Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00126/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On Wednesday 19th February 2014	**On 11th March 2014**

Before

Mr Justice Jay
Upper Tribunal Judge Kebede

Between

MR BRIAN BEANGSTROM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E King, Counsel
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. This is the resumed hearing of the appeal against the decision of the Secretary of State to deport the Appellant. The First-tier Tribunal allowed the appeal, but the case falls to be re-determined by us in the circumstances which have arisen.

2. On 10th December 2013 Upper Tribunal Judge Kebede found two errors of law in the First-tier Tribunal's decision. Those errors are closely related. The first error is that the First-tier Tribunal failed to consider whether the Appellant was able to meet the requirements of the Immigration Rules before proceeding to address the question of exceptional circumstances: it therefore appears that its decision on Article 8 of the Convention was a free-standing conclusion. Secondly, the First-tier Tribunal failed to give adequate reasons for concluding that the Appellant's circumstances were exceptional such that his right to family and private life outweighed the public interest in favour of deportation.

3. This Determination should be read in conjunction with Upper Tribunal Judge's Kebede's decision promulgated on 10th December 2013, a copy of which is annexed at Appendix A.

Essential Factual Background

4. Mr Brian Beangstrom was born in Durban, South Africa on 4th December 1951. His original name was Conway Ray Abrahams. He was adopted by Mr and Mrs Dickinson in 1955. His adoptive mother (née Mackay) was born on 10th January 1924 of British parents in Mombasa, Kenya. We have seen a copy of her birth certificate which bears this out. Mr and Mrs Dickinson divorced and Mrs Dickinson then married Mr Robert Beangstrom, date of birth 28th May 1931. The Appellant was adopted by the Beangstroms on 15th October 1957.

5. Mr Beangstrom claims first to have come to this country in 1978 or 1979 when he was granted indefinite leave to remain as the spouse of a British national. He returned to South Africa in 1987, and claims to have re-entered the UK in October 1998. The Appellant's assertion, which the First-tier Tribunal appears to have accepted, is that he entered the UK on that occasion on an ancestral visa, entitling him to four years' leave to enter. This was stamped on his South African passport. The Secretary of State has no record of this, although she

accepts that the status of the Appellant's adoptive mother entitled him to an ancestral visa.

6. According to the questionnaire which he completed on 29th June 2012, Mr Beangstrom 'applied to stay longer' when his original leave expired in 2004 or 2005. Again, the Appellant has no record of this application. In any event, his original leave expired in 2002 or 2003.

7. The Respondent's Notice of Intention to Deport records, 'you state that you applied for naturalisation in 2004/5 and that this was granted'. Mr Beangstrom disputes that he said this, although his case is that in 2009 his South African passport and 'naturalisation papers' (we will be returning to this latter point) were stolen in Brighton. A pro forma letter from the Brighton police vouches that a crime of unspecified nature was reported to them. It is unclear why the Appellant's 'naturalisation papers' were on his person, and it is also unclear why the Appellant has failed to obtain evidence from the South African Embassy corroborating his case that his passport issued in 2009 was to replace a passport which had been stolen earlier that year.

8. The evidence before the First-tier Tribunal was that Mr Beangstrom's son, Brett (d.o.b. 5th May 1985) is now a British citizen, having married a British spouse, and that through him the Appellant has two grandsons, Angelo, born in April 2006, and Bjorn, born on 18th December 2013 (evidently, a post-decision fact). They lived in Newquay, Cornwall, but we were told that fairly recently they moved to the Bournemouth area to be with other close family members.

9. Mr Beangstrom also has a step-son, Giovanni Mossa (d.o.b. 11th April 1980), who is also a British citizen and whom he regards and treats as his son. Through Giovanni the Appellant has a granddaughter, Vega, born in 2011. They live in Boscombe, Bournemouth.

10. The First-tier Tribunal referred to the fact that Mr Beangstrom and his two sons gave oral evidence which was robustly cross-examined. However, that tribunal undertook no analysis as to the strength of the relationships, save to observe that these were 'strong'; and the sons' letters of support in the bundle are quite general and certainly lacking in much particularity.

