



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/01090/2013

THE IMMIGRATION ACTS

Heard at Birmingham Sheldon Court

**Determination
Promulgated**

On 23 December 2013

On 15 January 2014

Before

**UPPER TRIBUNAL JUDGE PITT
DEPUTY UPPER TRIBUNAL JUDGE McCARTHY**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BABOUCARR JOBE

Respondent

Representation:

For the Appellant: Mr N Smart, Senior Home Office Presenting Officer

For the Respondent: Ms J Fisher, instructed by Duncan Lewis & Co, Solicitors,
Harrow

DETERMINATION AND REASONS

1. On 28 October 2013, the appellant Secretary of State was granted permission to appeal against the determination of First-tier Tribunal Judge Bennett and Mr S S Percy (the panel) that was promulgated on 10 October 2013. The panel allowed Mr Jobe's appeal against the Secretary of State's decision of 5 November 2010 that s.32 of the UK Borders Act 2007 (automatic deportation) applied and that Mr Jobe should be deported to the Gambia because of his criminal history.

2. The Secretary of State's grounds of appeal are that the panel failed to give adequate reasons for finding that the immigration decision was not proportionate. The grounds focus on the allegation that the panel failed to have proper regard to the fact deportation was clearly in the public interest because of the appellant's recidivism; and this was not outweighed by his relationships, particularly bearing in mind that neither the Mr Jobe's partner nor child were British citizens or had settled status in the United Kingdom. Mr Smart amplified these points by reminding us that the panel failed to make findings about whether the Mr Jobe's partner and child could relocate to the Gambia. At most, the panel took account of the
3. In addition to the grounds of appeal, Mr Smart relied on MF (Nigeria) v SSHD [2013] EWCA Civ 1192 (unreported) which was handed down two days before the determination was promulgated. He reminded us that the Court of Appeal had found that the Immigration Rules relating to deportation (paragraphs 398 to 399A) were a complete code and that the same outcome should result whether a decision was made under those provisions or directly under article 8 ECHR. The fact the panel came to different outcomes indicated a legal error.
4. Ms Fisher argued that the Secretary of State's grounds were in fact nothing more than disagreement with judicial findings which were legitimately made. She explained that the determination contained 120 paragraphs and addressed all the issues that were raised by evidence and argument. The Secretary of State was cherry picking certain factors and thereby taking them out of context. Ms Fisher reminded us that the panel was well aware of the significance they should give to public interest in that there is clear reference in para 103 to SS (Nigeria) v SSHD [2013] EWCA Civ 550 but when balancing the impact Mr Jobe's deportation would have on his partner and child, came to the conclusion that the Secretary of State's decision was not proportionate.
5. Ms Fisher reminded us that the panel recognised that the case was finely balanced but came down against deportation because the impact the decision would have on his partner and child was not reasonable. Ms Fisher reminded us of the panel's findings in paragraphs 115 to 177 of the determination; the panel found that there would be significant difficulties in maintaining family life should Mr Jobe be deported, including the fact that it would not be reasonable to expect his partner and child to accompany him to the Gambia. The factual findings were undisputed and include the fact that Mr Jobe's partner has been in the United Kingdom since six years old, all her close relatives are settled here and she has a pending application for settlement, made in January 2007 and referred to the Case Resolution Directorate.
6. Having heard from the representatives and having considered their arguments, we are satisfied that the determination contains no legal error for the following reasons.
7. It was open to the panel to find that it was more likely than not that Mr Jobe's partner's future lies in the United Kingdom. This is a reasonable conclusion given that she has been here since the age of six, that is, since

1996, particularly in light of the fact that her close relatives are now settled here. To this extent they dealt with the issue Mr Smart suggests they ignored because this finding is sufficient to establish that it would be difficult to expect Mr Jobe's partner to accompany him to the Gambia. The fact the panel went on to identify additional difficulties strengthens its conclusion.

8. The panel was well aware of the public interest in deporting foreign national criminals and gave that factor appropriate weight but recognised that the immigration decision would effectively sever the family life between Mr Jobe and his wife and child. We regard the panel's findings as going much further than mere acceptance of the couple's wishes, which is how the grounds portray them. The fact that the immigration decision had the potential to sever family life led the panel to find that the public interest was outweighed. It was open to them to make such an assessment. The finding is sustained because of the adequacy of reasons drawn from other findings throughout the determination.
9. We recognise that the panel may have erred in coming to different conclusions under the immigration rules and article 8 ECHR. However, the structure of the determination clearly shows that any error was in relation to how the panel applied the immigration rules because they failed to see that they should have undertaken a proportionality exercise in order to determine whether or not there were exceptional circumstances. It is hardly surprising that the panel proceeded as it did because the proper approach was not made clear until the Court of Appeal handed down MF (Nigeria). However, even if we accepted that this was an error on a point of law, it could not be material because the panel undertook the necessary proportionality exercise (including, as we have explained at para 4 above, a detailed examination of the public interest in deporting foreign criminals) and merely failed to relate its conclusions to the immigration rules.
10. Given the findings made by the panel, we can see that had it been aware of how the law applied, then they would have found that the circumstances in this appeal were exceptional and the appeal would have been allowed under the immigration rules for reasons identical to those given in relation to human rights.
11. For all these reasons we uphold the panel's decision and reject the Secretary of State's appeal.

Decision

The Secretary of State's appeal is dismissed.

The determination of First-tier Tribunal Judge Bennett and Mr Percy does not contain an error on a point of law.

We uphold the panel's decision that Mr Jobe's appeal against deportation is allowed.

Signed

Date

Deputy Judge of the Upper Tribunal