Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01374/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 April 2014	
Oral determination given following the hearing	On 30th May 2014

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

ROBERT OCHEN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Watterson, Counsel instructed by Graceland Solicitors
For the Respondent: Mr P Deller, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, who is a Ugandan national, was born in Uganda on 6 June 1982. He arrived in this country on 7 August 1989 and has lived in this country ever since. He has appealed against the decision of a panel of the First-tier Tribunal comprising

First-tier Tribunal Judge S Taylor and Mr D R Bremmer JP, lay member, which in a determination promulgated on 31 December 2013 had dismissed his appeal against the respondent's decision to deport him. It was said in the panel's determination that the decision to make a deportation order was made under Section 32(5) of the UK Borders Act 2007, which is a provision requiring the Secretary of State to make a deportation order in respect of foreign criminals under the "automatic deportation" provisions of Section 32 of that Act, although it is clear in fact that the deportation decision had been made pursuant to Sections 3(5)(a) and (5)(1) of the Immigration Act 1971.

2. The appellant's immigration history was set out at page 7 of the panel's determination. In summary, the panel recorded that on 17 January 2000 the appellant, his mother and siblings had been granted indefinite leave to remain but that a subsequent application made by the appellant on 23 August 2006 for naturalisation was refused due to his criminality. It is also recorded that he has had children by his partner in this country, Ms Gray, who is a UK citizen and that on 12 February 2013 the appellant applied for no time limit to his indefinite leave to remain. On 2 May 2013, following consideration of this application, the appellant was served with a notice of liability to deportation and a questionnaire which was completed on 13 May 2013.

3. The appellant has been convicted of a total of 31 offences on nineteen different occasions at various courts, his first conviction being on 6 December 1996 and his most recent conviction being on 28 March 2011. These convictions include offences of violence, theft, robbery, burglary, possession of drugs, handling stolen goods, driving offences, driving whilst disqualified and possession of a class A drug (heroin) with intent to supply. In respect of this latter offence, on 21 June 2003 at Inner London Crown Court he was sentenced to a term of 21 months' imprisonment. There are other serious offences recorded against him but it is sufficient for the purposes of this determination if I record that although the appellant has been convicted of numerous serious offences, on no occasion has he received a sentence of imprisonment greater than the 21 months imprisonment to which he was sentenced in 2003.

4. As already noted above the appellant appealed against the respondent's decision to deport him but that appeal was dismissed by the First-tier Tribunal. The appellant appealed against this decision and following a hearing before me on 20 February 2014 I found that the panel's decision had contained a material error of law for reasons which I gave within my decision. I shall not repeat everything which I stated within this decision but essentially I found that the panel had failed to give proper consideration to the provisions of paragraphs 398 and 399A of the Immigration Rules which now set out a basis upon which, in certain circumstances, the Secretary of State will consider that removal of a foreign criminal even though conducive to the public good, will nonetheless be disproportionate for Article 8 purposes. The relevant paragraphs of the Immigration Rules which I set out at paragraph 15 of my earlier decision provide as follows:

"398. Where a person claims that their deportation will 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 four years;

(b) the deportation of a 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 a 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…

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has lived continuously in the UK for at least twenty years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK…"

5. As I found in the earlier hearing before me, although the panel had wrongly considered that this appellant came within the category of persons whose deportation would be conducive to the public good under paragraph 398(b) because he had been convicted of an offence for which he had been sentenced to a period of imprisonment of less than four years but at least twelve months (which, had he been subject to the automatic deportation provisions set out within Section 32 of the UK Borders Act 2007 could not have been contested) rather than that of a person whose deportation would be conducive to the public good under paragraph 398(c) because in the view of the Secretary of State his offending had caused serious harm or he is a persistent offender who shows particular disregard for the law, this distinction was not material in this case. I found that in light of this appellant's appalling criminal record and also in light of what the panel found was his disregard to the truth (for reasons which it gave) it cannot realistically be argued that he is not a persistent offender who shows a particular disregard for the law. I gave an example within my earlier decision of why the panel could not rely on the appellant as a witness of truth which was that one of the more extraordinary factors in this case was that the appellant had claimed that he could not move in to live with his partner because he had a tenancy in his own name and had to look after his two younger brothers who

lived at that home with him but that this claim was as the panel noted "not consistent with his council tax bill from April 2013 in which he claimed 25% discount for single occupancy".

6. Whether or not paragraph 399A(b) or (c) was the relevant provision was immaterial to the decision because it has at all times been accepted that even after discounting the various periods of imprisonment which this appellant had served, by the date of the decision to deport him he had been living continuously in this country for at least twenty years immediately preceding the date of that decision. Accordingly it followed that the key issue which ought to be determinative of whether or not paragraph 399A applies (and thus whether or not the deportation of this appellant would be contrary to his rights under Article 8 pursuant to the provisions of paragraph 398) was whether or not it could be said that the appellant "had no ties (including social, cultural and family) with the country to which he would have to go if required to leave the UK".

