



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/01414/2013

THE IMMIGRATION ACTS

Heard at Stoke
on 13th February 2014

Determination Promulgated
on 25th February 2014

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AD

(Anonymity direction made)

Respondent

Representation:

For the Appellant: Mr McVeety – Senior Home Office Presenting Officer.

For the Respondent: Mr Shoye of Graceland Solicitors.

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a determination of First-tier Tribunal Judge PJM Hollingworth who allowed AD's appeal against the refusal to revoke a deportation order made against him.

Error of law finding

2. AD was born in 1972 and is a national of Gambia. He entered the UK on 15th September 2001 as a spouse and was granted indefinite leave to remain on 28th March 2003 in that capacity. On 8th May 2008 he was arrested for possessing cocaine and diamorphine with intent to supply and possession of cannabis. He pleaded guilty to those offences and on 24th July 2009 was sentenced to four years imprisonment. He was served with notice of liability for deportation and on 6th January 2011 a deportation order was signed. The deportation order is an automatic deportation order made under the provisions of the UK Borders Act 2007 [SSHD bundle, section D]. An appeal against the order for his deportation was dismissed by a panel of the First-tier Tribunal sitting at Nottingham on 3rd March 2011 (the TRP Hollingworth Panel)

3. The relevant parts of the sentencing remarks of His Honour Judge Fowler are as follows:

Both of you have pleaded guilty to offences of possession of class A drugs. In your case, [B], 3.83g of heroin and a further offence of possession of cannabis. In your case, [AD], you were convicted of two offences: one of possession of 2.8g of crack cocaine, another of 2.3g of heroin. All those offences, save for the ones of cannabis, with intent to supply.

I deal with you first [AD]. I take the view having heard the evidence in the trial that you were a regular visitor to these premises and that the circumstances in which you were arrested and the matters that were found in your possession indicate that your possession of these amounts of cocaine and heroin were as part of commercial supply. But I make it clear, and it will be from the sentence, that I am only sentencing you for the possession of these relatively limited amounts of class A drugs.

You are 36. You have a previous good character – that goes to the extent of you having a good work record. But these are serious offences, a seriousness that is marked by the Court of Appeal indicating that a starting point for sentences in such matters for one offence would be 5 years. But I mitigate the sentence that I pass upon you to take account firstly of your good character, secondly, to the amount of the drugs involved. The least sentence I can pass upon you is one of 4 years imprisonment. There will be no separate penalty in relation to the additional offence of possession of cannabis. That is 4 years imprisonment on each count to run concurrently.

4. AD made his first application to revoke the deportation order on 19th July 2011, shortly after his appeal against that order had been dismissed. The application was refused on the 20th October 2011 but with an ‘in country’ right of appeal. The appeal against the refusal to revoke was also dismissed, on 6th March 2012, by a panel of the First-tier Tribunal composed of Judge Landes and Mr G F Sandall (the Landes Panel) and AD became appeal rights exhausted on 16th

March 2012. A decision to detain pending removal on 9th May 2012 was cancelled as AD had, on the 2nd May 2012, applied to the First-tier Tribunal for permission to appeal the decision of the Landes Panel dismissing his appeal to the Upper Tribunal. Permission to appeal was refused by the First-tier Tribunal but was renewed on application to the Upper Tribunal on 21st May 2012 but again refused. AD became appeal rights exhausted on 20th July 2012.

