Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01798/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 May 2014	On 4 June 2014

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JOHNNY CALLIE

Respondent

Representation:

For the Appellant: Mr P Deller, Home Office Presenting Officer
For the Respondent: Mr C Jacobs, Counsel

DETERMINATION AND DIRECTIONS

Introduction

1. The Secretary of State appeals with permission the determination of First-tier Tribunal Judge Finch and Mrs Patfield (the panel) who allowed the respondent's appeal against the decision refusing to revoke a deportation order. I shall refer to the respondent throughout as the claimant. He is a

national of the United States born April 1950 and he arrived as a serviceman in the United Kingdom on 1 October 1991. The claimant retired from the United States Air Force on 1 October 1991 and he was thereafter granted leave to remain. The deportation order signed on 14 April 2009 was made after the claimant had been found guilty of conspiracy to supply a class A drug at Ipswich Crown Court for which he was sentenced to seven year's imprisonment on 30 November 2007.

2. No application for anonymity was made before me. I am satisfied that the anonymity direction made in the First –tier Tribunal should be continued in the proceedings in the Upper Tribunal solely in relation to the claimant's partner (SN) in the light of her particular circumstances.

3. There is a long history of proceedings by the claimant in the Asylum and Immigration Tribunal, First-tier Tribunal, the Upper Tribunal, the Administrative Court and the Court of Appeal. On 16 October 2009 an appeal against the deportation order which had been made pursuant to section 32 of the UK Borders Act 2007 was heard and dismissed by the AIT. On 13 November 2009 reconsideration of the decision was ordered by Senior Immigration Judge Spencer. In a determination dated 5 March 2010 Upper Tribunal Judge Taylor found that the AIT had materially erred in law but dismissed the appeal on human rights grounds. This followed a hearing confined to submissions only. On 3 June 2010 Upper Tribunal Judge Taylor refused permission to appeal to the Court of Appeal. On 28 July 2010, Hallett LJ refused permission to appeal on the papers and on 13 December 2010 a renewed application for permission to appeal was refused.

4. On 4 August 2011 the Secretary of State detained the claimant to effect his removal. Removal directions were then issued and on 23 August 2011 the claimant’s solicitors submitted an application to the Secretary of State to revoke the deportation order. The following day judicial review proceedings were issued and an injunction sought against removal. The same day the Administrative Court granted interim relief restraining the Secretary of State from removing the claimant. On 11 November 2011 the Administrative Court sealed a consent order between the parties permitting the claimant to submit further representations on the application to revoke the deportation order.

5. On 11 January 2012 the Secretary of State made a new decision refusing to revoke the deportation order and she certified the human rights claim as manifestly unfounded pursuant to section 94(2) of the Nationality and Immigration Act 2002. Permission to apply for judicial review of that decision was refused by a Deputy High Court Judge however on 27 July 2012, Sir Stephen Sedley ordered a stay against deportation and that the application for judicial review be determined at a hearing. On 12 September 2012 the Court of Appeal granted permission to apply for judicial review and remitted the case to the Administrative Court. Thereafter an order by consent was made by the Court quashing the certification. On 16 August 2013 the Secretary of State made a further

decision refusing to revoke a deportation order with an in-country right of appeal giving her reasons for doing so in a letter of the same date (the reasons letter). The appeal before the panel was heard on 27 February 2014. The claimant and his partner together with another witness adopted their statements. There was no cross-examination.

Application for Permission to Appeal

6. The Secretary of State relies on grounds of challenge being (i) that the judge had failed to give reasons or adequate reasons for findings on a material matter and (ii) the judge had made a material misdirection of law. As to (i), it is argued that although the panel had made reference to the starting point being that of the findings of the earlier tribunal, there was no further reference to those findings when addressing the current situation and evidence. Reliance is placed on *Devaseelan* (second appeals – ECHR – extra-territorial effect) Sri Lanka [2002] UKIAT 00702 being relied on. The second limb to the ground is that the panel failed to establish with adequate reasons how the current medical evidence was materially different from that which was available to the Tribunal in 2011. Inadequate consideration had been given "to the positions available to the [claimant's] partner in the UK". The panel had made no findings on the material matter of the claimant's own criminal conduct which jeopardised his relationship which had been considered by the Court of Appeal in *Lee v SSHD* [2011] EWCA Civ 348.

