Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/03977/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd January 2018	**On 22nd February 2018**

Before

UPPER TRIBUNAL JUDGE ANDREW JORDAN
DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR BORIS ZIVKOVSKI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Childs (Counsel)
For the Respondent: Mr I Jarvis (Senior HOPO)

DECISION AND REASONS

1. This is the re-making of the appeal following the decision of Upper Tribunal Judge Jordan to set aside the determination of First-tier Tribunal Judge Hanbury, promulgated on 16th December 2016, following a hearing at Taylor House on 4th November 2016. He found the determination contained an error on a point of law. His reasons for doing so are set out in the Appendix to this determination.

The Appellant

2. The Appellant is a male, a citizen of Macedonia, and was born on 28th August 1996. He appealed against the decision of the Respondent Secretary of State, dated 10th

November 2015, deciding to deport the Appellant as a persistent offender under paragraph 398(c) of the Immigration Rules. The Secretary of State determined that there were no compelling circumstances over and above those in paragraphs 399-399A of the Immigration Rules in the Appellant's favour, and that there were no very significant obstacles to the Appellant's reintegration into Macedonian society. Nor, were there 'very compelling circumstances' within paragraph 398 of HC 395 to outweigh the need to deport a foreign criminal. The Appellant had first come to the UK in February 2001, at the age of 4 with his mother. He was given indefinite leave to remain on 26th August 2009. Between 16th September 2010 and 16th September 2015, however, he committed six offences on six occasions, thus resulting in the Secretary of State's decision to deport him. The details of the offending are set out in the Appendix.

The Appellant's Claim

3. The essence of the Appellant's claim is that, although he has been convicted of six offences in total, all were committed whilst he was under the age of 18, and that no one offence has resulted in a sentence of imprisonment of greater than twelve months. His behaviour did not, accordingly, show a "particular disregard for the law".

The Judge's Findings

4. The judge did not accept the Appellant's attempt to mitigate the severity of his offences. He held that the offences were not minor. Moreover, the last offence was committed after his 18th birthday. The offence may well also relate to his gangland associates. This was even though the Appellant had attempted to explain his purchase of weapons on the basis that he wanted to display them as ornaments on his mother's wall. The judge had rejected such an explanation (paragraph 23). The Appellant's offending must be seen, according to the judge, against the background of his association with gangland members (paragraph 34). One person in fact, JA, whom the Appellant knew, was known to have been a member of the gang. Moreover, the Appellant had been the victim of a stabbing in the buttocks, which is a known gangland initiation technique. The Appellant had also used several aliases (paragraph 34). Account was taken by the judge of the leading judgment in **Maslov v Austria - 1638/03 [2008] ECHR 546**, as well as the Appellant's young age, during which time many of the offences were committed, but the judge concluded that given the numerous opportunities to improve his behaviour, and the Appellant's failure to do so, a deportation order was the appropriate course of action (paragraph 35). This was particularly the case given that the Appellant had been a guest in this country and there was a duty on the Secretary of State to protect the public interest (paragraph 36).

5. The appeal was dismissed.

The Finding of an Error of Law

6. The Upper Tribunal noted that the Appellant's last conviction was when he was aged 19. This was on 16th September 2015 at Uxbridge Magistrate's Court, where the

Appellant was convicted of possession of an offensive weapon, and sentenced to a twelve months' community order and 100 hours of unpaid work. The Appellant was at the time the subject of "Operation Nexus" which was aimed at targeting an increasing number of foreign nationals in the London area who were causing significant harm by their criminal activities. In fact, in relation to such gang activity the Appellant was encountered twenty times by the police between 31st October 2009 and 3rd February 2014. It was noted that before Judge Hanbury, however, when PC Raichira had given evidence, she had accepted that the Appellant had not been arrested since March 2016. The judge had moreover accepted the submission made on the Appellant's behalf that there was not a risk of future serious offending. The Upper Tribunal drew attention to the police officer's admission during cross-examination that there was no evidence to suggest that the Appellant had any ongoing contact with gangland associates anymore. Moreover, in the Rule 24 response, the Secretary of State did not dispute that such an admission had taken place.

7. Second, the judge had misdirected himself (at paragraphs 26 and 27) in relation to the application of the "very compelling circumstances" test. He had justified the deportation because the Respondent could demonstrate that there were very compelling circumstances justifying her decision. That, however, was not the test. The very compelling circumstances refer to the Appellant. The Senior Home Office Presenting Officer conceded that it would be unwise to rely upon a determination which was based upon a misunderstanding of the relevant legal framework. Since the judge had focused on the Respondent's circumstances, he had failed to examine the Appellant's case as to what were, or might be, the relevant circumstances.

