Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02109/2013

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On 27 October and 03 November 2014	**On 10 November 2014**

Before

The President, The Hon. Mr Justice McCloskey

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOSES MAWANDA

Respondent

Representation:

Appellant: Mr Tufan, Senior Home Office Presenting Officer
Respondent: Ms G Kiai (of Counsel) instructed by Irving and Company Solicitors

DETERMINATION AND REASONS

1. The Appellant is the Secretary of State for the Home Department (the "*Secretary of State*"). This appeal originates in a decision to make a deportation order made by the Secretary of State in respect of the

Respondent, dated 14 October 2013. By the terms of this decision, the Respondent was considered a foreign criminal as defined by section 32(1) of the UK Borders Act 2007 and it was determined that his removal from the United Kingdom would be, under section 32(4), conducive to the public good for the purposes of section 3(5)(a) of the Immigration Act 1971. The decision further recorded that the Secretary of State must make a deportation order under section 32(5) of the 2007 Act, subject to section 33.

2. The Respondent is a national of Uganda, now aged 31 years, who has been in the United Kingdom since 1990. On 26th November 2012, after the Respondent had been convicted in respect of various drugs offences and sentenced to 22 months imprisonment, he was formally notified of his liability to deportation and invited to make representations accordingly. Part of his response included a claim for asylum. By the terms of the impugned decision, this was dismissed.

3. The Respondent appealed to the First-tier Tribunal (the "*FtT*"). In the grounds of appeal, it was contended that his case fell within the exceptions under section 33 of the 2007 Act and paragraphs 399 and 399A of the Immigration Rules. The brief particulars of these general grounds were that the deportation of the Respondent to his country of origin, Uganda, would infringe his rights under Articles 2, 3 and 8 ECHR and, further, would be in contravention of section 55 of the Borders, Citizenship and Immigration Act 2009 ("*the 2009 Act*").

4. By its decision promulgated on 05 September 2014 the FtT:

(a) dismissed the Respondent's appeal on asylum grounds;

(b) dismissed the appeal under the Immigration Rules; and

(c) allowed the appeal under Article 8 ECHR.

In [53] of its determination, the FtT stated:

> "*Since the Appellant does not satisfy the requirements of the Rules ... we note that the only aspect for us to consider is whether there are any exceptional circumstances that would make the public interest in deportation be outweighed by other factors.* ***We have not considered the changes under the new Immigration Rules as the relevant Rules to be considered in an immigration case are the Rules at the date of decision ……. 14th October 2013 ……***
>
> *We note that the latest changes in the Immigration Rules take effect on 28 July 2014.*"
>
> [My emphasis.]

Thus the FtT did not give effect to the material modifications of the Immigration Rules which came into operation on 28 July 2014. These major modifications, in particular, made significant amendments to paragraphs 398, 399 and 399A. Furthermore, the FtT gave no effect to the amended provisions of the Nationality, Immigration and Asylum Act 2002 (the "*2002 Act*") which also came into operation on 28 July 2014. It proceeded to determine the appeal disregarding all of these new measures. This is the issue in respect whereof the Secretary of State applied for, and was granted, permission to appeal to this Tribunal.

5. On behalf of the Respondent, it was, realistically, accepted by Ms Kiai that this was an error of law on the part of the FtT. It was submitted, notwithstanding, that this error was not material since, in substance, the FtT took into account all material factors. In support of this submission, Ms Kiai provided an excellent skeleton argument, duly supplemented by clearly formulated submissions.

6. The concession on behalf of the Respondent is well made. Insofar as confirmation of the error of law committed by the FtT is required, it has been provided recently by the decision of the Court of Appeal in YM (Uganda) – v – Secretary of State for the Home Department [2014] EWCA Civ 1292: see [36] – [39] especially. I consider that the FtT unmistakeably erred in law. The question for this Tribunal is whether this error was material. I agree with Ms Kiai that if it could be demonstrated that, this error notwithstanding, the decision of the FtT gave proper effect in substance to the new statutory regime, its error of law would not be material.

7. The Respondent's case rests, firstly, on certain findings contained in the determination of the IAA Adjudicator dated 29 November 2002. I summarise these findings as follows:

(a) When the Appellant was aged seven years, in September 1990, his uncle brought him and his younger brother to the United Kingdom.

(b) In 1990, again accompanied by their uncle, the Respondent and his brother returned to Kenya, where they spent two years. During this period they spent very little time with their mother, their care being provided largely by other adults.

(c) They returned to the United Kingdom in 1999.

(d) By 2002 they had become "*useful and apparently well adjusted members"* of a community with cultural norms and attitudes related solely to life in this country. By this stage they were "*far more at home in West London than they would be in Kampala*".

(e) They were also "*attending college and appear to be making good progress towards qualifications which will enhance their employment prospects*".

(f) They were considered to be "*British in outlook and their friends are exclusively in this country*".

(g) Their father was dead and their mother continued to live in Kampala. There was no contact with her.

