Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00441/2013

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke on Trent	**Determination Promulgated**
On 14th November 2013	**On 28 November 2013**

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GODFREY MUTEKEDZA

Respondent

Representation:

For the Appellant: Ms E Martin, senior Home Office Presenting Officer
For the Respondent: Ms R Manning, counsel, instructed by French and Company solicitors

DETERMINATION AND REASONS

1. The Secretary of State (hereafter the SSHD) appeals against a decision of First-tier Tribunal Judge T R P Hollingworth allowing the appeal by Mr Mutekedza (the claimant), who is a citizen of Zimbabwe born on 18th April 1981, against a decision of the respondent dated 12th February 2013 refusing to revoke a deportation order.

Immigration background

2. The claimant arrived in the UK in May 2002 and claimed asylum. The application was refused. There does not appear to have been an appeal against any subsequent decision to refuse him leave to enter the UK or to remove him from the UK. On 8th August 2007 a deportation order was signed pursuant to a conviction. On 6th June 2009 a further claim for asylum was made and on 24th August 2012 an application was made to revoke the deportation order. The First-tier Tribunal judge found that the claimant was a persistent offender.

3. The essence of the challenge to that determination is as follows: the First-tier Tribunal failed

   a. to have regard to the Immigration Rules in making its Article 8 assessment; the Tribunal had no regard to the Immigration Rules and failed to consider public policy considerations against individual family and private life rights;
   b. to give any or any adequate reasons for findings on material matters; in particular treated the claimant's 11 years residence as a positive factor; failed to give adequate reasons for finding that the claimant had been rehabilitated when he had continued to offend; failed to give adequate reasons as to why the circumstances at the time of the assault on police "merited any discretion being made", failed to give adequate reasons for finding it was in his son's best interest for him to remain in the UK.

4. In oral submissions Ms Martin expanded upon these grounds, referring *inter alia* to the child's mother being in employment despite her illness; that the claimant was only a partial carer for his son; that the judge had failed to place sufficient weight upon the public interest in removal; failed to take account of the increasing seriousness of the claimant's criminality and his own finding that he is persistent offender. Ms Manning referred to the overall consideration given by the judge and that he was, on the evidence before him entitled to reach the findings he did. She specifically asserted that the reference in the determination to the claimant having been in the UK was a fact, not a "positive factor". She asserted that the judge considered the evidence as regards his alcohol treatment, his explanation given with regards the most recent offence and that the judge specifically referred to the decision being finely balanced. The SSHD accepted the relationship between the claimant and his son as per the reason for refusal letter.

5. There are some superficial inconsistencies in the First-tier Tribunal determination: in [27] the judge refers to it being a "conducive" deportation decision although he does also refer to a "great deal" having happened since the order was made. He later refers correctly [28] to the deportation decision having been made pursuant to a court recommendation six years earlier. He also states, rather inexplicably, that the conducive decision did not result in custodial sentence. It seems this is a rather inelegant way of expressing the fact that although an order consequent and ancillary to the sentence for the index offence was a recommendation for deportation, there had been no custodial sentence for that offence. In [33] he sets out the correct position namely that the issue "revolves around whether the [SSHD's] decision to refuse to revoke the deportation order is proportionate….".

6. The judge sets out clearly and concisely the evidence before him. He refers to the great weight placed by the respondent upon the claimant's offending and he clearly accepts the seriousness of this in finding that the claimant is a persistent offender. He records the evidence before him and states [28] that he has considered the SSHD's guidance but that it was not "really relevant" to the claimant. He refers to the deportation order having been signed some 6 years earlier.

7. Having arrived at that position the judge went on to carry out an assessment of the article 8 claim, not within the scope of the immigration rules, but by applying an assessment guided by the five step approach provided by *Razgar, R (on the Application of) v. Secretary of State for the Home Department [2004] UKHL 27*. The judge cannot be criticised for that because in doing so she was following the approach indicated as the correct one by the reported case of *MF (Article 8 - new rules) Nigeria [2012] UKUT 393 (IAC) (31 October 2012)*. As has now been made clear by the Court of Appeal in *MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192* in fact the rules do provide a complete code and so it is not necessary to look outside them. That is because paragraph 398 provides that:

> :… the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors."

It is, therefore, at this stage that everything relevant is considered as the decision maker looks at the "other factors" not relevant to the application of paragraphs 399 and 399A to see whether they outweigh the public interest in deportation. That is the same exercise of striking a balance between the competing interests in play as this judge carried out by applying the Razgar analysis. True it is that paragraph 398 speaks in terms of circumstances being "exceptional" but, as was pointed out by the Master of the Rolls in *MF (Nigeria)* that has to be considered in the light of the "Criminality Guidance for Article 8 ECHR cases: issued by the respondent to decision makers:

> "… "exceptional" means circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that deportation would not be proportionate. That is likely to be the case only very rarely."

8. Thus although the judge has not followed the route through the Rules, it is relevant to assess whether he has in any event taken all factors into account in reaching his conclusion upon the article 8 claim.

9. The judge specifically takes account of the breakdown in the relationship between the claimant and the child's mother[41]; the fragility of the claimant's immigration status when they met and she became pregnant [43]; the primary importance of the child [45, 46]; that the child's mother is the principle carer [47]; the mother's medical problems [48 -53]; that the relationship between the claimant and his own mother is not one of dependency [54]; that there is nothing other than unremarkable about the claimant's length of residence [55]; his offending behaviour [56-65, 67, 69,70, 73] including the lack of custodial

sentences and lack of any pre sentence reports but including the probation service letter of 2nd May 2013; that the assault on the police although not considered by the SSHD was treated by the judge as an indication that there should be no exercise of discretion; the substantial changes made by the claimant [66-68]. The judge records that there was agreement by both representatives that the decision was finely balanced [71].

10. Although it is possible that the judge could have expressed himself more clearly in some respects, what is beyond doubt is that he carefully considered the whole of the evidence before him and reached a reasoned and broadly coherent decision. His decision, as acknowledged by the SSHD's and the claimant's representatives could have gone either way. This was a fact based assessment for the judge to carry out as he struck the balance between the competing interests in play and, having hear oral evidence, he was best placed to do. That he reached the decision he did after full and considered deliberation is not as a result of lack of reasoning or unreasonable or perverse fact finding.

11. There is no error of law in the First-tier Tribunal judge's determination such as to set aside the decision.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision

The appeal is dismissed. The decision of the First-tier Tribunal judge stands.

Date

Judge of the Upper Tribunal Coker