IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)

B E T W E E N:-

MF (NIGERIA)

Respondent

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

CASE NOTE

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§§ references are to the Judgment of the Court of Appeal unless stated otherwise

1 On 8/10/13, the Court of Appeal[1] gave Judgment in *MF (Nigeria) –v- Secretary of State for the Home Department* [2013] EWCA Civ 1192, dismissing the appeal of the Secretary of State ["SSHD"] from the decision of the Upper Tribunal ["UT"].[2] The Judgment of the Court was given by the Master of the Rolls.

Facts[3]

2 MF is a Nigerian national who entered the UK unlawfully in 1998 and has remained ever since. In February 2006, he was arrested for involvement in a tax credit fraud and, in August 2006, he claimed asylum. In November 2009, MF was convicted on counts of acquiring criminal property (some £22,000 in benefits) and possession of a false Nigerian passport.[4] He was sentenced to 18 months' imprisonment. In October 2010, MF's asylum claim was rejected as "untrue". The UT found that MF's criminality and immigration history gave rise to *two* "strong public interest reasons for his deportation".

3 In 2007, MF met SB, a British citizen and they married in March 2009. SB had a British citizen daughter, FB, aged 16 at the time of UT hearing. MF became FB's step-father. The UT accepted that MF's deportation would be contrary to FB's "best interests" and treated this as a primary consideration. The SSHD conceded[5] that, as a result of SB's work commitments and FB's schooling and citizenship, there were insurmountable obstacles to the continuation of family and private life in Nigeria, making that option unreasonable. MF had provided care and assistance for SB's mother and father, although the UT found this not significantly to strengthen his case.

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[1] Lord Dyson (MR), Davis LJ, Gloster LJ; references LTL 8/10/2013
[2] *MF (Article 8 – new rules) Nigeria* [2012] UKUT 00393 (IAC)
[3] See in the Judgment at §§17-30
[4] Contrary to s329(1) Proceeds of Crime Act and s25(5) Identity Cards Act 2006.
[5] The Court of Appeal expressed no view as to the correctness of the concession: §24

All of MF's personal ties were formed in the full knowledge of the 'precarious' nature of his status. MF still had family members in Nigeria and was found able to resume his ties with them.

4 MF was visited by his relatives while serving his sentence and was released from custody in September 2010. He was assessed as at low risk of re-offending.

Issue arising

5 The case was originally billed as the SSHD's attempt to sustain her position that, because the new Rules[6] relating to the deportation of criminal offenders set out threshold conditions reflecting her general view as to when such action will be contrary to article 8, where those conditions are not met, a deportee could only succeed if s/he could show "exceptional circumstances". This position reflected an attempt by the SSHD to make a "substantial difference" to the case law and "essentially restore the exceptional circumstances test[7] disapproved of by the House of Lords in…*Huang –v- SSHD*" (at §31[8]).

6 In the deportation context, the "exceptional circumstances" criterion is contained within the Rules themselves (para 398). Under the Rules, in order to resist deportation on article 8 grounds, an offender sentenced to 4 years or more must *always* show "exceptional circumstances". An offender sentenced to less than 4 years, must show those circumstances *unless* s/he can meet the threshold conditions contained in paras 399-399A of the Rules. In a series of decisions[9], the UT held that if the Rules were not met, it was necessary to conduct a straight, Strasbourg compliant assessment outside of them. The SSHD's position on the appeal was that the Rules comprise a "complete code" for considering article 8.

7 On the facts of MF's case, he could only succeed under the Rules if he could show "exceptional circumstances". The UT found that there were no such circumstances[10], yet it allowed the appeal on the grounds that deportation would violate article 8 and because, quite aside from the Rules, the UT was mandated to intervene pursuant to: HRA, ss2, 6; 2002 Act, s84(1)(c)(e)(g); and UKBA 2007, s33(2) (UT at §§25-30).

8 Accordingly, a fundamental aspect of the SSHD's appeal to the Court of Appeal was that the UT erred in allowing the appeal under article 8 *notwithstanding* its conclusion that there were no "exceptional circumstances".[11]

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[6] HC 194 inserting into HC 395 new paragraphs 396-399C from 9 July 2012.

[7] The test was whether: "the case is so exceptional on its particular facts that the imperative of proportionality demands an outcome in the appellant's favour…" (Court of Appeal in *Huang*, per Laws LJ at §§56, 59)

[8] i.e in the MF Judgment, recording the SSHD's submission in the case of *Izuazu (Article 8 – new rules)* [2013] UKUT 000045 (IAC). See also: the SSHD's prior 'Statement of Intent: Family Migration' at §§7, 10-12, 33-40; the motion debated in the House of Commons on 19 June 2012; and the SSHD's further materials referred to in the MF Judgment at §§9-13

[9] Further to *MF*, see: *Izuazu (Article 8 – new rules)* [2013] UKUT 00045 (IAC); *Green (Article 8 – new rules)* [2013] UKUT 00254; *Ogundimu (Article 8 – new rules) Nigeria* [2013] UKUT 00060 (IAC)

[10] UT at §§64, 68

[11] SSHD Skeleton argument before the Court of Appeal, §47(b)

9 However, when the matter came before the Court of Appeal, the SSHD's position was not that set out at para 5 above. In her oral submissions and in a further written document, produced at the Court's request on the second day of hearing, the SSHD:

- asserted that the new Rules "do not seek to change the law", but simply "properly reflect the Strasbourg jurisprudence" (§34);
- stated that the new Rules did not "herald a restoration" of the exceptionality test disproved by *Huang* (§39); and
- conceded that the Rules should be interpreted consistently with the Strasbourg jurisprudence (§§36-39).

