IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00423/2014

THE IMMIGRATION ACTS

Heard in Stoke	**Decision and Reasons Promulgated**
On 11 September 2014	**On 13 November 2014**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ABIMBOLA OGUNMOLA

Respondent

Representation:

For the Appellant: Miss C Johnstone, Senior Presenting Officer
For the Respondent: Mr O'Ryan, Counsel, instructed by Paragon Law

DECISION AND REASONS

1. The Secretary of State has been granted permission to appeal the decision of a panel of the First-tier Tribunal comprising First-tier Tribunal Judge Somal and Mrs S Singer ("the panel"). For reasons given in their determination dated 23 May 2014 they allowed the appeal by the respondent (referred to in this determination as the claimant) against the

decision dated 25 February 2014 refusing to revoke a deportation order. Such order had been made in response to an application made by the claimant's solicitors on 2 January 2014. The deportation order in question was made on 11 March 2008 triggered by the conviction of the claimant on 12 September 2006 for possession of a false instrument.

2. The claimant is a national of Nigeria. His claim is that he arrived in the United Kingdom lawfully in 1992. The false instrument was a forged passport. The sentencing judge, His Honour Judge Carroll, give credit for the claimant's guilty plea entered at the earliest opportunity and considered that he was of previous good character. He concluded however that an immediate custodial sentence was justified if only to send out a message to others. The least possible sentence he could impose was thirteen months' imprisonment.

3. The regime of automatic deportation orders was not then in force and the Secretary of State therefore made a decision to make a deportation order on 16 March 2007 which the claimant appealed unsuccessfully. Another panel of the First-tier Tribunal comprising Immigration Judge Flynn and Mrs S Hussain dismissed the appeal on human rights grounds. In this regard the claimant had relied on having two children in the United Kingdom aged 8 years and 7 months and mental health issues. The panel concluded there was no evidence that the claimant had been living continuously in the United Kingdom for fourteen years nor that there was any evidence of companionate or compelling circumstances and thus dismissed the appeal. The decision under appeal had also taken account of an application dated 11 December 2006 that the claimant had made via his former solicitors for permanent residence based on the then fourteen year concession policy.

4. The decision of the later panel refers to the history of the claimant's relationship with his partner whom he had met in 2005. Apart from his time in prison, the couple had lived together until October 2011 until the claimant had lost his cleaning job. His partner believed she was pregnant. A row ensued and his partner and the children were evicted. Dialogue was re-established in March 2012. A further child was born in December 2012 and they moved in together again from November 2013. His partner gave evidence that the claimant was close to the children and was their primary carer as she worked part- time and studied full-time.

5. The claimant's partner who originates from Nigeria has refugee status.

6. The panel made these findings :

   (i) There was fresh evidence to enable them to go behind the findings of fact of the previous panel; these included the strength of the family and private life in the United Kingdom and the fact of the claimant's family having been granted refugee status in September 2013.

(ii) It was noted that the Secretary of State accepted that the claimant had a genuine and subsisting relationship with his partner and the two children and that they could not return to Nigeria.

(iii) The claimant had "not resided in UK with valid leave since he arrived illegally in 1992" observing that he had absconded for several years and worked unlawfully.

(iv) The sentence to imprisonment for thirteen months was a serious matter but "... not of the most serious type". The claimant had not offended since his release from prison which demonstrated that he had changed his offending behaviour.

(v) There were insurmountable obstacles to the claimant's partner and children continuing their family life with them outside the United Kingdom in the light of the grant of refugee status. The children had never been to Nigeria.

(vi) The best interests of the children were a primary consideration and separating the claimant from them would have a profound and long term impact reflected in evidence from the claimant's partner, a witness and testimonials from friends.

7. Having set out these findings the panel concluded that there were "sufficiently compelling reasons (exceptional circumstances) which outweighed the public interest in favour of deportation".

8. The ground of challenge by the Secretary of State is lengthy from which the following can be distilled:

(i) The panel had erred in law by failing to give genuine and proper regard to the government's view on what are exceptional circumstances.

(ii) The panel had failed to identify why the claimant's circumstances were exceptional and had failed to consider that family life had been established in the full knowledge of her precarious immigration status and the knowledge that the claimant was subject to deportation.

(iii) The claimant's role as primary carer had been whilst he worked illegally.

(iv) There was no evidence that the claimant's deportation would have a profound and long term impact on the children and there was no reason why that contact could not be made from abroad.

(v) The fact of the claimant working in 2008 and 2009 when not permitted to do so demonstrated that he had not reformed and may reoffend in the future. His partner had been unable to exert any sufficient influence over him.

(vi) There was a strong public interest in favour of the claimant's deportation and the panel had failed to carry out a thorough assessments taking into account consideration of society's revulsion against serious crime.

9. In sum, the Secretary of State considered that the public interest had not been properly balanced in the proportionality assessment.

