Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01579/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5th March 2015	**On 11th March 2015**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

DESMOND LEROY TOMLINSON
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: The Appellant appeared in person and unrepresented
For the Respondent: Ms A Holmes, Senior Presenting Officer

DECISION AND DIRECTIONS

1. This is an appeal by the Appellant against the decision of the First-tier Tribunal panel (Judge P Rowlands and Ms V S Street) (hereinafter referred to as "the panel") who, in a determination promulgated on 20th February 2014 dismissed the Appellant's appeal against the Secretary of State's decision to make a deportation order by virtue of Section 32(5) of the UK Borders Act 2007.

2. The Appellant appeared unrepresented before the Tribunal and I note from the file that the appeal had previously been listed for hearing on 26th January 2015. At that hearing Upper Tribunal Judge Eshun adjourned the appeal to provide further time for the Appellant to obtain legal representation. It was noted on the Record of Proceedings for that date that the Appellant had been informed that the hearing would proceed on the next hearing date in the event that he did not obtain legal representation.

3. Mr Tomlinson confirmed that he had not been able to secure legal representation therefore for the purposes of the proceedings, I explained the procedure that the Tribunal would adopt and gave him the opportunity to ask any questions. The Appellant had been represented at the time when grounds for permission to appeal had been issued and drafted by Counsel and therefore those grounds were relied upon by the Appellant.

4. The background to the appeal is as follows. The Appellant entered the United Kingdom on 13th July 2001 and was granted leave to enter as a visitor for two weeks. On 14th February 2003 he married a British citizen, Samantha Massey and on 12th June 2003 submitted an application for leave to remain as a spouse of a settled person in the United Kingdom. On the basis of that application on 7th January 2006 he was granted discretionary leave for three years. That leave expired on 7th January 2009 but the Appellant made no further attempts to extend his leave and remained in the United Kingdom.

5. Since he has been in the United Kingdom he has been convicted of criminal offences. On 11th February 2009 for an offence of theft, he was sentenced to one day in prison and on 30th September 2011 he was convicted of a further offence of theft and was sentenced to a community order of 40 hours' unpaid work. On 25th January 2012 at Central Criminal Crown Court he was convicted of an offence of robbery for which he was sentenced to a period of three years' imprisonment. He was convicted of a breach of the community order and a breach of bail for which the community service order was revoked, no separate penalty for breach of bail was imposed.

6. As a result of that conviction, on 19th July 2012 he was served with a liability to deportation letter and a questionnaire. A letter was received on behalf of the Appellant on 8th August 2012 in which he claimed asylum and in respect of that application the Appellant was interviewed. Following this, he became the subject of a deportation order as a result of his conviction on 25th January 2012, such order being dated 23rd July 2013.

7. In response to this, the Appellant relied upon the exception to be found in Section 33 of the UK Borders Act 2007 that his removal pursuant to deportation would breach his rights under the Refugee Convention and also under Articles 3 and 8 of the ECHR.

8. The Appellant appealed the decision and it came before the First-tier Tribunal panel (Judge Rowlands and Ms V S Street) (hereinafter referred to as "the panel") who in a determination promulgated on 20th February 2014 dismissed his appeal.

9. The Appellant sought permission out of time to appeal that decision with grounds submitted on 27th August 2014. Permission to appeal was granted by First-tier Tribunal Judge Andrew on 3rd September 2014. I shall deal with the issue of the timeliness of the appeal in due course.

10. The appeal came before Upper Tribunal Judge Eshun on 26th January 2015 and it appears that at that hearing the Appellant appeared unrepresented but further time was provided to him to obtain legal representation in accordance with the documentation in the bundle.

11. Thus the appeal came before the Upper Tribunal on 5th March 2015. As noted earlier in the determination, the Appellant did not appear with representation but in any event, there was already before the Tribunal substantive grounds for permission to appeal that had been settled by Counsel in August 2014 and thus reliance was placed by him on the matters set out in that document.

