Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01361/2013

THE IMMIGRATION ACTS

Heard at Field House
On 3rd March 2014

Determination Promulgated
On 27th March 2014

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AH
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms J. Isherwood, Senior Presenting Officer
For the Respondent: Mr K. Mak, MKM Solicitors

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity direction that no report or other publication of these proceedings or any part or parts of them shall name or directly or indirectly identify the claimant. Reference to the claimant may be by use of his initials but not by name. Failure by any person, body or institution whether corporate or

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incorporate (for the avoidance of doubt to include either party to this appeal) to comply with this direction may lead to a contempt of Court. This direction shall continue in force until the Upper Tribunal (IAC) or an appropriate Court lifts or varies it.

2. The Secretary of State appeals with permission against the decision of the First-tier Tribunal (Judge Flynn and Ms J A Endersby, non-legal member) who allowed his appeal against the decision of the Secretary of State that Section 32(5) of the UK Borders Act 2007 applied.

1. The history can be summarised as follows. The Respondent arrived in the United Kingdom on 12th May 1999 and was given leave to enter as a visitor until 10th November 1999. On 31st July 2000, he was given indefinite leave to remain. An application made for naturalisation on 28th December 2007 was refused because the required documentation and a full fee had not been submitted.

2. Whilst the Respondent has been present in the United Kingdom it is plain from the Secretary of State's decision letter that the Respondent had committed criminal offences. On 24th August 2012 he was convicted of two counts of robbery and was sentenced on 5th October 2012 to two years' imprisonment.

3. As a result of his convictions, the Respondent was informed of his liability to automatic deportation on 3rd December 2012. He responded giving details of facts on which he wished to rely on 10th December 2012.

4. A deportation order was signed against the Respondent and on 11th June 2013 a decision was made that Section 32(5) of the UK Borders Act 2007 applied. The reasons were set out in a detailed decision letter. The Respondent appealed against that decision and the appeal was heard on 11th December 2013 before the First-tier Tribunal panel (Judge Flynn and Ms J A Endersby, non-legal member).

5. In a decision promulgated on 13th January 2014 the panel allowed the appeal under the Immigration Rules. During the course of the hearing, the panel heard oral evidence from the Respondent and from the Respondent's partner and also the Respondent's mother. The witness evidence and summary of the same is set out at paragraphs 11 to 34 of the determination. The conclusions of the panel are set out at paragraphs 40 to 62 of the determination. They correctly identified and set out the relevant Immigration Rules at paragraph 44 of the determination. At paragraph 45 they made reference to the offences that had triggered the liability for deportation, namely that the Respondent had been sentenced to a period of imprisonment of two years and therefore met the requirements of paragraph 398(b) that the deportation of a 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 four years but at least twelve months. They also noted that as paragraph 398(b) applied so should paragraphs 399 and 399A. It had been submitted on behalf of the Respondent at the hearing that he met the Immigration

Rules and specifically the requirements of paragraph 399A(b). This sets out as follows:-

> "399A. This paragraph applies where paragraph 398(b) or (c) applies if –
>
> (a) …
>
> (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."

6. In this context it is right to observe that the decision letter recognised that the Respondent was a person who was aged under 25 and had spent at least half of his life living continuously in the UK. However what was not accepted was the second part of paragraph 399A(b) that "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".

7. Thus the panel considered the evidence before them in that respect. In doing so they followed the guidance of the Upper Tribunal in **<u>Ogundimu</u> (Article 8 – new rules) Nigeria [2013] UKUT 60** and set out what the Tribunal had said in respect of paragraph 399A(b) and the meaning of the word "ties". In doing so the panel applied that decision to the facts as they have found them to be. At paragraph 52 they recorded that whilst they had concluded that the Respondent's father had contact with his mother and daughter by telephone and visits to Jamaica and that he could resume contact if he wished, the panel was satisfied that there had been no contact by the Respondent with anyone in Jamaica since he had arrived. They also found that he had never returned to Jamaica since leaving at the age of 8 and that he had "not retained any real ties with Jamaica". Thus they were satisfied that he met the requirements of paragraph 399A(b). The panel went on to make other findings relating to paragraph 399(a) and the position of the Respondent's partner and son and his best interests. Those findings follow at paragraph 54 onwards. Their overall finding in this respect was set out at paragraph 61, namely that they found that the Respondent had a genuine and subsisting relationship with his partner and their son and that he met the requirements of paragraph 399A(b) because he was under the age of 25 and had spent more than half his life in the UK. They also recorded their overall conclusion that they were satisfied that the Respondent for the reasons they had given had no ties with Jamaica.