8. Third, the pattern of offending must be seen within the context of the Appellant's age and the fact that he was a minor when all but one of the offences took place. Whilst reliance was placed upon the decision of the European Court of Human Rights in **Maslov v Austria**, it was important not to overlook the underlying principle, which was that juvenile delinquency has to be seen as an unpleasant and harmful episode, but it should nevertheless not be viewed in the same way as offending committed by an adult. This is because an adult has a greater level of maturity, understanding, and discernment between what is right and wrong. Criminal damage and possession of cannabis for personal use, and street fighting, are reprehensible conduct but, when committed by a minor, they should not be treated as determinative of a settled state of mind thereby classifying the individual as a persistent offender showing a particular disregard for the law.

9. In the determination by Judge Hanbury, it was stated (at paragraph 36) that, "I am not satisfied that the fact that the Appellant was below the age of 18 when most of the offences were committed provide sufficient excuse for his offending or place him in a special category..." The Upper Tribunal held that such a statement runs counter to the relevant jurisprudence which expressly requires the judicial decision maker to consider juvenile offending as requiring separate consideration and to avoid treating juvenile offending as indicative of future offending.

10. Accordingly, had the judge given consideration to these factors, his decision on whether the Appellant could *now* be classified as a persistent offender, might have been different and it therefore now required reconsideration.

11. The Tribunal proceeded to set aside the decision of First-tier Tribunal Judge Hanbury and directed that the remaking of the decision would be conducted by the Upper Tribunal.

The Hearing

12. At the hearing of 3rd January 2018 Ms Childs, appearing as Counsel on behalf of the Appellant, relied upon her Skeleton Argument, which was before the First-tier Tribunal. She submitted that the Appellant was not a foreign criminal. He was not a persistent offender. He did not come under Section 117, so as to justify his expulsion. She relied upon the Tribunal determination of **Chege ("is a persistent offender") [2016] UKUT 00187 (IAC)**, for the proposition that in assessing whether the Appellant is a persistent offender, who shows a particular disregard for the law, the onus was upon the Secretary of State to show that this was the case, and the standard of proof was on a balance of probabilities. The Tribunal had to consider the whole history of the individual from the commission of the first offence, right up to the date of the decision, and then ask itself whether the Appellant can properly be described as someone who keeps on committing criminal offences (see paragraph 57 of **Chege**). Ms Child submitted that the Respondent had not discharged that burden of proving that the Appellant was a persistent offender. What was relevant was the Appellant's offending. The statutory focus was on the offences he had been shown to have committed. Five of the six offences were committed when the Appellant was a minor. **Chege** did not consider whether being of minority age was a relevant factor in assessing the test in the Rules and Section 117B, although Ms Childs' submitted that it should be a relevant factor. It will obviously be established that a minor has the necessary *mens rea* to commit a criminal offence, but the Tribunal must, be more hesitant to find that a child has settled on a course of offending, or that the child shows a particular disregard for the law. Given that the Appellant was of a minor age when he committed five of the six offences upon which the Respondent relies, and considering the nature of the offending, which may be categorised as juvenile delinquency (as stated in **Maslov v Austria**), the Tribunal should hold that he was not a foreign criminal and allow his appeal.

13. Second, the Appellant was subject to the exception applicable in paragraph 399A, insofar as Section 117C(4) was concerned. This was because the Appellant arrived in the UK when he was 4 years of age. He undertook his entire education in this country. He only spoke English. The family members with whom he continues to have contact are here in the UK, including his mother, and his sister. He has also worked in the UK. He could not be considered to be socially and culturally integrated into Macedonian life. The Appellant's offending did not serve to establish that he was not integrated into the UK life. It was well-known that the Respondent had a policy which recognises that children who have lived in the UK for a continuous period of seven years would start to put down roots and integrate into life in the UK. Given this, the Appellant would now encounter very significant

obstacles to integration on deportation in Macedonia. There would be a language barrier for the Appellant and he has no experience of education or employment in Macedonia. His statement and those of his relatives all make it clear that he is not in contact with any family member in Macedonia. After all, the Appellant's mother left Macedonia when the Appellant was 4 years of age. The principle was also well-known that those, who had spent most or all of their childhood in the host country, were in a "special situation" requiring very serious reasons which justify expulsion, and this could be of added significance given that the Appellant had committed most his offences when he was a juvenile.