11. Mr Beangstrom's partner is Ms Elisabeth Day who holds both French and British citizenship. Although it was clear to the First-tier Tribunal that Ms Day was supporting the Appellant whilst he was imprisoned, it also noted:

'The Pressure of the potential deportation has put significant pressure on the relationship to such an extent that Ms Day has had an emotional breakdown and is currently recuperating with her parents in France before returning [to] the United Kingdom to complete her Masters degree.'

12. The circumstances relating to the Appellant's criminal conviction may be summarised as follows. On 30th November 2011 he was convicted at the City of London Magistrates' Court on his guilty plea of conspiracy to supply over 140 kgs of cannabis. On 3rd May 2012 he was sentenced at the Central Criminal Court by HHJ Pontius to a term of 18 months' imprisonment. His pre-sentence report assessed him as being at a low risk of re-offending.

The Immigration Rules

13. The Immigration Rules applicable to Mr Beangstrom's case are those set out in paragraphs 396-399B of HC 395, which provide as follows:

'396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007.

397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.

Deportation and Article 8

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

(a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
(b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
(c) the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular 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, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or
(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
(a) it would not be reasonable to expect the child to leave the UK; and
(b) there is no other family member who is able to care for the child in the UK; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave or humanitarian protection, and

(i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment); and
(ii) there are insurmountable obstacles to family life with that partner continuing outside the UK.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has lived continuously in the UK for at least 20 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.

399B. Where paragraph 399 or 399A applies limited leave may be granted for periods not exceeding 30 months. Such leave shall be given subject to such conditions as the Secretary of State deems appropriate. Where a person who has previously been granted a period of leave under paragraph 399B would not fall for refusal under paragraph 322(1C), indefinite leave to remain may be granted.

Relevant Jurisprudence

14. We need to refer to two Court of Appeal authorities.

15. In **SS(Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550**, which was a decision on the old Rules, the Court of Appeal was concerned with the deportation of a foreign national who had remained in the UK without leave, and then married a British citizen with whom he now has a child. Laws LJ emphasised what he characterised as the powerful public interest in favour of deportation, and the need - in assessing proportionality – to identify a strong claim under Article 8 if the private and family rights of the putative deportee are to prevail.

16. In **MF(Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192**, a different constitution of the Court of Appeal addressed the new Rules, for the avoidance of doubt the Rules cited under paragraph 13 above. The issues were whether those Rules constituted a complete code, whether they were Strasbourg compliant, and the meaning of 'exceptional circumstances' in paragraph 398. The decision of the Court of Appeal Lord Dyson MR presiding, was that the new Rules *did* constitute a complete code which was Strasbourg compliant, and that the test was not 'exceptionality' but – in the case of a foreign criminal to whom paragraphs 399 and 399A did not apply – the need to identify 'very compelling reasons' before the public interest in favour of deportation did not prevail. The need for the existence of such reasons was underlined in a case where any family life was 'precarious'.

Evidence as to the Appellant's Status in the UK

17. The First-tier Tribunal concluded that the Appellant entered the UK on an ancestry visa in October 1998, that he has not returned to South Africa since then, and that he 'has now been in the United Kingdom for 15 years' (see paragraph 18 of the Determination).

18. Mr Melvin sought to re-open the finding that the Appellant came to this country on an ancestral visa. We do not consider that it was open to him to do so, but we heard further evidence from the Appellant regarding his immigration status at all material times. Mr Beangstrom told us that back in 1998 an agent acting for him applied to the British consulate in Durban for an ancestry visa on the basis that the father of his adoptive mother was a British citizen born in the UK. He paid approximately 500 rand for the agent's services, and then flew to this country, probably on a KLM flight, although he could not recall

precisely. The visa occupied a full page of his passport, and was valid for 4, possibly 5 years.

19. Upon the expiry of the ancestry visa, although he could not be precise about the date, the Appellant told us that he went to the Home Office in order to apply for what he called 'naturalisation'. He was told to go to an office in Hackney, where he formally applied for a certificate of naturalisation. He could not recall ever receiving an acknowledgement of his application, still less the outcome of it. In 2009 he was mugged in Brighton and his South African passport was stolen. The Appellant told us that his naturalisation application form was also stolen. He confirmed that he has never applied for a British passport, and he told us that in 2009 or 2010 he instructed an agent to obtain a visa in order to travel to France.

