Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01023/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 20 November 2013	**On 31 January 2014**

Before

UPPER TRIBUNAL JUDGE DEANS

Between

BMG

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr F Okungbowa, Duncan Lewis & Co, Solicitors
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

1) A panel comprising Judge of the First-tier Tribunal Walker and Mr B Yates dismissed this appeal against a decision by the respondent refusing to revoke a deportation order.

2) The appellant was convicted in November 2010 of being knowingly concerned in fraudulent evasion of prohibition or restriction of importation of Class A controlled drugs and sentenced to imprisonment for 54 months. A deportation order against him was signed on 15 October 2012. An appeal against deportation was unsuccessful.

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3) In November 2012 the appellant made an asylum claim, which was treated by the respondent as an application for revocation of the deportation order. The refusal to revoke the deportation order was dated 16 May 2013. In the view of the respondent the asylum claim was subject to section 72 of the Nationality, Immigration and Asylum Act 2002 on the basis that the appellant's offence was a particularly serious one and he constituted a danger to the community. The respondent argued that the appellant was not entitled to refugee status in terms of section 72 and that he was not eligible for humanitarian protection in terms of paragraph 339D of the Immigration Rules.

4) The Judge of the First-tier Tribunal upheld the respondent's decision under section 72 on the basis that the appellant had been convicted by a final judgment of a particularly serious crime and constitutes a danger to the community of the UK. The appellant had claimed asylum on the basis that he feared being killed at the hands of a gang in Jamaica, who had threatened him in order to extract money from him. The appellant was not entitled to refugee status or to humanitarian protection. So far as Articles 2 and 3 were concerned, the country information showed there was a sufficiency of protection and the appellant could seek help and assistance from the authorities if the need arose. There was also the possibility of internal relocation.

5) This left for consideration the appellant's right to private or family life. The Tribunal noted that the appellant has four children in the UK by four different partners. These children have been born over a period of less than 6 years. The first, B, was born in November 2004, the second, K, was born in February 2006, the third, D, was born in May 2010 and the youngest, T, was born in September 2010. The Tribunal noted that the youngest child was conceived while his wife was approximately 4 or 5 months pregnant with the third child. The Tribunal commented that this did not show much loyalty or responsibility toward his then current partner or his existing children. The Tribunal had doubts about the appellant's declared intention to commit himself to his wife and to be a good father to all of his children.

6) The Tribunal heard evidence from the appellant's wife, SG. When she was asked about the effects on her of the appellant's offending and imprisonment she referred to the serious financial hardship which had resulted for her and her daughter. The Tribunal's impression was that the appellant's wife was more concerned with financial issues than with "domestic and purely marital ones". The Tribunal heard evidence from the appellant's sister-in-law and a cousin of his wife. These witnesses spoke highly of the appellant and said that the children looked up to him as a male role model. They did not seem to be concerned that the appellant had been involved in serious crime and this led the Tribunal to have some reservations about their evidence.

7) The Tribunal accepted that the appellant is living with his wife and daughter, D, and that there was family life although of short duration. The Tribunal did not accept that the appellant has any family life with any of his other partners, although no claim had been made by the appellant in this regard. The Tribunal did not accept that the appellant has family life with his other children. There was a lack of evidence from the mothers and/or guardians of these children as to whether they consented to any contact with the appellant and, if so, what the extent of this was. In relation to the youngest child, T, there was no evidence that the appellant had ever seen her apart from a claim by the appellant that he had seen her twice. The Tribunal accepted that the appellant's wife and D are British citizens. At the date of the hearing the appellant had been living with them for 2 months.

8) The Tribunal accepted that the greatest interference with family life would be between the appellant and his wife and D. In their relationship the appellant and his wife had been apart for longer than they had been together. His daughter, D, was now aged 3 and had spent most of her life not living with and not really knowing her father. They had only been living together as a family for the past two months. The interference with family life resulting from the appellant's deportation was outweighed by the public interest. The best interests of the appellant's children were for them to remain with their primary carers, who were their mothers in respect of the first three, and a special guardian in relation to T.

9) The application for permission to appeal on behalf of the appellant contended that the Tribunal had failed to take into account a report by an independent social worker in respect of D. It was further contended that the Tribunal did not give adequate reasons in relation to proportionality and, in particular, did not mention or refer to an OASys report. This referred to the appellant's low risk of re-offending and the efforts he had made to rehabilitate. It was further contended that there was procedural unfairness in refusing an adjournment to enable the appellant's probation officer to provide a report to cover the period for which the appellant was on bail and his conduct since the offence was committed. The probation officer was unable to provide a report because she was on holiday and was not due to return from holiday until after the hearing date. Permission to appeal was granted on these grounds on the basis that the interests of a child were involved and it was "just arguable that if the panel had expressly considered and made findings taking into account the independent social worker's report and the OASys report, they might have come to a different conclusion."