7. As to (ii), the challenge is that the panel had failed to give balanced consideration to the public interest in making its findings under Article 8. It had failed to consider the serious criminality and the pressing public interest in favour of his deportation with reference to *SS (Nigeria) v SSHD* [2013] EWCA Civ 550. The panel had made no findings on the impact of section 32 of the UK Borders Act 2007 and the weight to be given to the public interest side of the balancing exercise. It had made no findings on the wider scope of deportation as a deterrent, an expression of societal abhorrence and as a system of control that maintains public confidence. Although the panel had noted that it may prove difficult for the claimant and his partner to acquire medical care in the United States, it was impossible for them to do so. The claim under Article 8 should not be enhanced by the virtue of healthcare in the United States being different or more expensive from that in the United Kingdom. It is argued that the Article 8 claim was not very strong nor were there any factors that would amount to something exceptional or 'very compelling' with reference to *MF (Nigeria) v SSHD* [2014] EWCA Civ 1192. The public interests in deporting a foreign national who has been convicted of a serious drugs related offence was pressing and a primary consideration to which the panel had not had due regard.

8. In granting permission to appeal, First-tier Tribunal Judge Cox considered there was no particular force in the first ground and it considered that the panel had given adequate reasons why it might be able to depart from earlier findings in 2011. He was just persuaded that there was arguable

merit in the second ground observing that although the panel had set out a number of quite compelling factors on the claimant's side of the proportionality balance, it was not sufficiently evident that the panel had properly applied its mind or given appropriate weight to the "extremely pressing public interest".

9. Mr Jacobs argued that permission had been confined to the second ground. I gave my ruling at the hearing that as permission to appeal had not been specifically refused on the first grounds, notwithstanding the negative observations on the merit of this ground, it remained open to Mr Deller to argue it ground before me.

Discussion

10. I am grateful to the extensive oral submissions from Mr Deller and Mr Jacobs the latter supplementing points raised in a skeleton argument.

11. I begin my consideration with the second ground. If that is made out, irrespective of any criticism made of the reasoning as asserted in the first ground, the decision will need to be set aside.

12. As the decision is a refusal to revoke a deportation order the Secretary of State was required to comply with paragraphs 390 and 390A:

> *"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 or Entry Clearance Officer assisting the application will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances to the public interest in maintaining the deportation order will be outweighed by other factors."*

13. Paragraphs 397 and 398 provide:

> *"397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to*

these obligations it will only be in exceptional interests that the public interest in deportation is outweighed.

398. 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 United Kingdom 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 four 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 four years but at least twelve 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 have shown a particular disregard for the law,"

the Secretary of State in assessing that claim will consider whether paragraphs 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."

14. Paragraphs 399 and 399A provide specifically for circumstances where there are children or a genuine and subsisting relationship with a partner and persons who have been here for a lengthy period to those who come within the categories of 398(b) and (c). Pursuant to paragraph 399B, limited leave may be granted for a period not exceeding 30 months.

15. In *MF* (Nigeria) Lord Dyson identified the issue the court was required to determine at [36] of his judgment:

> "What is the position where paragraphs 399 and 399A do not apply either because the case falls within paragraph 398(a) or because, although it falls within paragraph 398(b) or (c) none of the conditions set out in paragraph 399(a) or (b) or paragraph 399A(a) or (b) applies? The new Rules provide that in that event, "It will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors". It is the apparent difference between the parties as to the meaning and application of this provision which lies at the heart of the present appeal."

16. At [40] Lord Dyson noted the submission by Miss Giovannetti that,

> "The reference to exceptional circumstances serves the purpose of emphasising that, in the balancing exercise, great weight should only 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 trump the public interest in their deportation".

He accepted that submission and went on to explain what must be understood by reference to exceptional circumstances. At [42] he observed,

> "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 interests in removal. In our view, it is no coincidence that the phrase "exceptional circumstances" is used in the new Rules in the context of weighing the competing factors for and against deportation of foreign criminals"

And he continued:

> "43. The word "exceptional" is often used to denote a departure from a general rule. The general rule in the present context is that, in the case of a foreign prisoner to whom paragraphs 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the "exceptional circumstances".
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> 44. We would, therefore, hold that the new Rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence. We accordingly respectfully do not agree with the UT that the decision-maker is not "mandated or directed" to take all the relevant Article 8 criteria into account: paragraph 38."