7. As I noted in my earlier decision the Court of Appeal had made it clear in its decision in *MF (Nigeria)* [2013] EWCA Civ 1192, that when considering whether a deportation decision should be set aside, a Tribunal is obliged first to consider the Article 8 rights of the appellant by reference to paragraph 398, 399 and 399A of the Rules. As I also noted in the decision which I made it was acknowledged on behalf of the respondent by Mr Deller and I found that beyond recording that the appellant had stated in evidence that "he had no family or friends in Uganda" there did not appear to have been any specific consideration by the panel of whether or not the appellant could properly be said to have any "ties" within Uganda. The panel's consideration appeared to be limited to whether or not he would be able to adapt to life on return to Uganda as set out at paragraph 27 of its determination, as follows:

> "The appellant failed to explain why he could not return to Uganda, he was an able bodied adult, he spoke English and had qualifications, the appellant stated that he had found work as a labourer in the UK and he advanced no reason why he could not find similar work in Uganda."

At paragraph 22 of my decision I stated as follows:

> "The test as to whether or not somebody has 'ties' with a country is not simply whether that person would be able to find work in that country. While certainly the fact that English is commonly spoken in Uganda cannot be discounted when consideration is given to whether the appellant has ties (including social, cultural or family) the panel was obliged to consider this aspect of the appellant's case properly, which (as Mr Deller accepted on behalf of the respondent) it did not do. It follows that this Tribunal will now have to carry out this exercise."

8. I made directions with regard to the resumed hearing which included a direction that this hearing would be limited to consideration of whether or not this appellant still had ties in Uganda. I also invited the appellant to submit further evidence with

regard to this aspect of his appeal and if she felt it appropriate I directed that the respondent should make further investigations as to whether or not the appellant had any relatives still living in Uganda. I should however for the avoidance of doubt make it clear that by inviting the respondent to carry out such investigations if she considered it appropriate, I was not suggesting that the primary burden of proof to establish whether or not an applicant in a case such as this had ties with their home country fell on the respondent. My concern was that in a case such as this where the only evidence appeared to be that an applicant did not have such ties and had been in this country for over twenty years since a very young age, the burden might in such circumstances have shifted.

The Hearing

9. I heard submissions on behalf of both parties which I have recorded in the Record of Proceedings. Accordingly I shall not set out these submissions in full but shall set out only those parts of those submissions as are necessary for the purposes of this determination. I have however had regard to everything which was said to me during the course of the hearing as well as to all the documents contained within the file. I also heard evidence from the appellant and a cousin, Ms Vanessa McCain who both relied upon witness statements which in accordance with the directions I had given following the hearing on 20 February 2014 had been provided to the Tribunal and served on the respondent. Neither witness was cross-examined but Ms McCain was asked some supplementary questions, which again are recorded in the Record of Proceedings.

Submissions

10. On behalf of the respondent Mr Deller accepted that in a case such as this which was a rare case, if the appellant came within the provisions of the Rules then his appeal would have to be allowed. The Tribunal would only consider the wider aspects of Article 8 in circumstances where the appellant could not be said to satisfy the requirements of the Rules. This was because the Rules set out the Secretary of State's policy and the policy was that in the case of a person who had been here for over twenty years and who had not been sentenced to a term of imprisonment of four years or more, if that person had no ties with his or her home country then "that is the end of the game" because the Secretary of State's policy was that in those circumstances the removal of such a person would be disproportionate. I have summarised Mr Deller's arguments in a way which I trust has not been unfair to him. He put his arguments in a rather less truncated fashion.

11. On behalf of the appellant Ms Watterson relied on the decision of this Tribunal in *Ogundimu (Article 8 – new rules) Nigeria* [2013] UKUT 00060 and in particular on the summary of the judgment contained in head note 4:

> "The natural and ordinary meaning of the word 'ties' in paragraph 399A of the Immigration Rules imports a concept involving something more than merely remote or abstract links to the country of proposed deportation or removal. It involves there being a connection to life in that country. Consideration of whether a person has 'no ties' to such a country must involve a rounded assessment of all of the relevant circumstances and is not to be limited to 'social, cultural and family' circumstances."