20. We asked Ms King to explain to us the basis on which the Appellant was entitled to an ancestry visa in 1998. She drew our attention to the provisions of paragraph 186 of the Immigration Rules (it was unclear whether she was referring to the Rules extant in 1998, or the current Rules, but we strongly doubt whether anything turns on this), from which it became apparent that the Appellant's entitlement was based on showing that the father of his adoptive mother was born in the UK. The Appellant told us that he was, and if the copy birth certificate we have seen is genuine we believe that it is extremely likely that this was the case. It follows that the Appellant has advanced an entirely plausible case that he was entitled to, and obtained, an ancestry visa in 1998, and that he entered the UK on the basis of it. That case is not undermined by the Secretary of State's assertion that she has no record of an application being made in the Appellant's name in 1998. In the absence of clear evidence to the effect that the British Embassy's records in Durban were computerised back in 1998, and that computer files have been retained, we cannot place much weight on this point in the circumstances of this case. Accordingly, we see no reason to upset the finding of the First-tier Tribunal on this issue.

21. However, it is also clear that the Appellant's leave to remain in this country was not extended by the Secretary of State upon the expiry of the ancestry visa in 2002 or 2003. The highest the Appellant now puts the case is that he applied for 'naturalisation' on a date he cannot now remember; it is not his case that he was granted it, or (as he put the matter) that he 'received any return on it'. In fact, the only application he could have made at that stage was for ILR, but the Appellant may not have understood the finer points of this issue. We think it rather odd that the application form for 'naturalisation', or for whatever it was, was stolen in 2009 (why would the Appellant be carrying around the application form, we ask rhetorically), and it is also an

unsatisfactory feature of the evidence that the Appellant apparently did nothing to chase up the application over many years.

22. In our view, even if, which we doubt, the Appellant did make an application for ILR back in 2002 or 2003, in the sense that he sent a form into the Home Office or some other agency, that in itself would fail to demonstrate that he was granted any leave or entitlement to remain in this country at any stage. Merely sending in a form is insufficient.

23. Ms King urged us to consider the case on the basis that her client was clearly entitled to ILR upon the expiry of his ancestral visa, and so it may safely be inferred on the balance of probabilities both that he applied for and received an extension of his leave. We disagree; we have to consider the issue on the basis of the evidence the Appellant gave us, not on the basis of a generalised appeal to plausibility, abstracted from the precise circumstances of this Appellant. Ms King also invoked the provisions of section 3C of the Immigration Act 1971, but in our view it would be an exercise in speculation to conclude that a valid application for ILR was received and acknowledged by the Home Office within the currency of any extant leave; and so we do not. Finally, Ms King submitted in the alternative that her client should be treated as occupying some sort of 'half-way house' in that he was clearly entitled to an extension of his leave regardless of whether he was actually granted it. But in our view the issue of status is binary, and cannot be glossed over in this suggested manner.

24. It follows that the Appellant has been an over-stayer in the UK at all material times since 2002 or 2003.

Private and Family Life

25. We asked Mr Beangstrom to expand on the nature and quality of his existing relationships with his sons, grandchildren and partner. He told us that he is very close to his family, communicates with them daily by phone and/or email, and that he gets to see them approximately once per month. We heard nothing to indicate that these are other than 'strong family ties' (see paragraph 19 of the Determination), although nothing was drawn to our attention, or appears to have been drawn to the attention of the First-tier Tribunal, suggesting emotional ties above and beyond the ties which are prevalent in all close, well-functioning families.

26. As for Ms Day, the position has not changed. She lives with a close friend in Stoke Newington; the Appellant and Ms Day see each other

once or twice a week; the relationship is 'on the threads', and contingent on the outcome of the current appeal.

The Appellant's Application that the Case be Remitted to the First-Tier Tribunal

27. Ms King submitted that it would be unsatisfactory for this Tribunal to decide this appeal on a 'half-baked' basis (our formulation, not hers), namely on the basis of some limited further evidence from the Appellant, and nothing more. The findings of the First-tier Tribunal would be in danger of acquiring some sort of hybrid quality, she argued, not merely as regards the primary facts found but also the evaluative conclusions to be drawn from them. Ms King argued that the First-tier Tribunal had been best placed to assess the witnesses and to undertake the relevant evaluations, and that this Tribunal should do nothing to interfere with the findings made.