8. Thus they reached the ultimate conclusion on the evidence before them that the decision of the Secretary of State was not in accordance with the law as the Respondent could meet paragraph 399A(b) of the Immigration Rules. They made it clear at paragraph 62 they did not consider "Mr Mak's highly persuasive submissions with respect to the family's Article 8 rights and in particular the best interests of the child in accordance with Section 55 of the 2009 Act" because it was not necessary to consider Article 8 any further having found that the decision of the Secretary of State was not

in accordance with the law as the Respondent had demonstrated he met the requirements of paragraph 399A(b) thus they allowed the appeal.

9. Permission to appeal to the Upper Tribunal was sought on behalf of the Secretary of State on two grounds. It is important to set out those two grounds for reasons that will become abundantly clear. Ground (1) made reference to the panel having allowed the appeal under paragraph 399A(b). It was submitted that whilst the panel had made reference to the case of **Ogundimu** (as cited) the panel had failed to carry out an assessment into the possibility of the Respondent returning to Jamaica and whether in fact he could re-integrate into society there. The Secretary of State further submitted that the panel's findings were imbalanced, particularly in the light of the very real possibility that the Respondent may have siblings remaining in Jamaica, even if his father had not been in touch for a year. It was further submitted that the panel failed to give adequate consideration to the possibilities surrounding the Respondent's re-integration given that he was surrounded by family members in the UK who had potential to create links in Jamaica to assist him on return.

10. The second ground advanced on behalf of the Respondent concerned the findings made by the panel relating to his continued presence in the UK and that being in the child's best interests. In this regard it was submitted that the panel had failed to give adequate consideration to his past offending and the risk of re-offending and the impact that this would have on the child's best interests.

11. Limited permission to appeal was granted by First-tier Tribunal Judge Ransley on 29th January 2014. It is necessary to set out the reasons for granting permission. Judge Ransley said this:-

> "The grounds assert that the judge has made a material error in law for failure to give any reasons or adequate reasoned findings on a material matter. Ground (1) asserts that the judge has failed to carry out an assessment into the possibility of the Appellant returning to Jamaica and whether he could re-integrate into society there. The determination shows that the panel has accepted the Appellant's evidence that he has no contact with anyone in Jamaica since he arrived in the UK at age 8 and that he has never returned to Jamaica since leaving at the age of 8. The panel accepted that he had no ties in Jamaica (paragraphs 49, 50-52). By making these findings of fact, the First-tier Tribunal has ruled out the possibility of the Appellant returning to Jamaica and re-integrating into society there. This finding is open to the panel and it does not involve an arguable error of law. Ground (2) asserts that the panel failed to give adequate consideration to the Appellant's past offending, his heightened risk of re-offending, the legitimate aims of preventing crime and disorder and of deterring other foreign criminals in a similar position. In the determination (60) it was stated that the panel had taken account of **SS (Nigeria) [2013] EWCA Civ 550**. However, I find that neither in (60) or anywhere else in the determination did the panel consider the Appellant's past offending or risk of re-offending, or evaluate the public interest justifications in deporting the Appellant. For this reason there is an arguable error of law in the determination."