5. Rather than agree to removal AD advised an immigration official on reporting that he had submitted an application for further leave to remain on 1st August 2012. This was treated as another application to revoke the deportation order and refused on 14th November 2012. AD was detained and served with the refusal to revoke the deportation order which was certified under section 94 of the 2002 Act restricting any right of appeal to one that can only be exercised once he has left the UK. On 23rd November 2012 removal directions were set for 7th December 2012 and served upon AD although on the same day further representations were made on AD's behalf, which were refused and certified, followed by representations made on 29th November 2012 which were refused under paragraph 353 of the Immigration Rules.
6. A few days later further representations dated 3rd December 2012 were received, on 7th January 2013, asking for them to be considered as an asylum claim. AD underwent a screening interview and then a substantive interview on 30th January 2013. In the interim AD also lodged a Judicial Review application which was served on 6th December 2012 challenging the decision dated 30th November 2012 to refuse to revoke the deportation order and maintain the removal direction, which was refused by the High Court on 29th April 2013. Representations made on 3rd December 2012 were refused on 27th June 2013, supported by a supplementary refusal letter of 13th September 2013, with an 'in country' right of appeal which AD exercised. It is the appeal against this decision which was considered by Judge PJM Hollingworth and allowed.
7. The starting point in any revocation claim is the relevant Immigration Rules which are:

Revocation of deportation order

390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:

- (i) the grounds on which the order was made;
- (ii) any representations made in support of revocation;
- (iii) the interests of the community, including the maintenance of an effective immigration control;

- (iv) the interests of the applicant, including any compassionate circumstances.

390A. Where paragraph 398 applies the Secretary of State 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 maintaining the deportation order will be outweighed by other factors.

391. In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course:

- (a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order, or
- (b) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least 4 years, at any time,

Unless, in either case, the continuation would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors.

391A. In other cases, revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order.

392. Revocation of a deportation order does not entitle the person concerned to re-enter the United Kingdom; it renders him eligible to apply for admission under the Immigration Rules. Application for revocation of the order may be made to the Entry Clearance Officer or direct to the Home Office.

- 8. At the hearing before Judge PJM Hollingworth Mr Shoye confirmed that the asylum appeal was not being pursued.
- 9. Whilst I accept there is no legal obligation upon a Judge to make findings on each and every element of an appeal, it is important a reader of a determination understands the reasons for the decision made and can have confidence that all relevant matters, both legal and factual, have been considered. Of the four

elements specified as being relevant to a decision to revoke a deportation order only one appears to have been fully explored and reasoned in the determination. For example, bar a reference to the fact AD committed a very serious offence [12] there is little mention of the grounds on which the deportation order was made. The fact it related to the supply of drugs for which AD received a substantial prison sentence was very relevant as is the fact this is an automatic deportation appeal. There is in particular an inadequate assessment of the interests of the community which include the maintenance of immigration control. There is no analysis of the weight given to the fact AD has not been deported and has resisted deportation at every stage of the proceedings, including the filing of what appears to have been a false claim for asylum, which delayed his removal but which was not pursued on appeal. For the community to have confidence in an effective deportation regime as a means of removing foreign criminals there must be a possibility they will actually be removed. There is no mention of any deterrent element which is arguable in relation to this case. The passing reference to these elements having been considered in paragraph 73 is arguably insufficient to establish that the Judge discharged the duty of anxious scrutiny.

10. I accept that the representations made in support of revocation were considered in detail as were the interests of AD, including compassionate circumstances. The problem with the determination is that it is suggestive of a focus on the points raised by AD in support of his case with inadequate evidence of a balanced approach being undertaken as required by the Rules.
11. In relation to the Immigration Rules it was accept that the AD was not able to satisfy the relevant provisions [36] but beyond making this statement there is no indication of the weight the Judge gave to this fact. Indeed it appears that having accepted the requirements of the Rules could not be met the Judge sidelined this element and proceeded to conduct an 'old style' Article 8 ECHR assessment. There is also the question whether the finding AD is unable to succeed under the Rules is acceptance he is unable to succeed under paragraph 390 too. If so it is arguable the appeal should have been dismissed.
12. The Judge took as his starting point the findings of the Landes Panel whose determination was promulgated in March 2012. That appeal against the refusal to revoke the deportation order was therefore dismissed on its facts even before the introduction of the more stringent requirements to be found in the current Rules relating to deportation.
13. The human right element of the appeal had to be considered in accordance with the approach set out by the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192, the High Court in Nagre [2013] EWHC 720 (Admin) and by the Upper Tribunal in Gulshan [2013] UKUT 640. These judgments have made it clear that the question of proportionality must be looked at in the context of the Immigration Rules with no need to go on to a specific assessment under Article