8. The Adjudicator concluded that to remove the Respondent and his brother from the United Kingdom to Uganda would be disproportionate. He reasoned thus:

> "*In balancing the public interest under which deportation would normally be appropriate for someone who has no lawful right to remain in this country against the effects that they would have on the Appellants ….. I am satisfied that* ***it would have extremely harsh and damaging consequences for both of these young people.*** *Here they have, despite the somewhat impersonal experience of being in care for quite a long time in this country, built up a network of relationships with foster carers and their own circle of friends, as well as enjoying a particularly close relationship within their own sibling group.* ***They both left Uganda at a comparatively young age and their whole lifestyle, as well as their cultural background, has now become firmly identified with the United Kingdom. … I consider it reasonable to conclude that both Appellants would suffer severe shock if they now had to return to Uganda ….***
>
> *They are now well on their way to obtaining qualifications which would enable them to obtain employment …*
>
> *I am also mindful of the fact that it is only by a chapter of accidents and circumstances that both these boys have not already been granted indefinite leave to remain in this country.*"

[Emphasis added]

9. Having regard to the contents of the FtT determination under challenge in this appeal, together with the Devaseelan principles, it is clear that all of the earlier FtT findings rehearsed above continue to apply. The contrary was not argued on behalf of the Secretary of State.

10. In the recent FtT determination, the following findings were made:

(a) The Respondent is the father of a nine year old British citizen child, with whom he has a relationship involving telephone contact and visits. He had been involved in her care before his imprisonment.

(b) Adopting the assessment of the Social Services professionals concerned, the deportation of the Appellant from the United Kingdom "*would have a devastating impact on his daughter's emotional development*".

(c) (In terms) the best interests of the Respondent's daughter would be furthered if he were not removed from the United Kingdom.

(d) The Respondent's rehabilitation is positive and he has been involved in some voluntary work.

The FtT reasoned and concluded as follows:

> "*We find that this is a finely balanced case bearing in mind the Appellant's relationship with his daughter, the number of years he has spent in this country from a very young age and the fact that he has had continuous lawful residence more or less since he has been in the UK when he was granted exceptional leave to remain. Taking into account the significant period the Appellant has spent in this country, his relationship with his daughter, the best interests of his daughter and the fact that the Appellant has been drug free since going to prison we find that …. the balance of proportionality weighs in favour of the Appellant ….*
>
> *We have not come to our conclusion lightly ….*
>
> *The Appellant is fortunate to succeed in this appeal against a background of class A drug supply …..*"

11. I apply the new provisions of Part 5A of the 2002 Act to this appeal in the following way:

(a) Nothing turns on section 117B.

(b) The next question is whether "*Exception 1*" applies. The first two of the three qualifying conditions are not disputed on behalf of the Secretary of State viz the Respondent has been lawfully resident in the United Kingdom for most of his life and he is socially and culturally integrated here.

(c) Based on the findings of the two successive Tribunals rehearsed in [8] and [10] above, I agree with Ms Kiai that the FtT has, <u>in substance</u>, applied the third of the qualifying conditions viz "*there would be very significant obstacles to* [the Respondent's] *integration into the country to which* [the Respondent] *is proposed to be deported.*"

(d) I further agree with Ms Kiai that, as regards "*Exception 2*", the FtT <u>in substance</u> applied the test enshrined in section 117C(f) viz:

> "*Exception 2 applies where C has …. a genuine and subsisting parental relationship with a qualifying child and the effect of C's deportation on the partner or child would be unduly harsh.*"

There was no argument that any of the FtT's findings and conclusions were vitiated by irrationality or other public law infection.

12. I acknowledge that the FtT did not consciously or expressly apply the provisions of the new statutory regime in deciding that the Respondent's appeal should be allowed. Notwithstanding, I conclude that, however inadvertent or adventitious, the FtT did so in substance. Put slightly differently, I consider that by virtue of the totality of the findings of the two successive Tribunals, in 2002 and 2014, effect has been given to the new statutory regime. I would add that while the attention of this Tribunal was drawn to the new "Immigration Directorate Instructions" ("*IDI*") introduced on 28 July 2014, neither the application for, nor the grant of, permission to appeal was based on this instrument. I am satisfied, in any event, that there is nothing in the relevant provisions thereof – arranged in section 2.5 – to assist the Secretary of State, having regard to the stand out finding of the FtT that the removal of the Respondent from the United Kingdom would have "*a devastating impact on his daughter's emotional development*". In the abstract and on this issue, this must be one of the strongest cases of its kind.

13. Furthermore, it was accepted – properly – on behalf of the Secretary of State that, in the particular circumstances of this appeal, there is no further or separate issue to be addressed under the new provisions of the Immigration Rules.

14. I emphasis that this is an intensely factually and contextually sensitive case. I apprehend that appeals in which the argument that the error of law which afflicts the determination of the FtT in this case can be said to have been immaterial are likely to be the exception rather than the rule.

15. Finally, in the interests of promoting better quality decision making at first instance, I add the following:

    (a) Whereas the FtT summarised at great length the evidence which it received, this was followed by a relative paucity of findings. There is a distinct mismatch in this respect.

    (b) The FtT was wrong to espouse the criterion of "*compassionate circumstances*" in [54] of its determination. This was erroneous in law, but, fortunately, immaterial.

    (c) The suggestion that the criterion of "*compassionate circumstances*" arises from the decision in MF (Nigeria) [2013] EWCA Civ 1992 is equally misconceived. This is a binding decision of the Court of

Appeal which adopted the quite different criterion of very compelling circumstances.

(d) The statement in [59] of the determination that the Appellant's "*offence*" was "*more or less the only offence*" that he has committed is infelicitously phrased and regrettable. Fortunately, it is redeemed by the correct indication in [3] of the determination that the Respondent committed **four** offences.

All of these elementary errors were eminently avoidable. They are exacerbated by the syntax of the final sentence in [60] of the determination, which is unintelligible.

DECISION

15. On the grounds and for the reasons elaborated above, I dismiss the Secretary of State's appeal and affirm the determination of the FtT.

Signed:

_____THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 06 November 2014