10. A detailed Rule 24 response argues otherwise. There had been no misdirection on the multi-dimensional nature of public interest and that there had been a correct treatment on exceptional circumstances. The other errors of law identified in the grounds were not well-founded.

11. It was clarified before me that the claimant's partner had claimed asylum in August 2012 and although refused, she had been successful before a judge. That determination was not before the panel. I also queried whether the deportation dated 11 March 2008 had been served on the claimant. His case was that it had not been. Nevertheless I observed that the point had not been raised and it was not a ground of appeal.

12. In the course of her submissions, Miss Johnstone acknowledged that the Secretary of State's challenge was a perversity one as a consequence of a material misdirection of law by the panel when reaching its findings. She acknowledged the high standard of such a challenge.

13. For his part Mr O'Ryan argued that if I was of the view that the panel had properly directed itself as to the law, the challenge to the findings would be a disagreement. He was unsure whether the grounds by the Secretary of State could be properly articulated as a perversity challenge.

14. Candidly, Miss Johnstone accepted that the panel had correctly directed itself as to the law. I consider that she was correct to make that concession; the panel had referred to *Devaseelan* [2003] ImmAR [2002] UKIAT 00702 and to the decision of the Court of Appeal in *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192. In doing so, the panel had set out the observations by the Master of the Rolls on what was to be understood by exceptional. Otherwise the panel directed itself with reference to the familiar European law authorities including *Boultif*, *Uner* and *Maslov* as well as decisions of the United Kingdom in *Beoku-Betts* and *Razgar* giving a correct summary of the effect of those decisions.

15. Miss Johnstone clarified her grounds as discussion developed that although the panel had correctly directed itself as to the law it had misapplied the facts on the basis that no reasonable Tribunal could have come to the conclusion that this had.

16. By way of response, Mr O'Ryan reminded me of the nature of the offence and contrasted that offence and sentence with those considered by the Court of Appeal in *AM v Secretary of State for the Home Department* [2012] EWCA Civ 1634 and *AD Lee v SSHD* [2011] EWCA Civ 348. In

addition he invited comparison with the sentence and offence considered in *MF (Nigeria)*. He contended that it had not been perverse for the panel to have concluded there would be an adverse impact on the children and also clarified of the three children, he was the biological father of those born in 2007 and 2009. He contended there was an evidential basis for the conclusion reached.

17. By way of response, Miss Johnstone observed that there was no independent evidence regarding the impact and reminded me of the period of time that the applicant had been working unlawfully in the United Kingdom.

18. I reach these conclusions. In the light of it the acceptance that the panel had correctly directed itself as to the law, I must consider whether the panel had made findings open to it on the evidence. If so, it is then necessary to consider whether its conclusion on those facts was within the permissible range having regard to the public interest which in appeals of this nature is weighted in favour of the Secretary of State.

19. Such loading however is not fixed; the more serious the offence the greater the pull of the public interest. The panel was entitled to observe in [27] that the offence was "not of the most serious type" in the context of its analysis that the offence was for a serious matter. As reminded by Mr O'Ryan, the appellant in *AM* was convicted of a drug trafficking offence for which he was sentenced to fifteen years' imprisonment but reduced on appeal to twelve years. The appellant in *Lee* was also convicted of a Class A drugs offence and sentenced to seven years' imprisonment. *MF* was sentenced to eighteen months' imprisonment and in contrast with the other appellants in this trio of cases, that appellant was successful before the Upper Tribunal.

20. The Court of Appeal considered in *MF* that there had been a meticulous assessment of the facts weighing in favour of deportation and those against. There was no basis for the court to interfere. The Master of the Rolls noted the concession by the Secretary of State in *MF* that it would not be "a reasonable option" for the family members to relocate with the appellant to Nigeria and that there were "insurmountable obstacles" to family life continuing outside the United Kingdom.

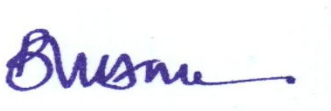
21. Each case must turn on its own facts. An inescapable feature in the appeal before me is the refugee status of the claimant's partner and thus the insurmountable obstacles of relocation with the claimant. Such obstacles should not of themselves be determinative of the proportionality exercise but it cannot be said that the panel regarded them as such.

22. In my view it was rationally open to the panel to conclude that the circumstances being those obstacles, the best interests of the children, the length of time the claimant has been in the United Kingdom and the absence of re-offending since the one offence were sufficient to outweigh the public interest. Its findings on the facts were properly open to it and,

as accepted, the panel correctly directed itself as to the law. Its conclusions on proportionality demonstrated an understanding of the public interest and the decision was within a permissible range of responses to the competing factors. It may be that another tribunal might have taken a different view but that is not the test. I am not persuaded that the panel made a legal error in its decision of the kind asserted in the grounds.

23. The appeal by the Secretary of State is dismissed.

Signed Date 12 November 2014



Upper Tribunal Judge Dawson