17. As to whether there was a one or two stage test Lord Dyson observed at 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 i.e. he can show that paragraph 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 paragraph 399 or 399A applies. It is the second part of a two stage approach which, for reasons we have given, is required by the new Rules."

18. The judge directed herself as to the law at [12] to [14] as to the impact of the UK Borders Act 2007 and the relevant Immigration Rules as follows:

> "12. The appellant accepts that he is an American and is therefore, a foreign national. The Home Office bundle contained the sentencing remarks made by His Honour Judge Goodwin which stated that the appellant had been sentenced to seven years' imprisonment on 30 November 2007. Therefore, the respondent was obliged to make an automatic deportation order under section 32(5) of the UK Borders Act 2007 and our starting point should be that the deportation of a foreign national criminal is conducive to the public good.
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> 13. Paragraph 398(a) of the Immigration Rules applies to this case as although the appellant has asserted that his deportation will be contrary to Article 8 of the ECHR, he was sentenced to a period of imprisonment of at least four years, and therefore, it will only be in exceptional circumstances the public interest and deportation will be outweighed by other factors for the purposes of the Immigration Rules and paragraph 399 of the Immigration Rules does not apply.
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> 14. However, the fact that new provisions had been inserted into the Immigration Rules, which relate to private and family life rights, does not mean that we do not have to consider the appellant's rights under existing domestic and European Court of Human Rights case law. We have a duty arising from section 6 of the Human Rights Act 1998 not to make a decision which conflicts with the appellant's rights under the ECHR. In particular, in *Green* (Article 8 – new Rules) [2013] UKUT 00245 (IAC) the Upper Tribunal (Immigration and Asylum Chamber) confirmed that we had to consider whether the refusal to revoke his deportation order would amount to a breach of Article 8 of the ECHR even if he did not qualify for leave under the Immigration Rules and its new provisions relating to family and private life. We have also taken into account the view of the Court of Appeal in *MF Nigeria) v SSHD* [2013] EWCA Civ 1192 and the decision in *Shahzad v SSHD* [2014] UKUT 85 (IAC) but do not believe these preclude us from taking into account Article 8 of the ECHR."

19. She thereafter proceeded to carry out the proportionality exercise observing at [17]: "Nevertheless the respondent also has to show that it would be proportionate to deport the appellant to the United States of America" and at [18] "We have reminded ourselves of the great weight which we must give to the fact that the appellant was convicted of a very serious offence which had a serious effect on the community in which he lived."

20. The judge weighed in the appellant's favour the observation by the sentencing judge that he did not believe that the claimant had been the

ringleader of the conspiracy to supply heroin and crack cocaine but that he had played a major part. She also observed that:

(i) The claimant's previous convictions for theft and shoplifting did not aggravate the sentence for conspiracy as it was far more serious.

(ii) A letter from the Norfolk and Suffolk Probation Trust dated 20 February 2014 stated that the claimant's compliance in engagement and supervision for his licence had been excellent, he had demonstrated good insight into the impact of drug offences, he did not demonstrate any attitudes that would lead to further offending, he had an excellent reference from the prison officer at Norwich Prison, had remained drug free since his release on 4 August 2010 and in a letter dated 14 March 2011 it was stated that he had been assessed to pose a low risk of harm to others in re-offending.

(iii) The evidence of rehabilitation and low risk was not before Upper Tribunal Judge Taylor. There was further medical evidence in relation to the claimant's partner and her risk of suicide and also further evidence of the claimant's successful rehabilitation.

(iv) The claimant is suffering from diabetes and degenerative changes to his right knee and is also suffering from high blood pressure.

(v) The claimant had been awarded a number of medals and had served in the Vietnam War. There were also very positive letters of support from the Pastor at Ipswich International Church and others.

(vi) The claimant had not relied on welfare benefits.

