



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/01542/2013

THE IMMIGRATION ACTS

Heard at Nottingham
on 29th January 2014

Determination Promulgated
On 31st January 2014

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RJ

(Anonymity order in force)

Respondent

Representation:

For the Appellant: Mr Richards – Senior Home Office Presenting Officer.

For the Respondent: Miss L Appia instructed by JF Law Solicitors.

DETERMINATION AND REASONS

1. This is an appeal against a determination of a panel of the First-tier Tribunal composed of First-tier Tribunal Judge Gurung-Thapa and Dr J.O De Barros (hereinafter referred to as 'the Panel') who in a determination promulgated on the 23rd October 2013 allowed the appeal of RJ against the order for his deportation from the United Kingdom.

Error of law finding

2. RJ was born in 1992 and is a citizen of Dominica. He has lived in the UK for a considerable period of time, having initially entered on 11th March 1993, as a visitor with his mother, who then married his father in the UK on 2nd June 1993. Infinite leave granted to RJ and his mother on 8th March 1996, on the basis of the marriage, was invalidated when it was discovered the marriage was bigamous. Accordingly RJ and his mother returned to Dominica in January 1998. His mother's first marriage was dissolved allowing her to re-marry lawfully on 3rd October 1998. RJ re-entered the UK on 16th April 2001 with his mother, lawfully. On 21st March 2002 RJ was granted leave to remain as a dependant of his mother.
3. RJ's criminal convictions include offences of burglary with intent of a dwelling and assault on a Police Officer committed on 31st August 2010 for which he received a Community Order at Inner London Crown Court, on 31st March 2011, with two requirements at an Attendance Centre of 24 hours and Curfew of 2 months. The index offence which led to the deportation decision is an offence of Robbery. RJ was convicted on 2nd September 2011 and sentenced to 2 years and 6 months imprisonment on 11th November 2011. He did not appeal against conviction or sentence.
4. The Panel allowed the appeal having set out in detail in the determination the factors in RJ's favour that they felt were determinative of the outcome of the Article 8 ECHR balancing exercise. The primary issue that arises from a reading of the determination is that it is clear why RJ won his appeal but not why the Secretary of State lost.
5. The Panel refer to the case of Masih and I accept that in RG (Automatic deport – Section 33(2)(a) exception) Nepal [2010] UKUT 273 (IAC) the Tribunal held that (i) when considering the automatic deportation provision in s. 32(5) UK Borders Act 2007, and the exemption at s.33(2)(a) relating to the claimant's private and family life (Article 8 ECHR), the Tribunal must give careful consideration to the factors set out at paragraphs 70-73 of Maslov v Austria [2009] INLR 47 ECHR; and (ii) particular care is required in relation to the consideration of the Article 8 ECHR impact on those who were lawfully resident in the UK at the time when the offence was committed. What this case did not say was that this is all the Tribunal must consider and it is incumbent upon any Tribunal considering appeals against deportation orders to take a balanced view of the evidence and set out a proper analysis of the competing interests and give adequate reasons for the weight given to that evidence and for the conclusions reached.
6. In Maslov the ECtHR, First Chamber, said that in assessing whether the Austrian authorities struck a fair balance between the claimant's right to family and private life and the prevention of disorder and crime, the relevant criteria were (i) the nature and gravity of the claimant's offences (ii) the length of his

stay in the host country (iii) the period which elapsed between the commission of the offences and the impugned measure and the claimant's conduct during that period and (iv) the solidity of the social, cultural and family ties with the host country and the country of destination.

