Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01773/2013

THE IMMIGRATION ACTS

Heard at Stoke	**Determination Promulgated**
on 13th February 2014	**on 19th February 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ROBERT JOHNSON

Respondent

Representation:

For the Appellant: Mr McVeety – Senior Home Office Presenting Officer.
For the Respondent: Mr Azmi instructed by Fadiga & Co Solicitors.

DETERMINATION AND REASONS

1. This is an appeal against a determination of a panel of the First-tier Tribunal composed of First-tier Tribunal Judge Pooler and Mr G Getlevog (non legal member), hereinafter referred to as 'the Panel' who in a determination promulgated on the 20th October 2013 allowed the appeal against the decision to deport Mr Johnson from the United Kingdom made pursuant to section 3(5)(a) of the Immigration Act 1971. This is therefore not an automatic deportation case.

2. The Panel set out their findings of fact at paragraphs 11 to 22 of the determination in which they accept the evidence that Mr Johnson is involved to a significant degree in the care of his child.

3. The Panel analyse the provisions of the Immigration Rules so far as they apply to the facts of this case [23 -26] and remind themselves of the need to undertake a proportionality assessment as per the guidance provided by the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192, which they did. As a result they found the decision to deport not to be proportionate on the facts [32].

4. The Secretary of State challenges the conclusions of the Panel in relation to the effect of the delay that has occurred it this case. The Panel noted the offending behaviour, sixty six offences in ten years, [13] and also found:

> 16. It is the appellants' case, which in the absence of challenge, we accept, that he has since that time taken steps to end the drug habit which was, it would appear, at the root of much of his offending behaviour. We accept his evidence that during his last prison sentence he was accepted on a rehabilitation programme which helped him to get off drugs and that he continued the programme after his sentence, taking Methadone until he was bale to come off that.
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> 17. Evidence as to the risk of re-offending is found in a letter of 20th April 2009 from the probation officer who had been supervising the appellant since September 2008. He had engaged well in supervision and was motivated to address his offending behaviour. He was then receiving intensive support to address his drug issues. The probation officer's assessment at that time of the risk of re-offending was low.

5. In relation to the issue of delay the Panel found:

> 29. Had the respondent taken steps to deport the appellant much earlier, for example in 2008, the decision maker and the Tribunal on appeal would have taken account of the lengthy and persistent offending history between 1998 and 2008 and would also have taken into account the apparent absence at that time of family.

6. When assessing the weight to be given to the delay the Panel found:

> 30. The circumstances before the Tribunal in late 2013 are markedly different. The delay cannot, in our judgment, be attributed to the appellant. Since 2008 the appellant had freed himself from the drug habit which appears to have been at the root of his offending behaviour. He has not offended for more than five years. He has,

importantly, established family life with his partner, his daughter now aged 1 and his four stepchildren.

7. The challenge to the weight the Panel gave to this element of the case has no arguable merit. The offending and delay elements were considered by the Panel with the required degree of care. In Yousuf (Somalia) v SSHD [2008] EWCA Civ 394 the Court of Appeal said that the amount of time the Home Office allowed to pass before serving a deportation order did not create any kind of legitimate expectation that the claimant would not be deported, but it did mean that the Home Office, and, in turn, the Tribunal, had to consider a period in which, unlike most deportees who had offended, the claimant had been able to show himself capable of living a law abiding life.

8. In this case the decision under appeal is dated 15th August 2013 whereas the last offence was committed in 2008. During that time Mr Johnson was able to avoid re-offending and formed a genuine and strong family life. The Secretary of State is in some sense responsible for the factual matrix created before the Tribunal. There is no merit in the claim the Panel failed to consider the relevant legal principles in relation to delay.

9. Ground 2 alleges a failure to consider the case of Nnyanzi v UK. It as asserted that as all the ties Mr Johnson has formed, and which he relies upon in support of his case, have been formed at a time he had no valid leave to remain there could be no legitimate expectation he would be permitted to remain to continue with his relationships in the UK.

10. Mr Johnson's immigration history was properly noted by the Panel as was the timing of the various relationships formed and relied upon [31]. They also found he is unable to satisfy the provisions of the Immigration Rules in relation to family and private life which they specifically noted as being a factor the Panel were required to weigh in the balance, as was the presumption that the public interest required his deportation. The determinative factors for the Panel are highlighted in paragraphs 33 and 34 in which they state:

> 33. In assessing proportionality we are bound to have regard to the best interest of the children as a primary consideration: see ZH (Tanzania) v SSHD [2011] UKSC 4. Bearing in mind the difficulties which the appellant's partner has previously experienced and the involvement of Children's Services which ended in May 2013, we conclude that the presence of the appellant in the household is on balance a protective factor for each of the children. We bear in mind also that for M it would be in her interests to be brought up by both of her parents.
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> 34. In summary we conclude that the public interest in deportation is outweighed by other factors. The appeal must therefore succeed.

11. It cannot be said the Panel failed to consider all relevant elements of the case and I find they undertook a proper assessment of the competing interests when undertaking the proportionally exercise. Such a properly conducted assessment, which this is, can only be challenged on public law grounds of which none are made out on the facts of this case. The Panel applied the weight they felt they were entitled to give to evidence and made findings within the range of those they were entitled to make on that evidence. It has not been shown such findings are perverse, irrational or contrary to the evidence.

12. Although the Panel refer to the case of EO [2007] UKAIT 00062 in paragraph 6, which has been superseded by Bah (EO (Turkey) – liability to deport) [2012] UKUT 00196(IAC), they applied the correct legal principles and so no material error is established.

Decision

13. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

14. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008) as no application for such was made and it has not been established it is warranted on the facts.

Signed…….
Upper Tribunal Judge Hanson

Dated the 18th February 2014