12. In summary, the grounds advanced on behalf of the Appellant dealt with the issue of extension of time at paragraph 2 and his immigration history since the decision of 20th February 2014 was also set out at paragraph 4. The first ground relates to the panel's failure to apply the correct statutory provisions in force at the time of the hearing. The grounds set out that the panel at paragraph 11 considered the appeal on the basis that this was a revocation of a deportation order and went on to set out paragraph 391 of the Immigration Rules in that respect. However, it was plain that this was not a revocation appeal but an appeal against the making of a deportation order. The determination did not set out or apply the statutory framework that was in place for the appeal. It was further asserted that the panel erred in law by failing to make clear findings on the core aspects of his asylum claim for the reasons set out at paragraphs 11-17 of the grounds noting that the Appellant's claim had been dismissed in one paragraph but as the grounds submit at [13] there were no clear findings on a number of aspects of his account. As to the background evidence, whilst the panel does not appear to accept his claim to be at risk of harm at the hands of a particular gang, the grounds annexed to it objective material relating to the Andem Gang, although it is noted that that material had not been placed before the First-tier Tribunal. The last ground argues that the panel erred in law without properly determining the appellant's request to adjourn the proceedings to obtain legal representation and those issues are set out at paragraphs 18 to 22.

13. Ms Holmes on behalf of the Secretary of State had provided a copy of the decision of the Upper Tribunal in **BO and Others (Extension of time for appealing) Nigeria [2006] UKAIT 00035**. She also had a copy of **Samir (FtT permission to appeal: time) [2013] UKUT 00003 (IAC)**.

In respect of the preliminary issue relating to timeliness, she referred the Tribunal to paragraph 1 of **Samir** in which the Tribunal posed the question "Suppose further that the First-tier Tribunal, considering the application, fails to notice that the application was out of time, and so makes no decision on whether to extend time, but issues a determination granting permission to appeal." However she observed that this was not a case where the First-tier Tribunal Judge had failed to notice that this application was out of time and therefore it was questionable as to whether this was a conditional grant as referred to in **Samir** at paragraph [17] and in relation to the case of **Boktor and Wanis [2011] UKUT 00442 (IAC)**. She referred the Tribunal also to the lack of explanation as to why the application was out of time.

14. As to the errors of law, she readily conceded that there were a number of errors of law in the determination of the panel. Those identified in the grounds related to the failure to apply and analyse the appeal on the basis of the correct legal framework. Whilst at [1] the panel appear to consider the correct approach, she observed at [11] that the panel went on to consider the principles applicable to a revocation of a deportation order. She submitted that the panel did not apply the correct framework but had covered the substance. She made reference to paragraph [18] and at [19] the best interests of the children which she said was just about adequate. Thus she submitted that they had considered matters relevant to Article 8, albeit not properly.

15. As to Section 72 of the 2002 Act, she noted that it was an issue raised in the refusal letter at page 10 where Section 72(2) of the Nationality, Immigration and Asylum Act 2002 was referred to and the consequences of applying Section 72 to a person was that their claim for asylum would be refused if the appellant had failed to rebut the presumption that the crime was particularly serious or that his continued presence in the United Kingdom constituted a danger to the community. The issue was set out plainly within the refusal letter and the Secretary of State had certified that the presumption under sub-Section 2 applied to him in accordance with Section 79(9)(b) of the 2002 Act. The panel wholly ignored that issue which was the matter that they had to deal with first before dealing with the asylum claim.

16. As to the grounds relating to the failure of the panel to deal adequately with the issue of asylum and making clear findings of fact on the core elements of his claim, she submitted that the determination at [11] was unclear and it was difficult to ascertain whether or not they believed the factual elements of the appellant's account and referred to certain sentences at [11] that suggested that they had doubted his credibility but did not overtly say so. Ms Holmes had provided a copy of **AB (Protection – criminal gangs – internal relocation) Jamaica CG [2007] UKAIT 00018**. She submitted that at the time of the hearing this was the country guidance decision relevant to the Appellant's claim. The panel did not refer themselves to this country guidance case but she submitted that in the light of that case the Appellant could not show that he fell within the

circumstances referred to in that case and thus any errors in relation to the asylum claim were not material. However she recognised that within that determination there were a number of references to the Tribunal determining the case on the facts of each individual case.

17. After hearing submissions, I adjourned to consider the submissions that I had heard in the light of the documents before me. On resuming the hearing, I indicated to the parties by way of a brief summary that I had reached the conclusion that the determination was fundamentally flawed and as a result it could not stand. I therefore now give my written reasons for reaching that decision.