Submissions

10) At the hearing before me Mr Okungbowa relied upon the application for permission to appeal. He referred to the report by independent social worker in respect of D. The Tribunal was not correct at paragraph 70 of the determination to say that the appellant barely

knew the child before his release. The social worker stated at page 3 that D knew her father. The Tribunal did not consider the effect of removal on the children and did not consider the best interests of the children at all. These were detailed in the social work report. Reference was made to the case of SS (Sri Lanka) [2012] EWCA Civ 155. There were no adequate reasons for finding that the effect on D's family life would be limited. There was no consideration of the OASys report. The Tribunal's assessment was one-sided as they had considered only the seriousness of the offence. This was a one-off offence. The appellant was seeking to rehabilitate himself. He had been a low risk prisoner. Reference was made to the case of Maslov.

11) In relation to procedural unfairness, Mr Okungbowa submitted that an adjournment had been sought for an updated report from OASys. The Tribunal did not consider this relevant because of the short time the appellant had spent with his daughter. The Tribunal should have had regard to the lapse of time since the offence was committed. On the basis of procedural unfairness the Tribunal's decision was not sustainable and should be set aside. The appeal should be remitted to the First-tier Tribunal. The appellant has now spent five months with his child and further evidence could be provided in relation to this.

12) For the respondent, Mr Wilding submitted there was no procedural unfairness in not adjourning. The Tribunal gave clear reasons for not adjourning and if the appellant's representatives considered that a report was necessary then they had had sufficient time to obtain this.

13) Mr Wilding continued that it was argued on behalf of the appellant that the Tribunal did not consider the risk of re-offending or the appellant's behaviour in prison. These matters were, however, the bare essentials of what would be expected by an offender and would not necessarily outweigh the public interest in deportation. The appellant had been at liberty so far for only five months and had not re-offended but this was not a weighty factor either. This was a long sentence for a first offence. The appellant had not been convicted of selling drugs on the street but of involvement in the importation of Class A drugs. The sentence had triggered the automatic deportation provisions and only in exceptional circumstances would the public interest be outweighed, having regard to paragraphs 388 and 389 of the Rules.

14) Mr Wilding further referred to the decision of the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192. The Immigration Rules in relation to deportation were a complete code and only a very compelling case would succeed, especially if imprisonment was for greater than four years.

15) Mr Wilding referred also to SS (Nigeria) [2013] EWCA Civ 550 and the weight to be given to the legislation in the 2007 Act. The OASys report would have added very little of substance to the appellant's case if explicitly considered. It was argued for the appellant that there was a

low risk of re-offending but the risk of re-offending was not an issue which the Tribunal weighed against the appellant.

16) Mr Wilding continued that the Tribunal had accepted that there would be an effect on the appellant's wife and daughter of his deportation and none of their findings at paragraph 70 in this regard were incorrect. The Tribunal found family life established but the interference to that family life was outweighed by the public good. The Tribunal had section 55 of the 2009 Act in mind. There was nothing to suggest the Tribunal did not have all the documentary evidence before it. Even if there was an error it was not material in terms of MF (Nigeria). The appellant had not lived with his daughter for a long period and she was born when he was in Jamaica. He had been arrested at the airport on his return. The social work report did not grapple with the severity of the situation and gave very little attention to the appellant's conviction and sentence. The Tribunal accepted that it was in the best interests of the children to be with their primary carers. It had to be accepted that deportation will separate families. This was a case with serious offending where family life was less than settled and the appellant had a short period to establish a relationship with his child. Any failure to consider the social work report, if it was an error, was not material. The Tribunal found at paragraphs 68-69 that the public interest outweighed the interference with family life. The social work report would not have had any significant bearing on the outcome of the appeal. At paragraph 70 the Tribunal accepted there was interference with family life and rightly found against the appellant. Having regard to paragraph 70 the failure to mention the social work report expressly was not an error.

17) In response Mr Okungbowa submitted that as the social work report had not been tested before the Tribunal or considered by them, it was not possible to say what effect it might have had on the outcome of the appeal.

Discussion

18) Mr Wilding relied on the decision of the Court of Appeal in MF (Nigeria). This judgment was handed down not only after the hearing of this appeal before the First-tier Tribunal but after the application for permission to appeal was made. Nevertheless, the determination of the First-tier Tribunal must be read in accordance with the decision of the Court of Appeal, which sets out the applicable law and the correct approach to be taken in deportation appeals of this nature.