14. Ms Childs went on to explain that there was Pre-Sentence report of 16th September 2015 by Patricia H Ryan (see pages 210 to 211), who had stated with respect to the Appellant that,

> "He is suitable for a period of unpaid work. He now lives with his mum. He has never spent time in prison. So has not broken conditions. He has no family in Macedonia. He does not have family there. Therefore, there was a very significant risk to him if he was returned there."

15. For his part, Mr Jarvis, for the Respondent Secretary of State, submitted that paragraph 398(c) stated that the deportation of a person on conducive to the public good grounds was justified if "they are a persistent offender who shows a particular disregard for the law". There were concerns on the part of the judge (at paragraph 36) that the Appellant's offences may have related to gangland violence, and he had stated (at paragraph 34) that the Appellant used *aliases* to hide his identity as a gang member. After all, he had been stabbed in the buttocks as an initiation process. With respect to paragraph 399(a), in **Bossade (ss.117A-D-interrelationship with Rules) [2015] UKUT 00415 (IAC)** the Upper Tribunal confirmed that anti-social behaviour and criminality breaks down the continuum of integration in the UK, because the history of offending, "betokens a serious discontinuity in his integration in the UK especially because it shows blatant disregard for his fellow citizens." That was the position here. It was insufficient for the Appellant to rely on **Maslov v Austria** because the Court there did not create a special rule for juveniles. Many people committed offences when they were young. There were no very compelling circumstances in this case. There was a relatively high risk of re-offending in the next few years.

16. In reply, Ms Childs submitted that the Appellant may well have been a persistent offender when he was younger but he was not one now. At paragraph 13 of the grounds it had been stated that the Appellant had no longer any ongoing contact with gang members. None of the offences had been gang related. The Appellant could not reintegrate into life in Macedonia. In **Bossade**, the deportee was an adult. He was 29 years of age and he could work in the country of his origin. This was not the case here.

Remaking the decision

17. We have remade the decision on the basis of the decision finding an error of law on the part of the First-tier Tribunal Judge Hanbury, the submissions we have heard

today, and the findings that were made by the judge below. We are allowing this appeal for the following reasons.

18. First, it is well-established that juvenile delinquency has to be seen in a different manner to adult delinquency: see **Maslov v Austria**. In this case, five of the Appellant's six offences were committed when he was a minor.

19. Second, with respect to the future, the evidence of PC Raichira, who was cross-examined in the Tribunal below, was that there was no evidence to suggest that the Appellant had ongoing contact with gangland associates.

20. Third, the Appellant has not offended since.

21. Fourth, we accept the Appellant was a persistent offender (contrary to what Ms Childs has submitted before us) but this is a case where the Appellant did not commit serious offences.

22. Finally, he has been in the UK since the age of 4, he does not speak the language in Macedonia, has not worked there or been educated there, and would not be able to reintegrate into that country. There are very compelling circumstances on his part suggesting he should not be deported because as was stated in **Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813**, the concept of a foreign criminal's "integration" into the country to which it is proposed that he should be deported, as set out in Section 117C(4)(c) and paragraph 339A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. In fact, the idea of "integration" is one which,

> "calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and the capacity to participate in it, so as to have a reasonable opportunity to be accepted there..." (see paragraph 14).

In this broad sense, we are of the view that the Appellant would not be able to integrate into Macedonian society.

DECISION

1. The Judge made an error on a point of law.
2. We re-make the decision allowing the appellant's appeal against the respondent's decision of 26 January 2016 refusing the appellant's human rights claim and the decision to deport him pursuant to Section 5(1) of the Immigration Act 1971.

No anonymity direction is made.

Signed Dated

Deputy Upper Tribunal Judge Juss 12th February 2018

Appendix

DECISION ON ERROR OF LAW

Representation:
For the appellant: Ms G. Peterson, Counsel, instructed by Bijana & Co., solicitors
For the respondent: Mr P. Deller, Senior Home Office Presenting Officer

1. The appellant is a citizen of the Former Yugoslav Republic of Macedonia who was born on 28 August 1996. He is 21 years old. He arrived in the United Kingdom aged 4 and has remained here ever since.

2. The appellant appeals against the determination of First-tier Tribunal Judge Hanbury whose determination was promulgated on 16 December 2016 dismissing the appellant's appeal against the decision made by the Secretary of State on 10 November 2015 intending to deport the appellant as a persistent offender within paragraph 298(c) of the Immigration Rules.