7. Another legal error in the determination is a lack of analysis of the weight given to the fact RJ is unable to satisfy the requirements of the Immigration Rules. In paragraph 35 of the determination there is reference to the application of paragraphs 399 and 399A and a statement that as the SSHD has decided these rules do not apply it will only be in the most exceptional circumstances that the public interest in deportation will be outweighed by other factors, but no more.
8. The Immigration Rules define the government's interpretation of Article 8. Since the above decisions were published and the day before the Panel promulgated the determination under challenge the Court of Appeal handed down its judgement in the case of MF (Nigeria) [2013] EWCA Civ 1192 in which the Master of the Rolls indicated that where the "new rules" apply in a deportation case, the "first step that has to be undertaken is to decide whether deportation would be contrary to an individual's article 8 rights on the grounds that (i) the case falls within para 398 (b) or (c) and (ii) one or more of the conditions set out in para 399 (a) or (b) or para 399A (a) or (b) applies. If the case falls within para 398 (b) or (c) and one or more of those conditions applies, then the new rules implicitly provide that deportation would be contrary to article 8" (paragraph 35). Paragraphs 399 and 399A can be thought of as setting out the exceptions to deportation (paragraph 14).
9. There is no mention of this important judgment in the determination which, it is arguable, should have been considered prior to the promulgation of the decision. If, as appears to be the case, although no specific finding is made it was accepted by the Panel that RJ is unable to satisfy the requirements of the Rules the position is as set out in paragraph 35 of their determination, namely that the key questions revolved around the 'exceptionality issue'.
10. In MF (Nigeria) the Master of the Rolls stated that the main issue concerned the position when the appellant could not succeed substantively under paragraphs 398 or 399 of the rules on a deportation and the determinative question is whether there are "exceptional circumstances" such that the public interest in deportation is outweighed by other factors (see paragraph 398 of the new rules). Here the Court accepted a submission for the SSHD that "the reference to exceptional circumstances serves the purpose of emphasising that, in the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who do not satisfy paras 398 and 399 or 399A. It is only exceptionally that such foreign criminals will succeed in showing that their rights under article 8(1) trump the public interest in their deportation" (paragraphs 39 and 40). The Court went on to say: "In our view, [this] is not to say that a test of exceptionality is being applied. Rather it is that, in

approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be "exceptional") is required to outweigh the public interest in removal" (paragraph 42). Although the Court disagreed with the Upper Tribunal in MF's case on the question of form, it did not disagree in substance (paragraphs 44 and 50). It differed from the UT in considering that the rules did mandate or direct a decision maker to take all relevant criteria into account (paragraph 44). Accordingly, the new rules applicable to deportation cases should be seen as "a complete code ... the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence" (ibid). "Even if we were wrong about that, it would be necessary to apply a proportionality test outside the new rules as was done by the UT. Either way, the result should be the same".

11. There is no analysis in the determination of how the Panel interpreted the phrase 'exceptional circumstances' and although the later decision of [Kabia \(MF: para 298 - "exceptional circumstances"\) 2013 UKUT 00569 \(IAC\)](#) was not at that time promulgated, the definition referred to by the Tribunal in that case is that contained in the SSHD's guidance to caseworkers to which the Panel had access. In [Kabia](#) it was held that (i) The new rules relating to article 8 claims advanced by foreign criminals seeking to resist deportation are a complete code and the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence: [MF \(Nigeria\)](#) (ii) The question being addressed by a decision maker applying the new rules set out at paragraph 398 of HC 395 in considering a claim founded upon article 8 of the ECHR and that being addressed by the judge who carries out what was referred to in [MF \(Nigeria\)](#) as the second step in a two-stage process is the same one that, properly executed, will return the same answer; (iii) The new rules speak of "exceptional circumstances" but, as has been made clear by the Court of Appeal in [MF \(Nigeria\)](#), exceptionality is a likely characteristic of a claim that properly succeeds rather than a legal test to be met. In this context, "exceptional" means circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that a deportation would not be proportionate".
12. The determination contains a number of factual findings but findings of fact are not the ultimate decision but stepping stones on the way to reaching such a decision. The Panel makes a number of findings in paragraph 47 but fail to adequately analyse the effect of deportation and how such an effect amounts to exceptional circumstances. This is important for in [Maslov](#) the Court state that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in [this] country very serious reasons are required to justify expulsion, whereas the Rules apply an arguably different test which is that if a person is unable to satisfy the requirements reflecting the will of

Parliament they can only remain if they prove the existence of 'exceptional circumstances'.

