apparently, that no provision of the immigration rules justified his deportation. The judge went on to conclude that his removal to Jamaica as a deportee, which would, in the judge's view, prevent him seeing his children for at least ten years, would be "unduly harsh and disproportionate". To the extent that paragraphs 399 and/or 399A were engaged, therefore, the judge found in the claimant's favour.

9. The Secretary of State raised two grounds of appeal. The first is that the judge's conclusion in relation to paragraph 398(c) failed to take into account the Secretary of State's published guidance and her own conclusion that the claimant's crimes are sufficiently serious to warrant deportation. The grounds describe the judge's conclusion as "palpably wrong". The second ground is that the judge had misunderstood the meaning of the phrase "unduly harsh" and that, bearing in mind that the claimant does not live with his children now, the conclusion that his removal from the United Kingdom would be disproportionate was not merited.

10. We began our consideration of the matter by considering the terms of the immigration rules and the judge's conclusion in relation to paragraph 398(c). It seems to us clear that the judge was in error in considering that he was entitled to determine whether it was correct to say of the claimant

that "their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law". The requirements of the rule are clearly met if the Secretary of State takes that view; and, if the Secretary of State does take that view, it is not for a judge to say that that provision is not met. The Secretary of State makes an assessment and takes a view: this is not a matter of discretion (such as would enable a judge to allow an appeal on the ground that the discretion should have been exercised differently); it is simply a matter of precedent fact.

11. The judge's enquiry under this head ought therefore to have been directed to whether there was material before him showing that the Secretary of State did have either of the views set out as engaging paragraph 398(c). Inspection of the lengthy decision letter, dated 12 June 2014, is not helpful to the Secretary of State in that respect. In paragraph 1 of the letter the most recent prison sentences are set out, and described as "making a combined total of 14 months imprisonment". The paragraph goes on to say that "for the reasons set out below" it has been concluded that the claimant's deportation would be conducive to the public good. The claimant's immigration history, including his asylum claim, are set out in subsequent paragraphs, including at paragraph 69 a conclusion that the claimant has no right to remain in the United Kingdom on the basis of asylum, humanitarian protection, or article 3 of the European Convention on Human Rights. The letter then turns to the claimant's criminal convictions at paragraph 70. The history of offending is set out at paragraphs 71 to 77; the presumption in favour of the deportation of "a person liable to deportation", contained in paragraph 396 of the Immigration Rules is set out at paragraph 78. The letter then notes the circumstances under which an article 8 claim may interact with the public interest in deportation, before setting out the principle of paragraph 396 again at paragraph 82. Paragraph 398 of the Immigration Rules is then set out in full, divided between paragraphs 83 and 84. The next four paragraphs, with their heading, read as follows:

> "**Sentences between 12 months and 4 years' imprisonment**
>
> 85. Your client was convicted of perverting the cause of justice and motoring offences and sentenced to a period of 10 months and 4 months imprisonment, to run consecutively, making a combined total of 14 moths imprisonment.
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> 86. The Immigration Rules state that where a person has been sentenced to a period of imprisonment of at least 12 months but less than 4 years, in assessing a claim that deportation would be contrary to Article 8 ECHR, the Secretary of State will consider whether paragraph 399 or 399A applies.
>
> 87. If neither applies, it will only be in exceptional circumstances that a person's right to family and/or private life or other reasons would outweigh the public interest in seeing a person deported.
>
> 88. It is considered that paragraph 398(c) applies in your client's case because of criminal history. Overall, since your client claims to he entered the UK, he has been convicted on 5 occasions and committed 15 offences."

12. There is no further consideration of the terms of paragraph 398: the discussion then moves to paragraphs 399 and 399A.

13. The structure of paragraphs 85 to 88 is curious. Despite the reference to paragraph 398(c) in paragraph 88, the heading to the section, and paragraphs 85 and 86 (paragraph 87 adds nothing) show that the writer of the letter was thinking that a total sentence of 14 months put the claimant in paragraph 398(b), which, as we have noted in paragraph 7 above, it does not. Paragraph 88 makes it clear that at some stage it was realised that paragraph 398(c) was the appropriate one, but that sub-paragraph was said to apply solely "because of criminal history": and, in case that phrase is ambiguous, it is expanded in the second sentence of paragraph 88.

14. It appears to us that the identification of a "criminal history" is not sufficient to show that the Secretary of State has followed the decision-making process appropriate to paragraph 398(c). That sub-paragraph envisages two alternatives arising out of a criminal history: one is that the Secretary of State considers that the individual has "caused serious harm": the other is that the person is "a persistent offender who shows a particular disregard for the law". No doubt all offences cause some harm; and no doubt all offences show some disregard for the law; but in order for paragraph 398(c) to apply, the Secretary of State must have reached a view as to seriousness or as to particular disregard for the law. There is simply no trace in paragraphs 85 to 88 of the decision letter that that has been done in this case.

15. It follows in our judgement that the claimant's appeal fell to be allowed under the Immigration Rules, not because it is for the Tribunal to reach a conclusion under paragraph 398(c), but because it was for the Secretary of State to reach that conclusion and she did not do so. In the circumstances the claimant falls within none of the three sub-paragraphs of paragraph 398. The restrictive provisions of paragraphs 399 and 399A therefore do not apply. To put that in another way, the claimant's offending, when looked at from the perspective of the present time, falls at a level below that envisaged in paragraph 398. The whole structure of the Secretary of State's decision, applying paragraph 398 and accordingly applying paragraphs 399 and 399A, therefore, is not that envisaged by the rules properly read and interpreted.

16. The First-tier Tribunal erred in law by purporting to substitute his view of the claimant's criminality for that of the Secretary of State. We substitute a determination, allowing the claimant's appeal on the ground that the decision against which he appealed was "otherwise not in accordance of the law" within the meaning of section 84(1)(e).

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 6 August 2015