Judgment of the Court

10 The Court of Appeal held (or agreed) as follows.

- The use of the term "exceptional circumstances" in the new Rules does not restore the pre-*Huang* "exceptionality" test (§§32, 39, 41-42). Rather the term is there employed in the sense to be found in the Strasbourg case law, where ties are forged in the knowledge that immigration status is 'precarious' (§§41-42).
- Agreeing with the UT and MF, the Rules do not 'perfectly mirror' the Strasbourg jurisprudence and do not expressly provide "for consideration of all questions relevant to article 8 claims" (§39).[12]
- However, the relevant terms of the Rules ("it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors") should be interpreted consistently with the Strasbourg jurisprudence such that they do in fact require consideration of all the factors treated by the Strasbourg Court as relevant to proportionality (§§38-39). "Exceptional circumstances" is therefore to be read as requiring the application of the proportionality balancing exercise required by Strasbourg (§44).

[12] At §39, the Judgment lists some of the examples in which the express provisions of the Rules fall short in this respect. The (non-exhaustive) list, given in MF's submissions and with which the Court does not appear to dissent, was as follows. The Convention approach, as reflected in the domestic and Strasbourg jurisprudence, differs from the Rules in that the former: (1) lay down no 'bright line' thresholds; (2) affords no fixed degree of weight to the 'public interest' in deportation, but requires to be weighed in the balance matters such as: the nature and seriousness of the offence; the time elapsed since the offence; and the applicant's conduct during that period; (3) recognises that the 'public interest' is not exclusively comprised by the deportation of 'foreign criminals' – on the facts of individual cases, there may also be a 'public interest' in: promoting and safeguarding the welfare of children; the continued presence of a person of value to the community; acknowledging a delay in the process as reducing the weight to be attached to the public interest in enforcement; (4) recognises: 'family life' ties beyond those between partners and between parents / minor children e.g, those between parents and young adult sons and daughters; 'private' life ties as between more distant relatives; an assessment of private and family life taken as a whole; (5) recognises the principle that the 'best interests' of the child are to be treated as a primary consideration; (6) recognises the 'special situation' of aliens who have long residence in a member state requiring "very serious reasons" to justify their expulsion; (7) as regards 'partners': is "unsympathetic" to actions which break up marriages and separate children such that it will "rarely" be proportionate to uphold the removal of a spouse or child (see *Razgar*, *EB*); and generally employs a test of "reasonableness" to the question of relocation, as opposed to "insurmountable obstacles"; and (8) employs a qualitative, rather than a mechanical, approach to 'private' life.

- The process that the decision-taker must therefore take is in two stages. Stage (i): if the criminal sentence is for less than 4 years, determine whether any of the threshold conditions in paras 399-399A are satisfied. Stage (ii), if they are not, or if the sentence was for 4 years or more, conduct the proportionality balancing exercise as required by Strasbourg, having regard to all the relevant factors identified by the jurisprudence – that is what the "exceptional circumstances" criterion requires (§§7, 35, 44, 46).

- The result of the Convention-compliant construction placed upon the Rules is that Stage (ii) may be conducted within the Rules and not, as the UT held, outside them. To that extent, the new Rules form a "complete code" (§§44, 46). But even if the Rules were not so construed, such that Stage (ii) had to be conducted outside them, the outcome would be the same. (§§45-46). Accordingly, the difference of approach between the Court and the UT was one of "form not substance" (§50).

- As the context is criminality, there is in general a compelling public interest in deportation to which "great weight" attaches such that applicants may succeed only if their circumstances are "sufficiently compelling" (§§38, 40, 42, 43, 46).

- Without deciding the issue of whether the test for relocation of "insurmountable obstacles" (Rules, para 399(ii)), rather than "reasonableness", was compatible with the Convention, the Court "inclined" to view that, for the reasons given in *Izuazu*[13], the stringency of the former would be contrary to article 8 (§§47-49).

- As to the facts, the UT had conducted a "meticulous assessment" of the factors for and against deportation, giving significant weight to the serious view taken by the SSHD of MF's criminality and his poor immigration history, yet attaching considerable importance to the best interests of MF's step-daughter. The UT was entitled to strike the balance in favour of MF and there was no basis for interfering with its decision. Thus the SSHD's appeal was dismissed (§§50-51).

11 The UT's conclusions as to the approach to the new Rules had been in the alternative to its finding that, for reasons of retrospectivity, the new Rules did not apply to MF's particular case.[14] The Court, however, proceeded on the basis that the new Rules were applicable (§25).

