Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/25906/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 July 2015	**On 10 August 2015**

Before

DEPUTY UPPER-TIER TRIBUNAL JUDGE MAHMOOD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ND
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr K Norton, Home Office Presenting Officer
For the Respondent: Mr B Amunwa, Counsel, instructed by J McCarthy Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the determination of First-tier Tribunal Judge Nightingale. For ease following this judgment I shall refer to the parties in the same format as they were at the First-tier Tribunal although Mr ND is the Respondent to this application.

2. The Appellant is a citizen of Trinidad and Tobago. He had appealed against the decision of the Secretary of State to remove him pursuant to Section 10 of the

Immigration and Asylum Act 1999 after he had made an application for leave to remain based on him having a family life with a British partner.

3. The Respondent, the Secretary of State, had refused the application because it was said that the Appellant's presence in the United Kingdom was not conducive to the public good and that his conduct, character and associations made it is undesirable for him to remain in the United Kingdom.

4. The Secretary of State appeals on two grounds. It is said firstly that the judge made a material misdirection in law and, secondly, that paragraph EX1 of the Immigration Rules was not lawfully considered in respect of insurmountable obstacles. Having heard the submissions of the parties and having considered the written documents including the Secretary of State's grounds and the Appellant's skeleton argument this is my extempore decision which I have given in court today. I given an extempore determination, not least, because I am of the view that the Appellant and his wife, along with the Secretary of State should be able to hear as soon as possible what the outcome of the application made in 2013 ought to be.

5. It is of course quite clear that the grounds that the Secretary of State has lodged have to satisfy the requirement of the Court of Appeal's decision in **R (Iran) v Secretary of State [2005] INLR 633**. It is quite clear that mere disagreement with the decision of the First-tier Tribunal Judge's decision is not enough. There has to be an identifiable error of law and that error of law has to be material. That is a decision of the Court of Appeal of some standing. My task is not to rehear the original appeal.

6. I therefore turn to the grounds of appeal. They are detailed and rather repetitive and in the circumstances perhaps paragraph 1F of the Secretary of State's grounds summarise the position where it states:

> "Therefore the SSHD asserts that the A's conduct is undesirable for several reasons including his poor immigration history, his willingness to lie to immigration officials, his disregard for immigration control by bringing a person into the UK on a false premise, the reason why and their present status do not mitigate the initial action on the A's part. His convictions in the UK and his convictions in Trinidad and Tobago."

7. Ground 2 can be summarised by reference to paragraph 2B which states as follows:

> "The SSHD respectfully submits that the FTJ's assessment of insurmountable obstacles is fundamentally flawed. British citizenship is not in itself a trump card. The factors relied upon are indicative of the ordinary hardships a person will face in relocating to another country. It is reasonable to suppose that the A's partner would have to make a choice between her career, her UK home and her family ties if she wishes to continue to enjoy a relationship with the A who is subject to immigration control."

8. I then turn to the First Tier Tribunal's determination. It is to be noted from the outset that the determination of the judge was a very detailed one with specific and detailed reference to the evidence that she had considered, both oral and written, and indeed she had also set out and considered the submissions of the respective parties.

9. Of course it is right to note that the length of a determination is not necessarily an indication of accuracy or indeed of care in decision making, but I agree with Upper Tribunal Judge McGeachy's observation when he granted permission to appeal in this case that the determination is indeed a thoughtful one. I have considered the numerous paragraphs in which the First-tier Tribunal considered the evidence. She clearly had in mind the Appellant's poor immigration history and that he had been in the United Kingdom unlawfully for many years. She also noted, however, that the seriousness with which the Appellant's offending was to be viewed had in fact been based in part on an incorrect premise. This incorrect premise was an important part of the case. It considerably affected the approach to the case. The incorrect premise was acknowledged during the Respondent's case before her.

10. The judge had said at paragraph 60 of her decision as follows:

> "I have considered the evidence before me in the round, and with care. I am indebted to Mr Williams who in my view, very sensibly and quite rightly, accepted the Appellant's account with regard to events in Trinidad and Tobago. I am equally indebted to Detective Constable Scutt for his frank admission that but for the information provided from Trinidad and Tobago this would not be a 'Nexus' case, and the Appellant's UK offending would not be considered to be serious enough to engage his department. It is therefore of note that the serious nature of the matters said to be outstanding against this Appellant in Trinidad, at page 5 of DC Scutt's statement are now accepted the Respondent to be considerably less serious than first thought. Certainly, I find it doubtful that DC Scutt's department, and all the expense which that involvement entails, would have been engaged if the circumstances as are now accepted had been known at that time. Nonetheless, I have considered his evidence with care and, in particular, that relating to conduct rather than the simple fact of criminal convictions."