18. Dealing with the first issue, I have taken into account the decision of **AK and Others (Tribunal appeal – out of time) Bulgaria* [2004] UKAIT 00201** and **Boktor and Wanis (Late application for permission) Egypt [2011] UKUT 00422** and have had regard to the decision of **BO and Others (Extension of time for appealing) Nigeria [2006] UKAIT 00035** and that of **Samir** (as set out earlier). I begin by considering whether or not this was a conditional grant of permission (see **AK** at paragraph 23 and **Samir** at 18-21). Having considered the grant of permission in accordance with those decisions, I have reached the conclusion that this was not a conditional grant of permission because it cannot be said that the judge failed to notice that the application was out of time. At paragraph 1 of her reasons, Judge Andrew expressly referred to the application being "out of time". Thus in those circumstances it could not properly be said that she failed to notice that the application was out of time. I am satisfied that it is implicit within that grant of permission that Judge Andrew did extend time for two reasons; firstly, because she expressly noted that this was an appeal out of time and secondly, had she not extended time she would not have admitted the appeal and would have given reasons as to why she was not extending time. In those circumstances, whilst she did not explicitly state she was extending time, I find that it is implicit from the decision as a whole and in particular that she went on to set out in that decision why she considered that the determination of the First-tier Tribunal panel was a decision in which arguable errors of law had been demonstrated. Whilst Ms Holmes refers to there being insufficient reasons given for the lateness, those matters were set out comprehensively within the grounds at [2] at (a)-[h] but in any event, having reached the conclusion that the judge did extend time, the permission to appeal which was granted, now brings the appeal properly before the Upper Tribunal.

19. I therefore now deal with the merits of the appeal. The determination of the panel demonstrates there are a number of errors of law as set out in the grounds advanced on behalf of the Appellant. The first error relates to the basis upon which the appeal had come before the First-tier Tribunal panel. It is plain from the refusal letter, and the deportation order that this was not a revocation appeal but an appeal against the making of a deportation order and that the relevant statutory framework to be applied by the panel was A398 to 399A of the Immigration Rules and the

considerations in a revocation case which the panel purported to apply at paragraph [11] are wholly different to those as set out in paragraphs 398 to 399A. Ms Holmes however conceded that the wrong statutory framework had been applied by the panel. Whilst they began at [1] by making a reference to the deportation order and paragraphs 399 and 399A, and appeared to note at [10] the basis upon which the appeal was advanced on behalf of the Appellant, in the section entitled "Finding and Reasons" the panel set out what they considered to be "the statutory basis for the consideration of a revocation of a deportation order" and set out paragraph 391 and at [12] made a legal direction to themselves in the following terms "having set out the main Rules in relation to revocation we now set out the factual findings." Thus it is plain from reading the determination that the panel clearly erred in its understanding of the correct statutory framework and the application of the relevant Immigration Rules. The panel made reference to **MF (Nigeria) [2012] UKUT 00393** however they have failed to take into account that since the decision of the Upper Tribunal, that case had come before the Court of Appeal having been reported in **[2013] EWCA Civ 1192** and therefore would properly have been before the panel at the time of their decision in January 2014. Nowhere within the determination do they set out the correct statutory framework or apply the factual circumstances to that framework in deciding the relevant matters of this appeal.

20. It is further plain from the reasons for deportation letter dated 23rd July 2013 that the Secretary of State relied upon Section 72 of the Nationality, Immigration and Asylum Act 2002. Reading that letter, it is also plain that the Secretary of State considered that the evidence in the form of the representations were not sufficient to rebut the presumption that he was convicted of a serious crime or that his continued presence in the United Kingdom would be a danger to the United Kingdom community. Thus the Secretary of State considered, in the light of the failure to rebut the presumption, in accordance with Section 72(9)(b) of the 2002 Act (as amended) the Secretary of State had certified the presumption under Section 72. The effect of the certificate was that any appeal under Section 82(1) of the 2002 Act, the judge must consider certification first and if the judge upheld the certificate then the asylum aspect of the appeal would be dismissed without consideration of the asylum claim. Whether the appellant had rebutted the presumption in Section 72(2) required an assessment of all the circumstances, including the circumstances of the offence and also the Appellant's history of offending (see **SB (Cessation of exclusion) Haiti [2005] UKIAT 00036**). It is right also to observe that the effect of upholding a certificate under Section 72(9)(b) of the 2002 Act would affect the Appellant's asylum claim as it requires the First-tier Tribunal to dismiss the appeal on asylum grounds without determining the merits of those grounds but would have no affect upon the Appellant's claim under Article 3 based on his risk of serious harm upon return to Jamaica. Nonetheless, that issue was wholly ignored within the determination and no consideration was given to the Section 72 certification process.