28. We did not rule on Ms King's application at the outset. Our purpose was to investigate how far we could fairly and properly proceed on the basis of asking further questions of clarification of Mr Beangstrom, without seeking to impugn or re-write the findings of fact made by the First-tier Tribunal. Our view was that if we were to come to the conclusion that it would be unfair to Mr Beansgstrom to decide this appeal without remitting the case to the First-tier Tribunal, then we would be obliged to accede to Ms King's application.

29. In our judgment, having heard further evidence on a limited number of issues, as recorded above, we have reached the clear conclusion that it would not be unfair to proceed to determine this appeal at this appellate level. The Appellant's additional evidence served to clarify his immigration status at all material times, and in our view no further evidence is required, or indeed could reasonably be obtained. The First-tier Tribunal did not properly investigate the issue of the lawfulness of the Appellant's remaining in the UK at all material times, and we have now done so. As for the private and family life issues, the further evidence we have heard does not serve to contradict the findings made below; rather, it enables us to expand on them.

The Appellant's case on appeal

30. Ms King conceded that the First-tier Tribunal did not apply **MF(Nigeria)**. Her first submission was that this omission made no difference to the outcome of her client's successful appeal before that tribunal because it was always made clear that the claim was being

made under Article 8 of the Convention, and outside the scope of the applicable Immigration Rules. Furthermore, and approaching the issue on that basis, the First-tier Tribunal clearly found that there were exceptional circumstances which outweighed the strong public interest in favour of deportation of foreign criminals. Her second and alternative submission was that, in the event that this Upper Tribunal undertakes the proportionality exercise for itself in the light of Court of Appeal guidance, the outcome should be the same. In other words, and paying appropriate regard to the findings of fact and evaluations made below, we should equally conclude that the public interest in favour of deportation is outweighed by the compelling Article 8 features of the instant case.

31. We are grateful for Ms King for her clear and sustained submissions on these issues, advanced both orally and in writing.

Our Findings and Conclusions

32. We cannot accept Ms King's first submission. In effect, it was an attempt by her to re-visit the error of law decision made by Upper Tribunal Judge Kebede (see Appendix A). We cannot do that, nor are we disposed to.

33. It follows that it is, and always has been since the error of law decision was made, for this Upper Tribunal to undertake the proportionality assessment merited by this case in the light of binding authority from the Court of Appeal. We do so on the basis previously foreshadowed: namely, we have regard to the First-tier Tribunal's findings of fact; we may supplement those findings to the extent that the Appellant's further evidence throws light upon them; we may undertake our own evaluation of all of the available evidence, drawing inferences to the extent that we may fairly and properly do so.

34. Our point of departure is to consider the Appellant's case within the framework of the applicable Immigration Rules.

35. Given that the Appellant was convicted of an offence for which he received a sentence of imprisonment of between 12 months and 4 years, the first stage is to consider whether paragraph 399 or 399A applies.

36. Paragraph 399(a) does not apply because the Appellant does not have a child in the UK under the age of 18 years. Paragraph 399(b) does not apply because, although the Respondent concedes the genuine and subsisting relationship with Ms Day, the Appellant has not lived in the

UK with valid leave continuously for at least the 15 years immediately preceding the date of the decision, discounting any period of imprisonment.

37. Paragraph 399A does not apply because the Appellant has not lived in the UK for at least 20 years immediately preceding the date of the immigration decision, discounting any period of imprisonment. If necessary, we would have been prepared to hold that the Appellant does not have any ties, including social, cultural or family ties, with South Africa.

38. It follows that for the purposes of the Rules the issue is whether there are exceptional circumstances present in this case such that the public interest in deportation is outweighed. In view of the decision of the Court of Appeal in **MF(Algeria)**, that issue needs to be reformulated in this way: are there very compelling reasons, related to the family and private life of the Appellant, such that the clear public interest in favour of deportation is outweighed?