8 if it is clear from the facts that there are no particular compelling or exceptional circumstances requiring that course to be taken. That approach is consistent with what the Court of Appeal said in MF (Nigeria) and with the approach of the House of Lords, particularly in cases such as Huang [2007] UKHL 11 and Razgar [2004] UKHL 27. The starting position for the Judge was to look at the Rules and see whether the AD was able to meet their requirements. If not, the question to be considered is whether the decision would lead to a breach of Article 8 but in the context of whether there are factors not covered by the Rules which give rise to the need to consider Article 8 further. A failure to apply this structured approach by the Judge is also an arguable misdirection of law and legal error.

14. Mr Shoye sought to rely upon MF in support of his case although in doing so he highlighted the effect of the error referred to above. In paragraph 35 of the judgment in MF the Court of Appeal state:

35. It is common ground that the first step that has to be undertaken under the new rules is to decide whether deportation would be contrary to an individual's article 8 rights on the grounds that (i) the case falls within para 398 (b) or (c) and (ii) one or more of the conditions set out in para 399 (a) or (b) or para 399A (a) or (b) applies. If the case falls within para 398 (b) or (c) and one or more of those conditions applies, then the new rules implicitly provide that deportation would be contrary to article 8. Whether a case satisfies the criteria set out in para 398 (a), (b) or (c) is self-evidently a question of "hard-edged" fact; and whether one or more of the conditions set out in para 399 or 399A applies may also involve a question of "hard-edged" fact. But it may involve a question of evaluation, such as whether it would be reasonable to expect the child to leave the UK (para 399(a)(ii)(a)) or whether there are "insurmountable obstacles to family life" with the partner continuing outside the UK (para 399(b)(ii)). We shall revert to the meaning of "insurmountable obstacles" later in this judgment.

15. At paragraph 46 of the judgment it is stated:

46. There has been debate as to whether there is a one stage or two stage test. If the claimant succeeds on an application of the new rules at the first hurdle ie he shows that para 399 or 399A applies, then it can be said that he has succeeded on a one stage test. But if he does not, it is necessary to consider whether there are circumstances which are sufficiently compelling (and therefore exceptional) to outweigh the public interest in deportation. That is an exercise which is separate from a consideration of whether para 399 or 399A applies. It is the second part of a two stage approach which, for the reasons we have given, is required by the new rules. The UT concluded (para 41) that it is required because the new rules do not fully reflect Strasbourg jurisprudence. But either way, it is necessary to carry out a two stage process.

16. In paragraph 45 the Court found that however the proportionality test was applied, i.e. inside or outside the Rules, the result should be the same. The difficulty for AD is that as a proper assessment of the merits of the case under the Rules was not undertaken it cannot be said that the outcome of the traditional Article 8 ECHR assessment was the outcome that would have been arrived at under the Rules. The determination as promulgated in fact has differing outcomes under the Rules and Article 8 ECHR.
17. I find arguable legal error in the determination for the reason set out above and move on to consider whether it is material to the decision to allow the appeal.

Is the legal error material?