13. The Panel also failed to consider if Maslov is in fact relevant to this case as when RJ committed the index offence he was an adult – see Onur v. the UK (Application no. 27319/07) ECtHR Fourth Section where offences committed as a young adult meant the case was readily distinguishable from Maslov and Balogun v United Kingdom (Application no. 60286/09) ECtHR (Fourth Section), May 2012, in which the nature of the Applicant's offending and the fact that, with the exception of one conviction, all of his offences appeared to have been committed when he was over the age of eighteen meant that his case could be clearly distinguished from that of the applicant in Maslov.
14. In assessing the public interest the Panel should also have had regard to the case of Masih (deportation - public interest - basic principles) Pakistan [2012] UKUT 00046(IAC) in which the Tribunal said that so long as account is taken of the following basic principles, there is at present no need for further citation of authority on the public interest side of the balancing exercise. The following basic principles can be derived from the present case law concerning the issue of the public interest in relation to the deportation of foreign criminals: (i) In a case of automatic deportation, full account must be taken of the strong public interest in removing foreign citizens convicted of serious offences, which lies not only in the prevention of further offences on the part of the individual concerned, but in deterring others from committing them in the first place. (ii) Deportation of foreign criminals expresses society's condemnation of serious criminal activity and promotes public confidence in the treatment of foreign citizens who have committed them. (iii) The starting-point for assessing the facts of the offence of which an individual has been committed, and their effect on others, and on the public as a whole, must be the view taken by the sentencing judge. (iv) The appeal has to be dealt with on the basis of the situation at the date of the hearing. (v) Full account should also be taken of any developments since sentence was passed, for example the result of any disciplinary adjudications in prison or detention, or any OASys or licence report.
15. There is no mention of this case in the determination and, whilst I accept this is not necessarily a legal error if it is shown the required principles have been properly considered and applied, it was conceded before me that there is no mention of the deterrent element which is relied upon by the SSHD.
16. This is an automatic deportation case and so the Panel in assessing proportionality needed to have regard to the guidance given by the Court of Appeal in SS (Nigeria) v SSHD [2013] EWCA Civ 550 in which the appellant had been sentenced to 3 years for dealing drugs. He appealed relying on the best interests of his children. The Court of Appeal said that in previous cases in which potential deportees raise claims under article 8 relying on the children's interests, insufficient attention had been paid to the weight attached to the

policy of deporting foreign criminals which came from primary legislation. The deportation was upheld. The finding in relation to the weight to be given to the fact the deportation order reflected the will of Parliament was confirmed by the Court in Richards v Secretary of State for the Home Department [2013] EWCA Civ 244 in which the Court of the Appeal upheld the decision of the Upper Tribunal to dismiss the appeal saying that the important point was that the strong public interest in deporting foreign criminals was not merely the policy of the Secretary of State but the judgment of Parliament. That gave it special weight which the courts needed to recognise.

17. There is no analysis of the weight given to this factor by the Panel and it is not possible to infer from a reading of the determination if this element was considered and, if so, how it was resolved – other than the fact RJ succeeded which implies it was given little weight which may be arguably irrational.
18. I find the legal errors identified to be material to the decision. The determination shall be set aside although as there is no challenge to the factual findings made these shall be preserved.

The remaking of the decision

Discussion

19. RJ's case is based upon the fact he has been in the UK and is settled in this country and has lost ties with Dominica. The preserved findings are as follows:
 - i. Family life recognised by Article 8 had not been proved to exist between RJ and JR [38].
 - ii. Although RJ's parents and sibling are in the UK [39] it had not been proved family life recognised by Article 8 exists. The relationships do not go beyond normal emotional ties [41].
 - iii. RJ has established a considerable private life simply on the basis of his length of residence in the UK [41]. The issue in relation to Article 8 is that of proportionality [41].
 - iv. RJ was 17 when he committed the first offences for which he was convicted and 18 when he committed the Robbery [47(i)].
 - v. RJ has had continuous leave to remain since 2001. There is no indication he has overstayed his leave [47(ii)].
 - vi. There is no evidence RJ has committed further offences since June 2011 although he has been in detention since. He has obtained a number of educational certificates whilst in detention [47(iii)].

- vii. RJ has spent the majority of his childhood in the UK. He attended primary and secondary school here. The majority of his immediate family are in the UK. When RJ returned to Dominica with his mother in 1998 he lived with his mother and younger brother and attended school there. They lived with a friend of his mother. RJ has not maintained a link with Dominica. RJ has been offered an apprenticeship. He has a genuine desire to take up employment [47 (iv)]
20. It is not suggested before me that RJ is able to satisfy the requirements of the Rules and so this is a case in which consideration must be given to establishing whether there are circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that a deportation would not be proportionate. To enable such circumstances to be assessed I have considered the guidance provided by the case of Boultif v Switzerland [2001] ECHR 54273 as confirmed by Uner v the Netherlands [2007] Imm AR 303. In those cases the Court said that in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued, the following criteria had to be considered.
- (i) The nature and the seriousness of the offence committed by the Appellant;
 - (ii) The length of the Appellant's stay in the country from which he or she was to be expelled;
 - (iii) The time that had elapsed since the offence was committed and the claimant's conduct during that period.
 - (iv) The nationalities of the various parties concerned;
 - (v) The Appellant's family situation, such as length of marriage and other factors expressing the effectiveness of the Appellant's family life;
 - (vi) Whether the spouse knew about the offence at the time he or she entered into the family relationship;
 - (vii) Whether there are children in the marriage and if so their ages;
 - (viii) The seriousness and the difficulties which the Spouse is likely to encounter in the country of the Appellant's origin;
 - (ix) The best interests and well being of any children of the Appellant; and in particular the seriousness of any difficulties that they would be likely to encounter in the country to which the Appellant would be expelled;
 - (x) The solidity of social, cultural and family ties with the host country and with the country of destination.
21. RJ is a single man with no children and it is a preserved finding that he has no family life in the UK recognised by Article 8. In relation to the offence, His Honour Judge Price, sitting in the Crown Court at the Kingston Upon Thames, stated in his sentencing remarks:

At about two o'clock in the morning of the 15th June of this year all three of you decided to attack and rob [TJ], who was lawfully walking the streets. He was talking on the phone, and I have no doubt that this was the motivating factor behind your actions. He was attacked and kicked, which caused him to lose his balance and then fall to the ground. He hit his elbow and arm, causing bleeding and considerable pain. Even then he tried to hold on to his shoulder bag. He was then kicked three times, hard, on his torso, kicked on his leg, and it is clear that attempts were made to kick him in the head. He was able to ward off those kicks with his arm, whereupon he was kicked in that part of his body.

His bag was taken. He says that all three of you then started to laugh and say "We've got it." You all then ran off. Happily for justice you were soon apprehended. You have all pleaded guilty.....

....The aggravating features are that this was a robbery with all three of you playing a part, and so obviously outnumbering your victim. It was at two o'clock in the morning, another aggravating feature. Each of you is responsible for meting out gratuitous violence in the way I have outlined. This is, in other words, as is accepted, a level two offence so the custody threshold has been passed.

I now turn to consider each of you individually, starting with you, [RJ]. You are the eldest being now 19. You frankly admitted to the author of the pre-sentence report that you were the ringleader. You must take the greatest responsibility, both by that admitted fact and your age. You have previous convictions for burglary of a dwelling and common assault. You put forward the excuse that you were desperately short of money, because you had debts to drug dealers. It is an excuse which these Courts hear with regularity. It may well be true, but I have to say that affords little mitigation.

I consider than an immediate custodial sentence of imprisonment is justified and, indeed, required.

22. The Sentencing Judge clearly considered this to be a serious offence, which was accepted by the Panel [47(i)] and is a crime of violence. In the Pre-sentence report dated 19th October 2011 there is reference to RJ misusing drugs. In the section dealing with the assessment of serious risk of serious harm the author of the report states:

"... Having considered the nature of the current offence and past offences, I am of the view that [RJ] does not satisfy the above criteria and is not, in my opinion, dangerous. I do assess him as posing a high risk of harm to members of the public. In reaching this decision, I have considered the following in respect of the offence and [RJ]; that it was carried out at night, with 2 co-defendants on a lone victim, the fact that he admitted that he was one who

suggested the robbery and appeared to take the main protagonist role in it, his seniority in the group and that violence was used albeit from what information I have it appears no serious long term injuries were sustained by the victim. I have also taken into account his past offending behaviour and the compliance position on his current community order.

23. In relation to the risk of re-offending the author of the Pre-Sentence report concluded that as a result of the above issues, his guilty plea, victim empathy, acknowledgment of the impact of his crime, and the fact he has re-offended within a year, that RJ posed a medium risk of re-offending. The Panel refer in paragraph 45 of their determination to what they describe as a contradiction in the evidence in relation to the level of risk, This has occurred as a result of the existence of a letter from HMP Littlehay dated 26th January 2012 stating RJ did not meet the criteria for the TSP programme due to his assessed low risk of reoffending although the reasons for the same and the detailed basis on which this assessment was made have not been disclosed.
24. In any event risk of reoffending is not determinative. In Gurung v SSHD [2012] EWCA Civ 62 the Court of Appeal, when overturning a Presidential Upper Tier panel, said that the absence of a risk of reoffending, though plainly important, is not the "ultimate aim" of the deportation regime. We are troubled, too, by the proposition in paragraph 40(iii) (cited above) that the nature and seriousness of the offence do not by themselves justify interference with family and private life without prospective regard to the public interest. Although Mr Bourne does not seek to characterise this as an error of law, he is right, in our view, to suggest that it misplaces the emphasis. The Borders Act by s.32 decides that the nature and seriousness of the offence, as measured by the sentence, do by themselves justify deportation unless an exception recognised by the Act itself applies.
25. The contradictory nature of the evidence was not resolved before me and the Tribunal has a detailed Pre-sentence report and a memorandum from the prison containing no analysis of the facts that formed the basis of the conclusions as to risk. If RJ is alleging he only poses a low risk he must adduce sufficient evidence to prove this upon which due weight may be placed. I have noted the evidence of co-operation within the prison environment and lack of evidence of adjudications and the expressions of remorse and it may be that ongoing good behaviour is the basis for the assessment that the risk has reduced.
26. The period of time RJ has been in the UK is set out above. He has resided here continuously since 2001, a period of twelve years. I accept that RJ has not offended since the index offence but, as recognised by the Panel, he has been in custody and immigration detention since. It is reasonable to expect that he will not re-offend in such a controlled environment and that even if the risk of further offending may be low on release, this is the case only if he remains drug free.