39. On the one hand, there is a strong public interest in favour of deporting the Appellant as a foreign criminal. We adopt the approach of Laws LJ in **MS(Algeria)**. We accept Ms King's submission that 'the public interest is not a fixity', although we would prefer to phrase it in terms of the public interest varying to some extent to reflect the circumstances of the offence and of the offending. Plainly, there is a low risk of reoffending. Yet, the public interest in favour of deportation does not dwindle to a correspondingly low level. This was a serious offence, and although we take into account the sentencing remarks of HHJ Pontius as regards the Appellant's level of culpability, the public's clear revulsion in offending of this nature needs to be recognised, as does the public interest in deterrence.

40. On the other hand, the Appellant's Article 8 rights fall to be placed in the balance. We accept that the Appellant's family ties are strong, and we do not seek to go behind the First-tier Tribunal's finding in any way. However, the context is important. The Appellant's sons are fully grown up and are no longer dependent on him. They live in the Bournemouth area and there are visits on a monthly basis. We accept that this is a warm, close-knit family with strong interpersonal ties, but we do not accept that there are any special or particular factors in play which might elevate this case above the norm. Furthermore, contact by email, telephone and Skype, much of which takes place now, can continue to take place if the Appellant is removed to South Africa.

41. The Appellant's relationship with Ms Day must also be placed in the balance - in his favour - but it is not a particularly powerful

consideration in the circumstances of this case. Ms Day no longer lives with the Appellant and they see each other only once or twice a week. It is true that these deportation proceedings must be placing considerable pressure on the relationship, and we were also told that it would end if the Appellant were deported. Overall, this is a factor which carries some weight but probably not as much weight as the Appellant's family ties, which appear to be more robust.

42. The issue for us is whether there exist very compelling reasons which, taken cumulatively, outweigh the strong public interest in favour of deportation of a foreign criminal whose status in the UK has been precarious since 2002 or 2003. Our clear conclusion is that there are not. We naturally have some sympathy for the Appellant, and we recognise the frankness of much of the evidence he gave us. However, his case under Article 8 of the Convention, viewed as sympathetically as it is possible to do, is not sufficiently compelling to defeat the case of the Secretary of State in upholding the strong public interest which Parliament has stated must be recognised.

43. This appeal is therefore dismissed.

Signed Date

Mr Justice Jay

APPENDIX A

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00126/2013

THE IMMIGRATION ACTS

Heard at : Field House
On : 3 December 2013

Decision Promulgated

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Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BRIAN BEANGSTROM
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Ms E King, instructed by J D Spicer Zeb Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Beangstrom's appeal against a decision to deport him from the United Kingdom. For the purposes of this decision, I shall refer to the Secretary of State as the respondent and Mr Beangstrom as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

2. The appellant is a citizen of South Africa, born on 5 December 1951. He claims to have first entered the United Kingdom in 1978 or 1979 when he was granted indefinite leave to remain as the spouse of a British national and to have left the United Kingdom on at least two occasions since then, most recently in 1987. He claims to have returned to the United Kingdom in 1998 on a four year ancestry visa and that he applied for, and was granted, naturalisation in 2004 or 2005, but had his passport and naturalisation certificate stolen in a robbery in 2009. However the respondent had no records to support that claim.

3. On 30 November 2011 the appellant was convicted at City of London Magistrates Court for conspiracy to supply a class B controlled drug - cannabis. On 3 May 2012 he was sentenced to 18 months' imprisonment and on 7 June 2012 he was notified of his liability to automatic deportation. He responded to that notice on 3 July 2012 and enclosed a statement in which he claimed to have been threatened by his co-defendant who had links with a drugs cartel in South Africa. In response to the respondent's enquiry he made a claim for asylum and was interviewed in that regard on 31 August 2012. A deportation order was signed on 9 January 2013 and a decision subsequently made that section 32(5) of the UK Borders Act 2007 applied.