21. That may not be material as they went on to dismiss the claim for asylum. However, in relation to those findings, I am satisfied that the panel erred in law in the consideration of his claim. The Grounds of Appeal set out the factual basis upon which the Appellant advanced his asylum or Article 3 claim which was premised upon his fear of serious harm at the hands of a named gang, namely the Andem Gang, in Jamaica and that he had been approached by that gang, had been asked to carry drugs by them in 2001 and that he had been the subject of serious physical harm and physical injury at their hands and that the risk of return would have to be considered in the light of the circumstances of that gang, their reach and the threat posed to the Appellant. The consideration of sufficiency of protection was required and also that of internal relocation. Such matters to be determined having first made findings of fact on the basis of the factual claim advanced on behalf of the Appellant. The panel dealt with the claim at [21]. Ms Holmes observed that it was not clear to her what findings were made as to whether the panel accepted any of the factual basis of the claim. I consider that that is right. The panel noted his claim that if he were to be removed he would be at risk from gangs in Jamaica, however they observed "this is pure speculation on the Appellant's behalf, there is no evidence whatsoever to back up any claim that he would be under threat from gangs" and went on to state "no evidence to support his contention that he personally would be at risk." However that ignores the factual basis upon which the Appellant advanced his case as to the nature of the threat, the identity of the gang and the fact that he had been the subject of physical harm which had resulted in injury to him having been stabbed, beaten, had lost two teeth and had broken two fingers. He had submitted that the gang were still active and were a well-known gang and that he could not return in safety to Jamaica. The panel did not appear to make any findings on those factual issues. There was a country guidance decision relevant to this appeal to which the panel should have had regard to and that decision makes it plain that it is incumbent upon the Tribunal to make factual findings as to the particular circumstances of the Appellant concerned, the nature of the gang, sufficiency of protection and whether, in the light of the findings of fact, the Appellant could safely relocate. Thus it is plain that the starting point to determine is the facts of each individual case. I am satisfied that paragraph [21] did not determine the facts of this Appellant's case nor did it apply the legal tasks of sufficiency of protection and internal relocation to those facts.

22. Whilst Ms Holmes readily accepted there were a number of errors of law in the determination but that in Article 8 terms, the panel had made findings on the substance of some of the relevant issues, I have reached the conclusion that the decision is so fatally flawed that it undermines the determination as a whole and makes it an unsafe one.

23. Section 12(2) of the TCEA 2007 requires me to remit the case to the First-tier Tribunal with directions or to re-make it. After discussion and agreement with the parties, and in accordance with the Practice Statement dated 25th September 2012, I remit this appeal to be heard before the First-tier Tribunal, as I consider that the findings and

conclusions that have to be made on a re-making of the decision require primary fact-finding. It also provides the Appellant with further time to obtain legal representation. He informed the Tribunal that he had practical difficulties in advancing his appeal and the decision that I have made to remit to the First-tier Tribunal would provide time for him to obtain the assistance that he stated he required.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision. I remit the appeal to the First-tier Tribunal to be heard afresh

Consequential Directions

(1) The matter should be listed before the First-tier Tribunal on a date to be fixed at Hatton Cross (not before Judge Rowlands or non-legal member Ms V S Street).

(2) The Secretary of State shall provide to the Tribunal from documents within its bundle a copy of the report referred to by the First-tier Tribunal panel at [13] of its decision. The Respondent should also provide copies of any pre-sentence report or OASys Report in relation to the Appellant as previously directed by the Tribunal.

The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. There was no request for anonymity and I do not consider such an order is required.

Signed Date 6/3/2015

Upper Tribunal Judge Reeds

No fee is paid or payable and therefore there can be no fee award.

Signed Date 6/3/2015

Upper Tribunal Judge Reeds