19) The Court of Appeal held that the new Rules in relation to deportation and family life are a complete code. If the appellant could not benefit from paragraphs 399 or 399A then it was necessary to consider whether there was circumstances which were sufficiently compelling (and therefore exceptional) to outweigh the public interest in deportation. It was pointed out at paragraph 42 that in considering

whether removal was a proportionate interference with an individual's Article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling is required to outweigh the public interest in removal.

20) In this appeal it is submitted on behalf of the appellant that the Tribunal failed to take into account a report by an independent social worker on the relationship between the appellant's daughter, D, and her father and failed to have regard to an OASys report on the risk of re-offending and the efforts the appellant had made to rehabilitate.

21) In general terms, Mr Okungbowa had some justification for expecting that a Tribunal should take into account an expert report and either accept it or give good reasons for its rejection. Mr Wilding pointed out, however, that at paragraph 70 of the determination the Tribunal accepted that the interference with the appellant's family life would have its greatest effect on his wife and on his daughter, D. This was outweighed by the public interest in deportation. Mr Wilding submitted that the report by the independent social worker showed no more than what the Tribunal had already concluded, namely that there would be interference with the appellant's family life with his daughter, and with hers with him, and would not affect the balancing exercise, in terms of which the public interest outweighed this interference.

22) I accept Mr Wilding's argument in this regard. The appellant was sentenced to imprisonment for a period of more than four years, which is not only sufficient to invoke the automatic deportation provisions in section 32 of the 2007 Act but takes the appellant outwith the protection for family life provided by paragraphs 399 and 399A of the Immigration Rules. This is a clear indication of the considerable weight to be given to the public interest where an offender has been sentenced to imprisonment for four years or more. In such circumstances, even if the appellant had enjoyed settled family life with his child or indeed, several children for a considerable period, the public interest in deportation would not necessarily be outweighed by the interference with family life, even having regard to the best interests of the child or children. In the circumstances in which the Tribunal in this appeal found that family life had been carried on, the Tribunal was entitled to find that the public interest in deportation outweighed the interference with family life.

23) Mr Okungbowa further argued that the Tribunal erred in not referring to the OASys report, on the basis of which the appellant constituted a low risk of re-offending. He had been a model prisoner and made attempts to rehabilitate. He had committed no further offences.

24) Mr Wilding's submission was that these factors would not outweigh the public interest in deportation but were simply a starting point for considering the balancing exercise in relation to the public interest. By this submission I took Mr Wilding to mean that were these factors absent

then it would be much more difficult for the appellant to show that the interference with his private or family life outweighed the public interest but, even where these factors were in the appellant's favour, they did not lead to the conclusion that the public interest would be insufficient to justify the interference with the appellant's private or family life.

25) I accept Mr Wilding's argument in this regard. Furthermore, as Mr Wilding went on to submit, the basis of the Tribunal's decision in respect of Article 8 was not the risk of re-offending but the nature of the conviction and sentence, which the Tribunal categorised as a very serious crime. The tribunal went on to say, at paragraph 69, that while this was his only conviction he appeared to be a person who would ignore rules and regulations when it suited him. He had entered the UK with only one month's leave to remain but became an overstayer. Even after he was apprehended he failed to report and managed to stay at large for a considerable period. Even at a time when he claimed that he wanted to regularise his situation and obtain leave to remain as a spouse he was actively involved in criminality. During this same period he was in what he claimed was a brief relationship with his fourth "baby-mother". In the view of the Tribunal this showed the appellant to be a person who was quite prepared to do what he wanted and to ignore his responsibilities to others, whether the community at large or individuals.

26) The Tribunal was entitled to find that the nature of the appellant's conviction and sentence was sufficient in itself to show the public interest in deportation without having regard to the risk of re-offending or the appellant's behaviour in prison. In other words, it was not the appellant's future behaviour which led the Tribunal to conclude that the public interest in this deportation outweighed the interference under Article 8 but his past behaviour. The Tribunal did not err in making its decision in this way.

27) The final point is that of procedural unfairness. As Mr Wilding pointed out, the Tribunal considered the adjournment application and gave their reasons for refusing to adjourn at paragraph 7 of the determination. The Tribunal considered that an up-to-date report by the probation officer would add little to the appellant's case as the probation officer had seen the appellant on only a limited number of times between his release in July and the hearing on 16 September. This was a decision the Tribunal was entitled to make and there was no unfairness to the appellant arising from this.

Conclusions

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

29) I do not set aside the decision.

Anonymity

30) The First-tier Tribunal made a direction for anonymity and, for the reasons given by it, I continue this direction in the form of an order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date

Judge of the Upper Tribunal