4. The respondent, in making that decision, addressed the appellant's claim to fear persecution from his co-defendant who was also facing deportation to South Africa, but considered that he would not be at risk on return and that in any event there would be a sufficiency of protection available to him or he could safely relocate to another part of the country. The respondent then gave consideration to the immigration rules with respect to Article 8 of the ECHR, concluding that the appellant fell within paragraph 398(b), applicable to offences leading to a sentence of imprisonment of less than four years but at least twelve months. The respondent did not accept that paragraph 399(a) applied to the appellant since his son and stepson were adults. Neither was it accepted that paragraph 339(b) applied, although his relationship with his partner was accepted as genuine and subsisting, since he had not been living in the United Kingdom with valid leave continuously for at least 15 years preceding the date of the deportation decision and it was not considered that there were insurmountable obstacles to her accompanying him to South Africa. It was not accepted that paragraph 399A applied, since

he had not lived in the United Kingdom for 20 years and had failed to establish that he had no ties to South Africa. The respondent did not accept that there were exceptional circumstances such that the appellant's right to family and/or private life outweighed the public interest in his deportation. It was accordingly concluded that his deportation would not breach Article 8. It was not considered that the appellant's relationship with his partner, who was a dual British/ French national, would benefit him under The Immigration (European Economic Area)(Amendment) Regulations 2012.

5. The appellant's appeal against that decision was heard in the First-tier Tribunal on 11 September 2013, before a panel consisting of First-tier Tribunal Judge Morgan and Mr G F Sandall. The panel heard from the appellant and his two sons and found their evidence to be credible. They accepted that the appellant had previously lived in the United Kingdom for almost ten years following his marriage to a British citizen, that he had on this occasion been in the United Kingdom for fifteen years and that he had entered on an ancestry visa. They accepted that he had no close family in South Africa and that he had strong family ties to the United Kingdom, including his stepson Giovanni, an Italian citizen, who had a partner and a son, and his son Brett who was a British citizen and was married with a seven-year-old son. They also accepted that he was in a relationship with a French national who was at the time recuperating with her parents in France after having an emotional breakdown as a result of the deportation proceedings. The panel considered the part played by the appellant in the importation from South Africa of cannabis, noting that his involvement was at the lower end of the scale and taking account of the sentencing judge's remarks. They concluded that the appellant's deportation was disproportionate and in breach of Article 8 and they accordingly allowed the appeal on human rights grounds.

6. The respondent sought permission to appeal to the Upper Tribunal on the following grounds: that the panel had erred by failing to make any findings on the immigration rules; and that they had failed to apply the correct approach to the question of "exceptional circumstances", to make findings on the establishment of family life, to give adequate weight to the public interest and to identify any insurmountable obstacles to the appellant's family accompanying him back to South Africa.

7. Permission to appeal was granted on 24 October 2013, with respect in particular to the first ground.

8. The appeal then came before me on 3 December 2013. I heard submissions from the parties on the error of law.

9. Mr Tufan submitted that the Tribunal had erred in law. There was nothing in the appellant's circumstances that was exceptional. His relationship with his grandchildren was not exceptional: there was no

evidence of dependency outside the normal emotional ties. This was not in the category of exceptional cases. The Tribunal had also erred by relying upon RG (Automatic deport Section 33(2) (a) exception) Nepal [2010] UKUT 273, since that decision had been overturned by the Court of Appeal in Gurung v Secretary of State for the Home Department [2012] EWCA Civ 62 and the appeal subsequently re-made and dismissed by the Upper Tribunal. Mr Tufan relied on the case of PK (Congo) v Secretary of State for the Home Department [2013] EWCA Civ 1500 in submitting that the Tribunal had failed to consider the three relevant facets in deportation cases: society's revulsion at serious crimes; deterrence; and risk of re-offending.

10. Ms King submitted that whilst the immigration rules paragraphs 399 and 399A should have been referred to, any error on the part of the Tribunal in failing to do so was not material in the light of the two-stage approach in MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192 and also on the basis that it was accepted that the rules did not apply. The rest of the grounds were re-arguing the case. The question of exceptional family ties and insurmountable obstacles was not relevant since the Tribunal was concerned with private life rather than family life. The Tribunal had considered the risk of re-offending and the nature of the offence, as well as the question of deterrence at length and was clearly mindful of the public interest. The Tribunal concluded that the appellant's circumstances were exceptional, when looked at as a whole and when considered cumulatively.

11. Mr Tufan, in response, submitted that although the Tribunal had referred to the question of deterrence, there was no indication in the determination that it had analysed the matter.