12. The appeal came before the Upper Tribunal, Ms Isherwood appeared on behalf of the Secretary of State and Mr Mak, who appeared before the First-tier Tribunal, appeared

on behalf of the Respondent. After the grounds of permission had been filed and the grant of permission by Judge Ransley, a Rule 24 reply was filed on 11th February 2014. In that Rule 24 response it summarised the findings of the First-tier Tribunal panel, namely that at paragraphs 52 and 61, the panel concluded that the requirements of paragraph 399A(b) (private life) were satisfied and thus the appeal was allowed under that Rule. The reply went on to state:

> "The Respondent's challenge to the appeal being allowed under paragraph 399A(b) was rejected by First-tier Tribunal Judge Ransley in the decision on permission. No challenge was made to the appeal being allowed under paragraph 399A. In these circumstances the Respondent's grounds that the panel failed to take into account past offending, risk of re-offending and the legitimate aims of the public is irrelevant and entirely misconceived since the Immigration Rules clearly do not require these factors to be assessed".

The reply goes on to state and make clear that the appeal was allowed under the Immigration Rules and that the panel at paragraph 62 had stated that it was unnecessary to consider the matter under wider Article 8 jurisprudence, which are the only circumstances in which the public interest in deportation would therefore be relevant.

13. At the hearing Ms Isherwood had not seen a copy of the reply although it is plain that it had been served upon the Secretary of State as it had been upon the Upper Tribunal. She therefore took time to read that reply. Having done so, it was plain from the grant of permission that in respect of the two grounds advanced on behalf of the Secretary of State, no permission had been granted on Ground (1) relating to the panel having allowed the appeal under the Immigration Rules and specifically under paragraph 399A(b). Furthermore, no application had been made to renew that ground to the Upper Tribunal for permission after that had been refused by the First-tier Tribunal. In those circumstances, the fact that permission was granted in respect of Ground (2) could not undermine the panel's conclusion under the Immigration Rules under paragraph 399A(b), permission having not been granted on that particular ground. In those circumstances, Ms Isherwood had nothing further that she wished to advance on behalf of the Secretary of State.

14. I have therefore reached the conclusion that it has not been demonstrated that the panel erred in law. It was accepted on behalf of the Secretary of State and by the panel, that the other part of the requirement of paragraph 399A(b) of the Rules were met. The only issue was whether the Appellant had no "ties (including social, cultural and family) with the country to which he would have to go if required to leave the UK". The panel set out its findings in this respect within the determination at paragraphs 49 and 50-52, relating back to the oral evidence that it had the benefit of hearing. The panel, having had the opportunity to hear the oral evidence of the Respondent, his partner and mother, reached the conclusion that the Respondent had no contact with his mother (who lived in Jamaica) and that he had met her only once when she confirmed that she had no responsibility for him (paragraph 49). The panel also concluded on the evidence before them that there had been no contact by the Respondent with anyone in Jamaica since he arrived in May 1999 nor that he had

ever returned to Jamaica since leaving at the age of 8. The overall conclusion based on the evidence and applying the Tribunal decision in **Ogundimu** was that the Respondent had not retained any real ties with Jamaica. As **Ogundimu** makes it plain, each case turns on its own facts.

15. Whilst the grounds on behalf of the Secretary of State sought permission to appeal the decision made under paragraph 399A(b), it is plain from reading the grant of permission that the First-tier Tribunal Judge (Judge Ransley) specifically considered background but did not grant permission on it for the reasons given. Judge Ransley considered the findings that had been made by the panel and reached the conclusion that they were reasonably open to them on this issue under paragraph 399A(b) and that "by making the finding that the FTT has ruled out the possibility of the Appellant returning to Jamaica and re-integrating into society there. This finding is open to the panel and it does not involve an arguable error of law".

16. Thus the judge expressly considered the grounds advanced on behalf of the Secretary of State but did not grant permission on this ground. No application has been made by the Secretary of State to seek renew permission to appeal on that ground as the Rules provide for. In this case it can be seen that this was a qualified grant of permission in which the judge expressly when setting out the reasons for reaching that view, refused to grant permission on Ground (1) which in essence was the main ground of appeal. The permission being limited to Ground (2) as recognised in the reply under Rule 24, that permission on Ground (2), even if it were found an error of law, would not be material because the Respondent's appeal succeeded under the Immigration Rules and specifically paragraph 399A(b) for which permission has not been granted.

17. Thus it has not been demonstrated that the decision of the First-tier Tribunal panel involved the making of an error of law. The decision shall therefore stand.

Direction Regarding Anonymity – Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Upper Tribunal Judge Reeds