Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01655/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 April 2014	**On 10 April 2014**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR K L
(Anonymity Direction Made)

Respondent

Representation:

For the Appellant: Ms A Holmes a Senior Home Office Presenting Officer
For the Respondent: Ms L Delgado a Solicitor from Benchmark Solicitors LLP

DETERMINATION AND REASONS

1. The appellant the Secretary of State for the Home Department. I will refer to her as the Secretary of State. The respondent is a citizen of Jamaica who was born on 3 May 1978. I will refer to him as the claimant. The Secretary of State has been given permission to appeal the determination of a panel sitting in the First-Tier Tribunal (First-Tier Tribunal Judge Stokes and non-legal member Ms J A Endersby). The panel dismissed the claimant's appeal under the Immigration Rules but allowed his appeal on human rights grounds against the Secretary of State's decision of 22 July 2013 that Section 32 (5) of the UK

Borders Act 2007 applied and that she was required to make a deportation order against him following his conviction for possessing a Class A controlled drug with intent to supply and the resulting sentence of two years and six months imprisonment.

2. The claimant appealed under section 82 (3A) and 92 (4) (a) of the Nationality Immigration and Asylum Act 2002 (as amended) on the grounds that he fell within exception 1 from automatic deportation under section 33 (2) of the 2007 Act namely, that his removal would breach his Convention rights under Article 8. His appeal was heard by the panel on 5 February 2014. Both parties were represented, the claimant by Ms Delgado, who appears before me. Oral evidence was given by the claimant and his wife. The panel set out the evidence in detail between paragraphs 18 and 28 of the determination. The equally detailed findings of credibility and fact appear between paragraphs 29 and 38. I will not repeat the claimant's immigration history or the history of decisions and appeals leading up to the appeal heard by the panel. These can be found in paragraphs 1 to 6 of the determination.

3. The panel concluded that the Secretary of State was required to make a deportation order. There was a presumption that the public interest required the claimant's deportation. The panel addressed his relationship with his wife, two natural children, one stepchild and another child under the provisions of paragraphs 399 and 399A, concluding that these requirements were not met. Furthermore, the claimant had not lived in the UK continuously for at least 20 years immediately preceding the date of the deportation order, after discounting the period of his imprisonment. Under the Immigration Rules there were no other factors which amounted to exceptional circumstances and outweighed the public interest in deportation. The Secretary of State's decision was in accordance with the Immigration Rules and she should not have exercised her discretion under paragraph 399B differently.

4. The panel went on to consider the Article 8 grounds outside the Immigration Rules. After reviewing the case law the panel set out the factors which weighed against the claimant in paragraph 57 and those which weighed in his favour in paragraphs 58 and 59. In doing so the panel treated the welfare of the claimant's two natural children as a primary consideration. In paragraph 60 the panel reached the conclusion that the factors in favour of deportation were weighty particularly as to the serious view taken by the Secretary of State of the claimant's criminality and her legitimate aim to protect society and to prevent disorder and crime. On the other hand the panel placed considerable importance on the interests of the claimant's two natural children. The decision was considered to be finely balanced but in all the circumstances was struck in favour of the claimant. In paragraph 62 the panel said; "we find that the decision appealed against would cause the UK to be in breach of the law and its obligations under Article 8 ECHR and the appellant's removal would have unjustifiably harsh consequences for him and his family such that deportation would not be proportionate to any of the legitimate

objectives identified in Article 8 (2) of the European Convention." (my emphasis).

5. The Secretary of State applied for and was granted permission to appeal by a judge in the First-Tier Tribunal. There is one composite ground which argues that the panel erred in law by failing to identify exceptional circumstances which would render the claimant's deportation unjustifiably harsh. No adequate consideration had been given to the public interest and SS (Nigeria) [2013] EWCA Civ 550 had not been followed. It was only in extremely rare circumstances that the Tribunal should exercise an inquisitorial function on its own initiative in evaluating the interests of a child. Reliance was also placed on Gulshan [2013] UKUT 00640 (IAC) and Nagre [2013] EWHC 720 Admin in support of the submission that the panel had failed to recognise that an Article 8 assessment outside the Immigration Rules should only be carried out where there were compelling circumstances not recognised by the Rules. The panel had failed to apply the test of whether there were exceptional circumstances namely circumstances which would lead to an unjustifiably harsh outcome.

6. I have a Rule 24 response from the claimant's solicitors together with a helpful composite bundle containing all the material before the panel and subsequent documents relating to the appeal to the Upper Tribunal.

7. Ms Holmes relied on the grounds of appeal and submitted that there had been no adequate consideration of the public interest. The factors set out in paragraph 47, 56 and 57 made only tenuous mention of the public interest factors. The panel had failed to grapple with the principles set out in OH (Serbia) [2008] EWCA Civ 694 of which no mention had been made. In reply to my question, Ms Holmes accepted that OH was addressed in the subsequent judgement of the Court of Appeal in SS (Nigeria) and that the panel referred to both Gulshan and Nagre. Overall, she submitted that the panel had not done enough in relation to considering the public interest. Ms Holmes accepted that the grounds did not attack the panel's findings of credibility or fact. She accepted that the words "unjustifiably harsh consequences" in paragraph 62 were "quite muscular". I was asked to find that the panel had erred in law, to set aside the decision and remake it.