Consideration and findings

12. In my view the Tribunal made material errors of law such that its decision has to be set aside and re-made.

13. Ms King's response to the first ground of appeal was that any error on the part of the Tribunal in failing to make any findings on the immigration rules was immaterial, given the two-stage approach in the consideration of Article 8, which the Court of Appeal subsequently found in MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192 inevitably involved the same consideration of proportionality. However it seems to me that that is to take an overly simplistic view of the matter. In omitting an analysis of the appellant's ability to meet the immigration rules, it is far from clear how the Tribunal reached the decision that it did. Had the Tribunal simply moved on to a consideration of Article 8 in its wider context, in accordance with the two-stage approach taken by the Upper Tribunal in MF (Article 8 - new rules) Nigeria [2012] UKUT 393 and on the basis of an accepted inability to meet the rules, it is not at all what it intended by its

conclusion at paragraph 23 that there were "exceptional circumstances" in the appellant's case. On the basis of a proper conclusion that such circumstances existed, it was open to the Tribunal to find that the requirements of paragraph 397 and 398 of the rules had been met and to allow the appeal on that basis. Yet that is not what they did. They did not provide any explanation as to how they were able to conclude (if that is what they did) that the requirements of the rules had not been met, but yet go on to allow the appeal under the wider Article 8. Accordingly it is far from clear how they reached the conclusion that they did and in that respect they materially erred in law.

14. In any event it seems to me that the Tribunal failed to give adequate reasons for concluding that the appellant's circumstances were exceptional such that his family and private life considerations outweighed the public interest in deportation. The Tribunal's approach appears to have been largely that because of the circumstances of the appellant's offence, his limited culpability and the low risk of re-offending, the public interest in his deportation was not strong and thus deportation was in breach of Article 8 of the ECHR. However such an approach was not a complete one and did not involve a full and proper consideration of the strength of his family and private life ties. The facts, as accepted by the Tribunal, were that the appellant had been in the United Kingdom for fifteen years, that he had two adult children and two grandchildren and that he was in a relationship with his British/French partner. There was, however, no analysis of the strength of the relationships other than a conclusion that the family ties were strong: in fact the evidence before the Tribunal was that his relationship with his partner was under stress and that his sons and grandchildren lived in different cities with limited contact. Similarly there was no proper analysis of the appellant's private life outside his family ties, other than his employment history and length of residence in the United Kingdom. Although the Tribunal accepted that he had entered the United Kingdom on an ancestry visa, no findings were made on his immigration status after the expiry of that visa, which was said to have been a four-year one. Clearly the question of the lawfulness of his residence in the United Kingdom was a material one in the consideration of proportionality, in particular as that had been a matter relied upon by the respondent, yet no findings were made in that regard. Accordingly, it is difficult to ascertain, on the findings made by the Tribunal, how it was able to conclude that his family and private life ties were sufficiently exceptional so as to justify a conclusion that his deportation would be in breach of Article 8 of the ECHR.

15. For all these reasons I find that the Tribunal's determination cannot stand and must be set aside. In view of the fact that it was not its findings of fact as such that have been challenged, but rather what it did with those findings, I consider that it will simply be for the Upper Tribunal, in re-making the decision, to undertake its own proportionality assessment in accordance with the guidance in MF (Nigeria) [2013] EWCA Civ 1192. I do not agree with

Ms King's submission that the appeal needs to be fully re-heard but consider that it can proceed largely by way of further submissions from both parties. It will be helpful to be provided with further evidence relating to the appellant's current circumstances, in particular to his immigration status and his relationships, and to that extent, therefore, it may well be appropriate to hear limited oral evidence.

16. I make the following directions for the resumed hearing.

Directions

(a) No later than ten days before the date of the next hearing, any additional documentary evidence relied upon by either party, including, where possible, evidence of the appellant's immigration status in the United Kingdom and evidence relating to subsisting relationships, to be filed with this Tribunal and served on the opposing party.
(b) The appellant or his representatives are to file with the Tribunal and serve upon the respondent a consolidated, indexed and paginated bundle containing all documentary evidence relied upon.
(c) In respect of any witness who is to be called to give oral evidence there must be a witness statement drawn in sufficient detail to stand as evidence in chief filed with the Tribunal and served upon the respondent.
(d) The appellant's representatives are to file with the Tribunal and serve upon the other party a skeleton argument setting out all lines of argument to be pursued at the hearing.

Signed

Upper Tribunal Judge Kebede