IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01777/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 November 2015	**On 21 December 2015**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M A S
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Miss A Fijiwala, Home Office Presenting Officer
For the Respondent: Mr S Tariq, West London Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State, who I shall continue to refer to as the Respondent, against a decision of the First-tier Tribunal, Judge Dineen and Dr De Barros, by which the Appellant's appeal was allowed against the Secretary of State's decision to deport him to Afghanistan.

2. The Appellant was born on 2nd April 1990 and is aged 25 today. The decision was taken on 13th August 2013. It was a decision on conducive grounds pursuant to Sections 3(5) and 5(1) of the Immigration Act 1971. The Appellant came to the United Kingdom in June 2001 aged 11 years 2

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months and 12 days. His first criminal conviction was on 1st November 2005 and the last on 15th October 2011. He has a total of seventeen convictions for 23 offences including offences against the person, against property, public order offences and drugs offences. The First-tier Tribunal allowed the appeal on the basis that the Appellant succeeded under paragraph 399A(b) of the Immigration Rules as they were at the date of hearing which was 2nd and 3rd July 2014.

3. The problem is that the decision was only promulgated on 23rd January 2015. The Immigration Rules changed on 28 July 2014. Mr Tariq argued that YM (Uganda) [2014] EWCA Civ 1292 was not authority for saying that the First-tier Tribunal should have considered the 2014 Rules. However YM (Uganda**)**, it seems to me, makes clear that you have to assess the case against the Rules in force at the date of the Tribunal's decision which was 23rd January 2015 which were the 2014 Rules.

4. Paragraph 36 of YM (Uganda) says that

> "... when the Court of Appeal has to consider an appeal from the Upper Tribunal, its first task is to decide whether 'the making of the decision concerned involved the making of an error on a point of law'. This Court's task, therefore, must be to consider the law as it had to be applied at the time of the UT's decision. It cannot be to consider the law as it has subsequently developed. Thus, in my view, both the new Part 5A to the 2002 Act and the 2014 Rules are irrelevant to the first task that we are faced with."

They go on at paragraph 37 to say

> "If, however, this Court considers that the Upper Tribunal's decision did involve 'the making of an error on a point of law', there are further decisions to make. This Court can, but is not obliged to, set aside the decision of the Upper Tribunal. If it does so, then the matter can either be remitted to the Upper Tribunal or this Court can re-make the decision itself."

and they indicate then that if that was to be the case then both the new statutory provisions and the 2014 Rules would become relevant.

5. In **YM** it was accepted in that case by both parties that the Upper Tribunal had erred when it considered the case in applying the Rules at the date of the Secretary of State's decision rather than at the date they decided the case. That was the error. And the same thing has happened in the present case.

6. Therefore the First-tier Tribunal clearly made an error in considering the Rules as they were at the date of hearing rather than at the date they made their decision, and the Rules have a very significant difference. The difference is in the exceptions contained at paragraph 399A which was the basis upon which this appeal was allowed.

7. Pre- the 2014 changes 399A read:

> "This paragraph applies where paragraph 398(b) or (c) applies if –

(a) The person has lived continuously in the UK for at least twenty years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or

(b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK."

8. That was the provision under which the First-tier Tribunal allowed the appeal.

9. The new provision in paragraph 399A of the Rules following 28 July 2014 reads:

"(a) the person has been lawfully resident in the UK for most of his life and,

(b) he is socially and culturally integrated in the UK and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

10. It can be seen from this that the requirements in the 2014 Rules are considerably more strict than those under the 2012 Rules.

11. In considering this under the incorrect Rule therefore the First-tier Tribunal made an error of law and as that was the basis and the sole basis for allowing the appeal it is clearly material and to that extent I set it aside.

12. However there has been no challenge to the First-tier Tribunal's findings, the error of law was the application by the Tribunal of the facts that it found to the law.

13. Having set it aside I then have to redecide the appeal on those facts. Firstly, in relation to 399A has the Appellant been in the UK for most of his life? It is my view that if he has been in the UK for more than half of his life that must be the equivalent to "most". He came at the age of 11 years 2 months and 12 days and excluding time spent in prison he has been here for eleven years, ten months and thirteen days. That is for more than half his life and therefore I find and indeed it is accepted by the Presenting Officer, represents "most" of his life.

14. That however is not the end of it. He must also be socially and culturally integrated into the UK and on the basis of the very considerable offending behaviour only four years after he came it cannot be said that he has integrated into UK society. He has taken himself outside mainstream society by his persistent offending.

15. The next head is an additional factor, namely that there will be very significant obstacles to his integration into the country to which it is proposed he is deported. Mr Tariq says there would be very significant obstacles and points to the fact that he has no ties to Afghanistan, which was accepted by the Secretary of State as evidenced in paragraph 23 of the First-tier Tribunal's decision. However, the absence of ties is only a part of it. Very significant obstacles are obstacles that are more than significant, they have to be very significant and the First-tier Tribunal noted at paragraph 46 that the Appellant is in good health and well educated, he is articulate, he has sources of income other than that provided by his parents and is a confident person. At paragraph 47 of its determination the First-tier Tribunal was satisfied "he would establish a private life quickly in Afghanistan, even given the absence of contacts in that country". That finding has been unchallenged and on the basis of it, it cannot be said that there are very significant obstacles to his integration into Afghanistan.

16. Having found that he does not meet the requirements of paragraph 399A which is an exception to deportation, paragraph 398 as it is under the 2014 Rules indicates that if that paragraph does not apply "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".

17. The First-tier Tribunal, again applying the older version of the Rules, found there to be no exceptional circumstances. if there were no exceptional circumstances, and again that part of the decision has not been challenged, then it follows that there cannot be very compelling circumstances. MF (Nigeria) [2013] EWCA Civ 1192 tells us that the Rules so far as deportation are concerned are a complete code, any Article 8 matters are either included in the exceptions in 399A or fall to be considered under paragraph 398: very compelling circumstances.

18. On the basis that this Appellant is not integrated into the UK; on the basis that he has no Article 8 family life in the UK and that he can re-establish a private life in Afghanistan there are no very compelling circumstances. Therefore having set aside the decision of the First-tier Tribunal I remake it and dismiss it under the Rules and under Article 8.

Notice of Decision

The Secretary of State's appeal to the Upper Tribunal is allowed such that the Appellant's appeal against the decision to deport him is dismissed on all grounds.

No anonymity direction is made.

Signed Date 9th December 2015

Upper Tribunal Judge Martin