Discussion

18. On 6th March 2012 the Landes Panel promulgated their determination in which they dismissed AD's first attempt to have the deportation order revoked. The findings of the Landes Panel are said to have been the starting point for Judge PJM Hollingworth. The Landes Panel only carried out an assessment of the Article 8 ECHR elements of the appeal as the hearing was before the 9th July 2012 when the current provisions set out in the Rules came into force. The Landes Panel accepted there was family life between AD, his partner, and their child A as they were living together [23].
19. It was accepted by the Landes Panel that the issue before them was one of proportionality. The Panel set out the Bouliff test and analysed each of the elements of that case by reference to the facts as found in this case, including a report from an independent social worker Christine Brown [27-43]. The Landes Panel set their conclusions out at paragraphs 44 to 53 leading to a finding that the appeal must be dismissed. The Landes Panel specifically stated that were it not for the child A they would have no hesitation in saying that deportation was in the public interest [51] although the offence was found to be so serious that the separation of a father and his son, who had only been together for a period of six months at that time, as well as the separation of AD from his partner was justified.
20. As this was the starting point for Judge PJM Hollingworth his focus was on what had changed in the 18 months between the two hearings such as to make the decision to remove no longer proportionate. The Judge thought the following to be relevant:
 - i. Since the Landes Panel promulgated their determination AD and his partner have had another child, born in April 2013 [41].
 - ii. AD has resided with his partner since his release from custody subject to a short period of detention before he was granted bail [41].

- iii. That AD and his partner do intend to continue to live together in the future, a conclusion supported by the birth of the child in April 2013 [44].
 - iv. AD's partner has been very depressed and anxious since AD was informed that he will be deported and in light of the continuing appeal hearings for which she receives medication [54].
 - v. AD's partner told her GP that she will be unable to manage to look after the two boys without his help. Members of the family have been supportive but his will not be enough to prevent her taking her own life [55].
 - vi. The GP advises upon the course of action to be taken if AD is to be deported. AD has to help with household duties because she is depressed and anxious although this would lift if AD was allowed to remain as it is a reactive depression [56].
 - vii. AD has been assessed as presenting a low risk of re-offending [57].
 - viii. AD's Offender Manager expresses concern for the effect on the family of AD's removal [59]. On visits to the home A has been observed to be a happy child. AD is observed as being a 'hands-on' father [60].
 - xi. A letter from a Meredith Ripley Children Centre worker refers to the role played by AD in the family and the strong bond he has with his son A and the strong relationship AD has with his partner 64-66].
21. Not all the above are, however, changes to the circumstances that existed previously. I accept the birth of another child in April 2013 is but the domestic arrangements creating family life recognised by Article 8 was accepted by the Landes Panel. It is therefore not a new element but one that has continued during the passage of time created by the attempts by AD to avoid deportation. It was accepted by the Landes Panel that the relationship between AD and his partner is one they consider to be permanent although the Landes Panel note AD does not appear to have done anything to bring about a divorce from his first wife despite the length of the separation until after the deportation order [36]. They further found that "It is right [AD] and [his partner] are living together at a stressful time for them when they are both on medication for depression, but it is also an artificial time when a deportation order has already been made and the appellant is living under that shadow and unable to do anything other than be at home with his partner and child. Their behavior in this short period is not necessarily an indication that the relationship will be permanent in a less artificial situation." [37]. The Landes Panel also found AD's

partner was aware of his substance abuse and of the offence early in the relationship. It was also noted that it was not until AD was arrested and charged that she became pregnant with A [38]. A was born when AD was in prison and was two years of age at the date of the hearing before the Landes Panel.

22. The situation of the older child A was considered in detail as was the report of Christine Brown who was found to lack objectivity [Landes Panel determination para 34] although her record of her observations of the family were accepted by the Landes Panel. No further report from this source or other up-to-date evidence regarding the children has been provided. In relation to the best interests of A the Landes Panel found:

41. A now has a father not just in his life, but living with him and being a positive parent. He will have no meaningful relationship with him if the appellant is deported to Gambia. A is simply not of an age where an effective relationship can be maintained long term over the telephone and through the odd visit. We accept that A is too young to understand why his father is no longer living with him and that separation is likely to have the effects which Ms Brown outlines in her report. We accept also that if A were able to say what he wished, he would wish the situation to continue as it is, that is that his mother and father live with him and together. As a result it is clearly in A's best interests that the appellant remain in the UK. Ms Brown has not considered the position if the relationship between the appellant and [his partner] were to break down in the future, the appellant having been allowed to remain in the UK, but given the relationship between A and his father as it is now and given that it is generally in the best interests of children to maintain a relationship with both parents, we are satisfied that it would be in the best interests of A for the appellant to remaining in the UK even if he were not to maintain a relationship with [his partner].