27. In relation to nationality, RJ is Dominican.
28. In relation to the solidity of social, cultural and family ties with the host country and with the country of destination, it is accepted RJ has strong ties to the UK where he has developed a private life which includes his friends, family, his girlfriend, and where he has lived for most of his formative years. It is a preserved finding that RJ has not maintained a link with Dominica.
29. In relation to the removal of RJ, Miss Appia submitted that the fact RJ has his entire support network in the UK makes removal unreasonable. It was accepted that the public interest argument applied to all deportation cases but that this was not a trump card. It was further submitted that it would be harsh for RJ to be expected to return and this should tip the balance of the case in his favour. He will find it difficult in Dominica.
30. The fact his main family are in the UK has not been shown to be determinative of the appeal, although I accept life will be easier for RJ if he is permitted to remain in the UK. It may be difficult and possibly very hard for him to adapt to life in Dominica. He has not lived in that country for a number of years although does have extended family there. His mother refers in her witness statement to two of her sons from her first marriage living in Dominica and, although RJ may not personally have maintained contact with them, it is suggestive of a network which may possibly be able to assist if his mother asks for the same at times of difficulty. Dominica also has a relatively low crime rate for the Caribbean and it is not suggested RJ faces a real risk of harm sufficient to engage Article 3 in relation to any aspect of the case. Ms Appia confirmed that it is not being argued that return will result in destitution or a breach of Article 3 on a humanitarian basis.
31. Against these elements are the fact RJ is the subject of an automatic deportation order, he has been convicted of non juvenile criminal offences involving violence. He was the admitted ringleader of the gang that attacked the victim without provocation. He is a young male with some education who is capable of developing skills. There is no evidence of health issues and I note in the statements his mother's comment that she supports him financially and emotionally. There is no evidence the support provided by what is a close family will be lost if RJ is deported and it has not been shown that any support that could be provided whilst he obtains work and adapts to life in Dominica will be insufficient to meet at least his basic needs.
32. In the case of Masih it was recognised that the public interest in the prevention of crime and disorder includes two elements, the first of which relates to the risk of re-offending and the second to the deterrent element. Even if the risk of RJ re-offending is low there is a very strong argument that he be removed to provide an example to others who may be considering involving themselves in crimes of violence or gang type conduct that the UK Government will take firm steps to

remove them from the country. There is a real issue with gangs and related street criminality in this country, especially in the inner cities, and anything that can constructively serve to deter individuals from crimes of violence of this nature must be in the public interest.

33. The key element is the need to consider the question set out above, namely whether it has been proved there are circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that a deportation would not be proportionate. This is not only an issue under the Rules but also reflects the greater weight to be given to an automatic deportation order as per the cases of SS (Nigeria) and Richards v SSHD. The evidence and submissions have focused on the current circumstances and an allegation of hardship on return such as to make the decision unreasonable, but RJ has failed to substantiate his claim that removal will make the decision unlawful in relation to his case when a properly conducted balancing exercise is undertaken. The facts relied upon by the SSHD establish the decision is both lawful and proportionate, notwithstanding the time RJ has been in the UK. As stated in ME, the scales are heavily weighted in favour of deportation and something very compelling (which will be “exceptional”) is required to outweigh the public interest in removal”. Such very compelling circumstances have not been shown to exist in this case.

Decision

34. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

35. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed.....
Upper Tribunal Judge Hanson

Dated the 30th January 2014