11. Additionally it is said at paragraph 11 of the determination

> "In cross-examination, he [Detective Scutt] explained that Operation Nexus had now come under the umbrella of the Serious and Organised Crime Command. Someone from the Home Office would ask somebody at Nexus to make enquiries about an individual. He had simply collated any references to the Appellant held on computer. He had never had any individual dealings with the Appellant. He had never questioned, arrested, charged or interrogated the Appellant himself. All of the information was from the computer."

12. The offences themselves in relation to Trinidad are set out, for example, at paragraph 18 where the Appellant was described then as being 16 years of age, at school. He had been doing some metal work in school and it is said he was being young and foolish. He was dealt with for having an imitation fire arm. It was not a functioning gun. He was arrested and then fined the equivalent of £550 sterling and this fine was to be paid off by the Appellant's mother.

13. Therefore looking at this evidence and the way in which the First-tier Tribunal Judge was looking at it, it is quite clear to me that the judge noted that what was now being put by the Secretary of State was different to that compared with the original decision. The oral evidence of the police detective and a concession by the Home

Office at the hearing had significantly changed the seriousness of the case and the way in which it was to be viewed. Deplorable as any criminal conduct is, the judge was plainly entitled to come to the views that she did. Her views were clearly reasoned and explained. This is an important part of the case and in the way in which the Respondent's appeal has to be viewed.

14. As Mr Norton has indicated during the hearing today, he relies on the factors in respect of LTR.1.6 of Appendix FM but not now on LTR1.5. In my view that approach is the right and indeed the sensible approach in terms of the seriousness which was once being suggested. But it also indicates the way in which the judge herself had viewed the case as a result of the evidence which was put forward.

15. In relation to this ground I conclude that I can see no error of law which can be said to arise, let alone for it to be said that there was a material error of law. The judge's reasoning in my judgement was impeccable. True it is that perhaps others might not necessarily have come to the view that the judge did, but as the Court of Appeal's decision in **R (Iran)** makes abundantly clear, and as a number of decisions since then make clear, mere disagreement with a determination is not sufficient to enable a successful challenge to be brought against the decision of the judge.

Insurmountable Obstacles

16. I turn then to the second ground. In my judgement this ground must also fail because there is a failure to identify a material error of law. The Respondent's grounds in reality have rephrased the case which was put at the hearing before the judge. It is plain to see from numerous paragraphs including at paragraphs 81 and 83 that First tier Tribunal clearly had in mind both the correct law in relation to insurmountable obstacles but also that the correct factual matrix was applied in a careful, reasoned and balanced manner. The Tribunal noted that the Appellant's partner has British citizenship. The Tribunal did not view that, contrary to what is said in the grounds, as being a "trump card". However the First tier Tribunal was clearly unable to ignore the significant matters referred to, for example at paragraph 83 of the decision that the Appellant's partner's wife's education has been here in the United Kingdom. She has a career with the civil service. She has had a mortgage which now only has eight years left to pay, her own children are here. They have grandchildren and she is a carer for those grandchildren. The public interest was not lightly dismissed or side lined. It featured as a very important and significant factor.

17. The findings by the First-tier Tribunal Judge were not suggestive of there being a single issue which would enable her to conclude that there were insurmountable obstacle. She took a whole range of factors into account and came to the decision which she did.

18. In my judgment she was entitled to come to the decision that she did.

19. In the circumstances noting too the particular basis upon which permission to appeal was granted, namely the Appellant's overstaying, I can see that this was also specifically considered by the judge. She did so at paragraphs 76, 77 and 80. She

took those factors into account in both respects in relation to both parts of the grounds of appeal.

20. In the circumstances, looking at the grounds individually and indeed cumulatively I conclude that there is no material error of law in the judge's decision.

21. Accordingly, for the reasons I have outlined I do not find that there is a material error of law in the First tier Tribunal's decision and therefore the First-tier Tribunal Judge's decision stands whereby Mr ND's appeal had been allowed.

Notice of Decision

The Secretary of State's appeal is dismissed.

I make an anonymity direction order.

Direction Regarding Anonymity – Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge Mahmood