23. The Immigration Rules now set out in codified form the view of the Secretary of State in relation to how Article 8 should be assessed. Paragraph 398 states that 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.

24. Paragraph 399 only applies where paragraph 398 (b) or (c) apply which are not relevant in this case as a result of the four year prison sentence. For AD to succeed under the Rules it is therefore necessary for him to establish 'exceptional circumstances'. This is a term which has been considered by the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192 in which the Court accepted a submission for the SSHD that "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 paras 398 and 399 or 399A. It is only exceptionally that such foreign criminals will succeed in showing that their rights under article 8(1) trump the public interest in their deportation" (paragraphs 39 and 40). The Court went on to say: "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" (paragraph 42). The Court found that the Rules did mandate or direct a decision maker to take all relevant criteria into account (paragraph 44). Accordingly, the new rules applicable to deportation cases should be seen as "a complete code ... the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence" (ibid).
25. In Kabia (MF: para 298 - "exceptional circumstances") [2013] UKUT 00569 (IAC) it was held that (i) The new rules relating to article 8 claims advanced by foreign criminals seeking to resist deportation are a complete code and the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence: MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192 at para 43; (ii) The question being addressed by a decision maker applying the new rules set out at paragraph 398 of HC 395 in considering a claim founded upon article 8 of the ECHR and that being addressed by the judge who carries out what was referred to in MF (Article 8 - New Rules) Nigeria [2012] UKUT 393 (IAC) as the second step in a two-stage process is the same one that, properly executed, will return the same answer; (iii) The new rules speak of "exceptional circumstances" but, as has been made clear by the Court of Appeal in MF (Nigeria), exceptionality is a likely characteristic of a claim that properly succeeds rather than a legal test to be met. In this context, "exceptional" means circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that a deportation would not be proportionate".

26. The question to consider is therefore whether there is anything on the facts of this case which is very compelling and so “exceptional” such as the public interest is outweighed and the revocation of the deportation order justified.
27. Judge PJM Hollingworth concluded that those elements in AD’s favour had strengthened and that he had demonstrated that the rehabilitative aims of the criminal justice system have been achieved. In relation to AD’s partner’s medical condition the Judge found at paragraph 72 that her condition will improve on resolution of the appeal, whatever the outcome, and that the relevance of the health issues is in relation to the ability of AD’s partner to care for the children and the impact of this upon the section 55 assessment. It was found this element accorded greater weight and so the appeal was allowed.
28. As stated above exceptional circumstances have been defined as circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that deportation would not be proportionate. There is no evidence the family were unable to cope during the period of AD’s imprisonment or whilst in immigration detention such that the needs of his partner or child were not met, and as a result of which they suffered material adverse consequences. It is alleged AD’s partner will not be able to cope and that she will commit suicide if AD is deported. There is an assessment of her depressive condition in the letter from her GP dated 29th August 2013 and a suggestion that if AD is deported appropriate treatment will be available for the partner, on an in-patient basis if required. The GP says she should be admitted but not whether this will only be voluntarily or as a result of the statutory criteria in the Mental Capacity Act 2005 being met. There is no reference to the nature or duration of any treatment she may require or why such treatment is not available in the community.
29. The Panel found that in any event the partner’s condition will improve and if it does there is insufficient evidence to support a claim she will not be able to care for the children and meet their basic needs of food, heating, clothing, housing, love and affection, protection etc, and so it is a question of what impact there will be upon her and the children if AD is deported and whether this has been shown to be very compelling and so exceptional.
30. There is no evidence of the children having special needs requiring AD to remain per se. I accept that a key element in any child’s emotional development is the ability to be brought up by their father and mother, as stated by Christine Brown and the Landes Panel, but there are a large number of single parent families in the UK and the separation of families can be the effect of deportation.
31. There is evidence of family members in the UK but insufficient evidence to show they are unable or unwilling to assist and support the partner. Her own mother gave evidence before the Landes Panel and brought her to that Tribunal. There is no evidence support from agencies such as the GP and/or the