Comment

12 The Court of Appeal has underlined that it is the Strasbourg standards and principles which continue to govern the ultimate disposal of these cases.

13 Confronted with significant concessions by the SSHD, the Court has construed the new Rules, which on their face appeared discordant with article 8, as in fact doing no more than requiring decision-makers to conduct the conventional proportionality

[13] See the UT in *Izuazu* (above) at §§53-59
[14] MF in the UT at §§58-60, 63

exercise, paying regard to all of those considerations identified as relevant by the Strasbourg jurisprudence. That enables 'Stage (ii)' of the process identified by the UT, to be conducted *within*, rather than outside, the Rules.

14 Practitioners and Tribunals may struggle to conceptualise the distinction between the language used in the Rules ("exceptional circumstances") and that of the prohibited "exceptionality" test (see at §§40, 42, 46), or even to discern the substance of the circumstances that will be "sufficiently compelling" as to preclude deportation.

15 However, the firm ground to which practitioners and Tribunals may now hold in applying the Rules, is the clear confirmation that there has been "no change" to the post-*Huang* law and that the use by the Rules of "exceptional circumstances" is intended to embrace, rather than "flout" (see at §41), the Strasbourg jurisprudence.

16 The concern of applicants had been that the new Rules changed the terrain such that, for example, well known, leading cases, successful in Strasbourg[15] and domestically on the basis of the conventional "weighing of the multifarious considerations" involved in the proportionality exercise to arrive at a "broad and informed judgment which is not to be constrained by a series of prescriptive rules" [16], could <u>not</u> succeed under the new regime. Many such cases would fail because either: (i) they could not meet the (extreme) stringency of the thresholds relating to partners, children or 'private' life (paras 399-399A); (ii) they had been sentenced to 4 years or more; (iii) the facts did not disclose "exceptional circumstances" because they were not unusual or unique in their context, but rather disclosed the suffering of family members that is "part of the matrix that occurs in many such cases" (UT cited by the Court at §26), and/or (iv) nor could the plethora of relevant factors be weighed, or the public interest judged by anything beyond the length of the sentence.

17 Those concerns have now been allayed by the Judgment. There is no bar to the success of such cases. When one looks behind the terminology ("exceptional circumstances"/"sufficiently compelling") to see what, in substance, is being required, it is now clear that where the facts meet the standards envisaged by Strasbourg, an applicant is entitled to succeed. This will be so, for example, where analogy may be drawn with the approach and outcome in earlier decided cases.

18 Nowhere is this more clear than in the resolution on MF's particular facts. MF did not meet the conditions in paras 399-399A (UT, §§57, 68) and the UT, applying the then understood approach to "exceptional circumstances", found firmly that the facts could not meet that threshold (UT, §§61-64). Yet the UT found separately that deportation was disproportionate pursuant to article 8 and that the appeal fell to be allowed for that reason (UT, §§68-81). The Court refused to interfere with the UT's conclusion in striking the proportionality balance in MF's favour and, on that basis,

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[15] The concern applied to cases such as: *Boultif –v- Switzerland* [2001] 33 EHRR 1179; *Amrollahi –v- Denmark*, Applcn No 56811/00, 11 July 2002; *Beljoudi –v France*, Appln No 12083/86, 26 March 2012; *Sezen –v- Netherlands* (2006) 43 EHRR 30; *AA –v- UK* [2012] INLR 1; *AW Khan –v- UK*, Applcn No 47486/06, 12 January 2012; *Mokrani –v- France* (2005) 40 EHRR 30; *Radovanovic –v Austria*, Applcn No 42703/98, 22 April 2004; *Moustaquim –v- Belgium*, Applcn No 12313/86, 18 February 1991

[16] Lord Bingham in *EB (Kosovo)* at §§11-12, 21 after citing the passage in *Huang* (at §18) referring to the "many different factual situations" which arise in article 8 cases. See also, in relation to criminal deportation, Richards LJ In *JO (Uganda)* [2010] 1 WLR 1607 at §§21-22, referring to the highly fact sensitive exercise required to be performed in applying the *Uner* / *Maslov* criteria

upheld the UT's determination (§§50-51). Inherent, therefore, in the Judgment of the Court are the following propositions:

- the article 8 proportionality exercise carried out by the UT and by which it found in MF's favour, was no different from that which it could (and should) have conducted within the Rules, applying the "exceptional circumstances" criterion as it is now construed;

- the outcome would have been the same on either approach, indeed the Judgment of the Court is express to that effect: §§45, 50;

- the UT was entitled to find for MF (thus that there were "exceptional circumstances" as now understood) on the facts of his case (see above at paras 2-4), *notwithstanding that*: the context was non-unique; the prejudice to the family here was common to "many such cases"[17]; the criminal conduct and poor immigration history gave rise to two strong public interest reasons for deportation; and the case was 'precarious' (see at §18) as a result of the article 8 ties being forged in the knowledge of *both* an insecure immigration status and the potential consequences of criminal offending.

14 October 2013

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[17] See in the UT at §64