Discussion

12. I am very grateful to both Mr Deller and Ms Watterson for the concise but cogent way in which the respective parties' cases were advanced before this Tribunal. This is an unusual case because as I made clear following the earlier hearing before me, but for the new Rules there would have been little prospect of this appellant persuading any Tribunal that his removal was disproportionate. It is clearly conducive to the public good that somebody with a criminal record as appalling as that of this appellant should be removed from this country. He has been convicted of so many serious offences over such a long period of time that it is barely arguable that his removal would not benefit potential victims of the crimes he is likely to go on committing. That is such a weighty factor that under existing Strasbourg jurisprudence it would have been very difficult to come to any conclusion other than that this factor was so weighty as to outweigh any compassionate factors militating against deportation. However as Mr Deller quite rightly accepted we are now no longer governed merely by the existing Strasbourg jurisprudence because the Secretary of State has seen fit to incorporate within the new Rules provisions as to the circumstances in which she will consider that removal is disproportionate notwithstanding that it would be conducive to the public good. As Mr Deller accepted and as is also clear from the judgment of the Court of Appeal in *MF (Nigeria)* if a foreign criminal (which this appellant is) comes within the provisions of paragraphs 398, 399 and 399A(a) of the Rules then he cannot be deported. In this case this appellant has been present in this country for over twenty years, even excluding periods spent in prison, since the age of 7 and he has not been sentenced to a term of imprisonment of at least four years so that his deportation could only be justified under paragraph 398(b) or (c) of the Rules (as I have already indicated in this case the deportation can only be justified under paragraph 398(c) because the sentence of imprisonment which he received of more than twelve months was imposed before the 2007 Act came into effect).

13. Accordingly, by virtue of paragraph 399A(a) of the Rules the removal of this appellant will be considered by the Secretary of State to be disproportionate if it can properly be said that "he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK". It was for this reason that this hearing was convened for the specific purpose of considering whether or not the appellant could be said to have no such ties.

14. I consider first (although in the circumstances of this case this may be academic) who has the burden of establishing whether or not the appellant has "no ties", bearing in mind of course that great care has to be taken in any event when considering how a negative can be established. In my judgment, and as accepted by Ms Watterson on behalf of the appellant, because we would be dealing in this case with the Secretary of State's policy as set out in the Rules the burden is on the appellant to establish that he has no ties to Uganda. The standard of proof is the balance of probabilities.

15. As I have already noted, my suggestion that the respondent might consider making enquires as to whether or not the appellant had any family members in Uganda was not made on the basis that she had the primary responsibility of establishing that there were no ties but rather because these enquiries might allow her to rebut evidence which would be given to the effect that the appellant had no such ties. The only evidence I heard with regard to whether or not the appellant has any ties in Uganda was from the appellant himself and his cousin, Ms McCain. Clearly the appellant's evidence would have to be considered in light of the First-tier Tribunal's panel's findings that he was not a witness of truth and also in light of his criminal record which would cause the Tribunal to have doubt that anything he says can be relied upon. The Tribunal also takes note of the obvious fact that it was very much in this appellant's interest to tell the Tribunal that he had no ties in Uganda. However, Ms McCain's evidence is not subject to any such qualification. She is a lady who has no convictions and works for a firm of solicitors and I have no reason to doubt the truth of anything she says. She does not have a very close relationship with her cousin and certainly does not approve of his criminality and I accept that her sole purpose in coming to this Tribunal has been to give a truthful account, as she understands it, of whatever ties she and her cousin have with Uganda. The evidence from these witnesses is all one way and is that neither of them have any ties in Uganda at all. They had not visited that country since coming here more than twenty years ago. They have no family remaining in Uganda and they have no cultural ties to that country either. In my judgment, bearing in mind the observations of this Tribunal in *Ogundimu* there is simply no basis upon which this Tribunal can properly find other than that the appellant has no ties with the country to which he would be returned. To make it entirely clear I consider that the appellant has satisfied the burden of proof which is on him to establish that he has no ties with Uganda. I would however add the following observations with regard to this aspect of this case.

16. In the first place this is an appellant who came to this country when he was only 7 years old and has remained here for over twenty years. This is very different from cases where applicants have been here for shorter periods or had left their countries of origin when they were older and it should not be assumed that in every case where an applicant has been in this country a long time it would necessarily follow that he or she would have lost their ties to their home countries.

17. The next observation I would make is that because of the automatic deportation provisions which were brought in following the passage of the UK Borders Act, it is unlikely that the sort of situation with which this Tribunal has been confronted today

will re-occur very often. Had the automatic deportation provisions been in force in 2003 when this appellant received his sentence of imprisonment of more than twelve months, at that time he would not have been able to claim that he should be entitled to stay because of the provisions set out within paragraph 399A of the Rules because he would not then have been present in this country for over twenty years. Be that as it may, by reason of the finding which I have made that the appellant has in the words of paragraph 399A(a) "lived continuously in the UK for at least twenty years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK", as the deportation is pursuant to paragraph 398(c) it follows that his deportation would be unlawful because the Secretary of State's policy as set out within the Rules is that in these circumstances deportation would be deemed to be disproportionate.

18. As those representing the respondent frequently remind this Tribunal, where Parliament has expressed its will that the Rules should apply, they should and this appeal must accordingly be allowed.

Decision

I **set aside the determination of the First-tier Tribunal as containing a material error of law and substitute the following decision:**

The appellant's appeal is allowed under the relevant provisions of the Immigration Rules.

Fee Award

As this appeal has been allowed the appellant is allowed the appropriate fee.

Signed: Date: 27 May 2014

Upper Tribunal Judge Craig