Childrens Centre referred to above will not be available and adequate. There is no evidence that support cannot be provided through the statutory agencies to ensure the needs of the children are met, if required, post removal and during any period of adjustment and the establishing of an alternative routine.

32. If AD were to be removed and his partner committed suicide resulting in the loss of both parents and the children having to be re-homed with other family or in care, this is a relevant issue, but I find it has not been shown that on balance there is a real risk of the same in light of the knowledge of the partner's condition, her treatment, and the availability of support, such as to make it the determinative factor. I note there is no mention of the partner claiming to be suicidal if AD is removed in her evidence given in cross-examination before the Landes Panel. She stated she has a depressive state which fluctuates but she has never been referred to a psychiatrist and that she first saw her GP about her depression after her son was born in 2010. The relevance of this evidence is that the situation facing AD at that time was exactly the same as that facing him before Judge PJM Hollingworth. I also note in her witness statement dated 16th September 2013 a reference to her taking her own life [18] yet a clear statement regarding the needs of the children and the impact upon them of AD's removal. It appears contradictory to have such insight and awareness of the needs of her children on the one hand yet to be claiming that she will do something that will create the greatest threat to the children's wellbeing and future, the taking of her own life and deprivation of a mother figure in their lives, on the other; although I accept that in times of extreme emotional and/or psychological difficulties such a logic argument may be temporarily lost.
33. This is a case in which AD relies upon a claim of prospective suicide made by his partner and the adverse consequences for the children, as well as evidence regarding what he claims to be the indispensable role he plays in the children's lives, as the basis for being allowed to remain in the UK. The Landes Panel felt it necessary to exercise caution in relation to claims made by AD as noted in paragraph 46 of their determination where they are discussing the claim he made about his own medical condition and where they state "We find this to be another indication of the appellant exaggerating the situation to say what he thinks would be the most expedient".
34. Whilst I accept that prospective suicide is capable of engaging both Articles 3 and 8 and a relevant issue in relation to this case and the needs of the children, there needs to be the clearest possible evidence of a real risk that this would occur which would not otherwise be preventable by appropriate medical supervision on the part of the medical services in the UK which might reasonably be expected to exist within the NHS. Any claim such facilities are not available is manifestly ill-founded and I find it has not been proved on the evidence that such a real risk of the event actually happening is substantiated. Judge PJM Hollingworth failed to consider this element which is material as otherwise a party claiming they will kill themselves on removal or if a partner is

removed may be treated as being determinative even if there is, in reality, no real risk of it occurring following medical intervention (if required).