(vii) The claimant had been living with his partner SN since June 1995. She is a British citizen who has no contact with other members of her family and has very few friends. Due to her depression and anxiety she is unusually dependent upon the claimant and cannot easily leave her home on her own or travel outside Ipswich at all unless he is with her.

(viii) SN had been referred to a child and adolescent psychiatrist in 1976 following violent physical and sexual abuse from her stepfather from an early age. She would experience high levels of anxiety were she to leave her home and travel to America with the claimant. She has a history of attempted suicide and made a further attempt on 27 August 2009.

(xi) SN would be unable to obtain status in the United States as a resident alien unless she married the claimant. Her refusal to travel with the claimant arises from the abuse she suffered. She would only be able to stay there as a visitor and would not be entitled to Medicaid. It is unlikely the couple could afford private health insurance.

(xii) The claimant has two children born in the United Kingdom who are British citizens, a son born 26 December 1985. They enjoy a very close relationship. The claimant also has a close relationship with his grandson.

The claimant has not been able to maintain a relationship with his daughter who was born on 25 December 1996. He is no longer permitted contact although this is something he is trying to restore.

(xiii) The claimant has not lived in the United States since 1984, has no property there and in the light of his age and his medical conditions it would be difficult for him to obtain employment his parents are dead and he has no remaining contacts.

21. By way of conclusion the judge stated at [31]:

> "Taking this and the totality of the evidence into account in applying a balance of probabilities we find that the respondent has not established that the appellant's deportation to America would be a proportionate breach of Article 8 of the ECHR."

22. The judge was correct to proceed to a second stage with her Article 8 consideration and also rightly directed herself at [13] that it would only be in exceptional circumstances that the public interest would be outweighed by other factors. At [18] she reminded herself of the great weight that must be given to the fact that the appellant had been convicted of a very serious offence which had a serious effect on the community.

23. It is not only the nature of the particular offence which needed to be taken into account but in addition consideration needed to be had to the public interest in deporting foreign criminals who do not satisfy the various categories in 399 or 399A. There are thus two aspects to the public interest side. In referring to the crime itself and the effect on the community there is no doubt that the judge clearly had both aspects to the forefront of her mind. Mr Jacob argued that that so long as the judge had referred to exceptional circumstances it was not an error not to make reference to "very compelling". That must be right if it is possible to infer from the judge's evaluation of the factors militating against deportation that she did so on the basis of the scales being heavily weighted in favour of deportation. Reading the determination as a whole does yield such an analysis. I am not persuaded that the judge failed to consider the serious criminality as asserted in the grounds or that she was not aware of the pressing public interest. I am not persuaded that the judge strayed from the test she was required to apply.

24. As to the specific aspect referred to in the second ground regarding the problems it was anticipated SN would encounter from accessing medical treatment, this was only one of a number of factors that the judge took into account. If this were the only or principal reason for finding in the appellant's favour, I accept this would be susceptible to legitimate challenge. There is no challenge to the other findings other than the view expressed that the claim was not very strong. This is at best no more than a disagreement having regard to all the factors listed by the judge.

25. I return to the first ground which challenges the adequacy of the judge's reasons to depart from the findings of Upper Tribunal Judge Taylor. It is evident from the determination that the judge correctly considered that there was new evidence and came to conclusions rationally open to her. As it appears to be the case SN had attempted suicide in August 2009 and this did not come to light until after the hearing by Upper Tribunal Judge Taylor. This clearly had an appreciable impact and the judge was not in error in treating it as something new. The second limb to this ground argues that the judge has made no findings on the appellant's criminal conduct which now jeopardised his relationships; in other words the appellant has to accept the consequences of what he has done. Paragraphs [18] and [19] address the criminal behaviour in detail and I cannot see how the judge can be said to have overlooked this. Rehabilitation is particularly considered in [18] otherwise this limb is more appropriate to the considerations in the second ground which I have already dealt with.

26. In summary I am satisfied that the judge made findings rationally open to her on the evidence and correctly directed herself as to the law. Whilst another judge might have come to a difference conclusion, the finding on proportionality was a permissible one. I find that the panel did not err as alleged and I dismiss the appeal by the Secretary of State. The determination of the FtT stands.

Signed Date 3 June 2014

Upper Tribunal Judge Dawson