8. Ms Delgado relied on the Rule 24 response. She submitted that the panel had dealt with all necessary issues, in the correct order, referring to all relevant case law. SS Nigeria was addressed in paragraph 56 and a correct précis of the effect of this set out. In paragraph 57 the panel summarised the factors which militated against the claimant and in paragraph 59 those in his favour. Whilst there was no reference to OH Serbia the required factors were addressed in paragraph 59. The panel had properly weighed all the relevant factors. The grounds of appeal argued that the panel failed to consider whether there were "compelling circumstances" or "exceptional circumstances". Ms Delgado argued that this was exactly what the panel had done when, in paragraph 62, they summarised the test of "unjustifiably harsh consequences for him and his

family". I was asked to find that the panel had not erred in law and to uphold the determination.

9. Ms Holmes said that she did not wish to reply. I reserved my determination.

10. I find that the panel prepared a detailed and careful determination. The evidence is comprehensively set out and carefully assessed. The panel reached credibility findings and findings of fact which have not been disputed by the Secretary of State. There was no overall positive credibility finding in relation to the evidence of the claimant or his wife. Some important aspects of their evidence were not accepted. The Secretary of State makes no complaint about the panel's conclusion that the claimant failed under paragraphs 399, 399A and 399B of the Immigration Rules. The grounds submit that the errors of law were in relation to the assessment of the appeal on Article 8 human rights grounds outside the Immigration Rules.

11. Whilst OH Serbia is not referred to in the Secretary of State's grounds of appeal Ms Holmes argued that the panel did not address the principles set out in paragraph 15 where Wilson LJ said;

> "From the above passages in N (Kenya) I collect the following propositions:
>
> (a) The risk of reoffending is one facet of the public interest but, in the case of very serious crimes, not the most important facet.
>
> (b) Another important facet is the need to deter foreign nationals from committing serious crimes by leading them to understand that, whatever the other circumstances, one consequence of them may well be deportation.
>
> (c) A further important facet is the role of a deportation order as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes.
>
> (d) Primary responsibility for the public interest, whose view of it is likely to be wider and better informed than that of a tribunal, resides in the respondent and accordingly a tribunal hearing an appeal against a decision to deport should not only consider for itself all the facets of the public interest but should weigh, as a linked but independent feature, the approach to them adopted by the respondent in the context of the facts of the case. Speaking for myself, I would not however describe the tribunal's duty in this regard as being higher than "to weigh" this feature."

12. Although this was not raised in the grounds of appeal and there was no application to amend the grounds I find that the panel did not fail to apply these principles. There is the self-direction contained in paragraph 57 and the

reference to the opinion of Lord Bingham in Huang v SSHD [2007] UKHL 11 at paragraph 16 quoted at length, in particular the passage which deals with the treatment of foreign citizens who have committed serious crimes; "The general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant in another; the damage to good administration and effective control if the system is perceived by the applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on." The panel also weighed in the balance material factors such as the judge's sentencing remarks, the single drug dealing offence, the fact that the claimant had come off drugs and the low risk of further offending.

13. In paragraph 47 the panel set out relevant aspects of the judgement of the Court of Appeal in MF (Nigeria) v SSHD [2013] EWCA Civ 1192 including "The reference to exceptional circumstances serves the purpose of emphasising that, in the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who do not satisfy paragraphs 398 and 399 or 399A. It is only exceptionally that such foreign criminals will succeed in showing that their rights under Article 8 (1) trumps the public interest in their deportation" and "In our view, (this) is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's Article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be "exceptional") is required to outweigh the public interest in removal".

14. In paragraph 56 the panel referred to SS Nigeria and the conclusion of the Court of Appeal "That the State's policy in deporting foreign criminals must be given great weight where that policy is made by the legislature and not by the executive government. There is no rule of exceptionality but the more pressing the public interest in removal or deportation the stronger must be the claim under Article 8 if it is to prevail." The panel went on to say that regard had been given to the extensive case law referred to earlier in the determination.

15. Ms Holmes did not refer to any particular passage in SS Nigeria in support of the proposition that "Only an extremely rare circumstances should a Tribunal exercise an inquisitorial function on its own initiative in evaluating the interests of such a child". In any event I cannot find any indication that the panel exercised an inquisitorial function in evaluating the interests of any of the children. The evaluation of the interests of the children was carried out solely on the basis of the evidence submitted to the panel.

16. I find that there are clear indications that the panel had in mind and took into account that exceptional or very compelling circumstances were needed if the

claimant was to overcome the great weight to be given to the strong public interest in deportation. This was done firstly, in relation to the appeal under the Immigration Rules, in Paragraph 46. There is the reference to MF (Nigeria) and "exceptional circumstances", "exceptionally", "something very compelling (which will be "exceptional")" in paragraph 47 to which I have already referred. There is reference to Gulshan and "compelling circumstances" in paragraph 48. I have already set out what the panel said about the effect of SS (Nigeria) in paragraph 56. The panel referred to the particularly serious crime committed by the appellant namely the use of and dealing in drugs, in paragraph 57. Finally, and by way of what I find to be crucial emphasis in the final conclusion of the panel there is reference to the removal of the claimant leading to "unjustifiably harsh consequences" for him and his family in paragraph 62.

17. The panel made an anonymity direction in order to protect the interests of the minor children. I consider that it is necessary to continue the direction. I make an order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant or any member of his family.

18. I find that the panel did apply the correct tests in assessing the Article 8 grounds. As was said in paragraph 60 the decision was finely balanced but I find that it was one open to the panel on all the evidence. There is no error of law and I uphold the determination.

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Signed Date 8 April 2014

Upper Tribunal Judge Moulden