35. I do not find it shown on the available evidence that the needs of children cannot be met such as to require AD to remain in the UK, even if his partner requires a period of hospitalisation for assessment and treatment following AD's removal to enable her to come to terms with the emotional and psychological consequences of such an event.
36. In relation to the four elements included in paragraph 390: AD did commit a very serious offence for which he was sentenced to four years imprisonment. As a result he is the subject of an automatic deportation order. It was held in SS (Nigeria) that the 2007 Act attributes great weight to the deportation of foreign criminals. AD was convicted of serious drug dealing activities which the Sentencing Judge's remarks indicate was clearly part of commercial supply activities. The devastating effect drugs have upon society and a community has been recognised throughout Europe. The Landes Panel also noted the following on paragraph 28 of their determination:
28. The panel in the first appeal commented that the appellant's plea did not sit comfortably with the remarks he had made to the probation service as evidenced in the OASys report and found that the appellant had not been frank, minimising his involvement. We saw nothing to change that view which is well documented in the OASys report. The appellant still appeared to be minimising his own involvement when he spoke to the social worker as he told her that the offences had occurred because he became involved with a group of other men whom he had met in a nearby park (para 3.10 of her report)
37. In relation to the public interest; in MK (deportation - foreign criminal - public interest) Gambia [2010] UKUT 281 (IAC) (Sedley LJ sitting) the Tribunal indicated that in cases where deportation is automatic under section 32(5) of the UK Borders Act 2007 - essentially, where the appellant has been sentenced to at least one year's imprisonment - the Secretary of State must make a deportation order, and neither she nor the Tribunal has any discretion as to whether this would conduce to the public good. So, as held here by a panel including Lord Justice Sedley, there is no need to argue about whether in an individual case, as rule 364 puts it, "the presumption shall be that the public interest requires deportation."
38. What constitutes the public interest was discussed in the case of Masih (deportation - public interest - basic principles) Pakistan [2012] UKUT 00046(IAC) in which the Tribunal found that the following basic principles can be derived from the present case law concerning the issue of the public interest in relation to the deportation of foreign criminals:

- (I) In a case of automatic deportation, full account must be taken of the strong public interest in removing foreign citizens convicted of serious offences, which lies not only in the prevention of further offences on the part of the individual concerned, but in deterring others from committing them in the first place.
 - (ii) Deportation of foreign criminals expresses society's condemnation of serious criminal activity and promotes public confidence in the treatment of foreign citizens who have committed them.
 - (iii) The starting-point for assessing the facts of the offence of which an individual has been committed, and their effect on others, and on the public as a whole, must be the view taken by the sentencing judge.
 - (iv) The appeal has to be dealt with on the basis of the situation at the date of the hearing.
 - (v) Full account should also be taken of any developments since sentence was passed, for example the result of any disciplinary adjudications in prison or detention, or any OASys or licence report.
39. There is in this case a legitimate public interest in deterring serious crime involving the supply of drugs and in sending a powerful message to foreign nationals who might be minded to commit crimes involving drugs.
40. I accept there have been some changes to AD's family life, as identified by Judge PJM Hollingworth, such as the further period of time he, his partner, and their son have lived together as a family unit. It is accepted a second child has been born but if this indicates a further attempt to bolster a weak case in the hope of avoiding removal as the consequence of his actions, this is a reckless act, as both AD and his partner were fully aware of his precarious immigration situation as his appeal against the deportation order and the refusal to revoke the order had been dismissed and it was only the history of repeated applications/representations that prevented removal at that time, as recorded above. This is based upon a likely conception date of July/August 2012. The role AD claims to have within the family is also said to have been enhanced.
41. The above circumstances have been established as a result of the delay in removing AD but this is not as a result of matters for which the Secretary of State is responsible but because removal was prevented by the repeated applications I have referred to above. It is also relevant that such developments and the fact AD has remained out of trouble have occurred at a time he is subject to the risk of deportation and the threat of removal which might have affected his conduct.

42. I do not find it proved that credible unjustifiably harsh consequences will result from AD's deportation and that having weighed up those factors found in AD's favour and those in favour of the Secretary of State that the errors made by Judge PJM Hollingworth are material to his decision to allow the appeal. The determination is set aside. It has not been shown that the conclusion reached was one properly open to the Judge when all the legal and factual elements are considered with the required degree of care required in an appeal of this nature. As such, the weight given to the competing elements by the Judge is susceptible to a successful challenge.
43. In substituting a decision to dismiss the appeal I find AD had not established that he is able to succeed under the Immigration Rules. The outcome of a properly conducted proportionality exercise supports the Secretary of States argument that this is a case in which the deportation order should not be revoked and should be enforced. That is a conclusion that is neither perverse nor irrational and is in accordance with the evidence. Accordingly I dismiss the appeal.

Decision

44. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

45. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed.....
Upper Tribunal Judge Hanson

Dated the 20th February 2014