3. The relevant rules are

> **Deportation and Article 8**
>
> 398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State,…they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph …399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraph...399A.
>
> 399A. This paragraph applies where paragraph 398…(c) applies if –
>
> (a) the person has been lawfully resident in the UK for most of his life; and
>
> (b) he is socially and culturally integrated in the UK; and
>
> (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

4. The judge described the offences as principally for possession of controlled drugs (cannabis) all of which were committed whilst the appellant was a minor, save for the last offence.

5. The appellant's history of offending, extracted from the decision letter consists of 6 convictions:

(i) On 16 September 2010 the appellant was convicted of destroying or damaging property and sentenced to a three-month referral order.
(ii) On 2 November 2010 the appellant was convicted of using disorderly behaviour or threatening, abusive and insulting words which resulted in an extension of the referral order.
(iii) On 25 January 2012 the appellant was convicted of affray and sentenced to a 12 month use rehabilitation order, a six-day activity requirement and a four-month curfew requirement.
(iv) On 17 April 2013 the appellant was convicted of possession of a class B drug for which he was conditionally discharged for six months.
(v) On 4 February 2014 the appellant was convicted of possession of a class B drug and find £50.
(vi) (In paragraph 34 of his determination, the First-tier Tribunal Judge appears to place reliance on an offence which took place on 7 July 2012 when the police officer confirmed in evidence that his mobile telephone showed he was not in the area at the time.)

6. The final conviction took place on 16 September 2015 at Uxbridge Magistrates Court where the appellant was convicted of possession of an offensive weapon and sentenced to a 12 month community order and 100 hours of unpaid work. At the date of conviction the appellant was aged 19. There have been no further offences since.

7. However, the appellant was the subject of Operation Nexus targeting an increasing number of foreign nationals in the London area causing significant harm by criminal activities. The appellant was encountered 20 times by the police between 31 October 2009 and 3 February 2014 in relation to gang activity carried out by a large number of associates most or all of whom had criminal convictions.

8. PC Raichira gave evidence. She accepted that the appellant had not been arrested since March 2016. The judge accepted the submission made on the appellant's behalf that there was not a risk of future serious offending. However he did not accept there was not a risk of continuing offending were the appellant to be successful in the present appeal. I shall refer to this element later in this decision.

9. The grounds of appeal asserted the judge failed to consider the police officer's admission during cross-examination that there was no evidence to suggest the appellant had ongoing contact with 'gangland associates'. In the respondent's rule 24 notice the Secretary of State does not dispute that such an admission took place. In due course, it will, however, have to be proved.

10. I am satisfied that in reaching his conclusion, the judge materially erred.

11. In paragraphs 26 and 37 of his determination, the judge misdirected himself in relation to the application of the 'very compelling circumstances' test. He justified the deportation because the respondent could demonstrate there were very compelling circumstances justifying her decision. That is not the test. The very

compelling circumstances refer to the appellant. Given the circumstances of this case, Mr Deller accepted that it would be unwise to rely upon a determination which is based upon a misunderstanding of the relevant legal framework. By focussing on the respondent's circumstances, the judge did not examine the appellant's case as to what were or might be relevant circumstances.

12. More importantly, perhaps, the pattern of offending must be seen within the context of the appellant's age and the fact that he was a minor when all but one of the offences took place. Whilst great reliance is placed upon the decision of the ECtHR in *Maslov v Austria* (2008) EHRR 546, the underlying principle is universal. Juvenile delinquency has to be seen as an unpleasant and harmful episode but it should not be viewed in the same way as offending committed by an adult who should have developed a greater level of maturity, understanding and discernment between what is right and wrong. It was for this reason that the Court said that there was

> little room for justifying an expulsion of a settled migrant on account of mostly non-violent offences committed when a minor.

In the context of this case, it is particularly apposite and crucial to the process of decision making. Criminal damage and possession of cannabis for personal use and street fighting are reprehensible conduct but, when committed by a minor, they should not be treated as determinative of a settled state of mind thereby classifying the individual as a persistent offender showing a particular disregard for the law. It is not simply a pipe dream that juvenile offending is reversible with growing maturity. In the circumstances of this case, (i) there was no evidence of recent offending save for the offence in 2014 (ii) Mr Blundell's assertion in the grounds of appeal (the Counsel who represented the appellant before the First-tier Tribunal) that the police officer admitted during cross examination that there was no evidence to suggest the appellant had ongoing contact with his former gangland associates (iii) the judge's concession in the determination and in the probation service report that there was no risk of future serious offending.

13. In paragraph 36 the judge said:

> I am not satisfied that the fact that the appellant was below the age of 18 when most of the offences were committed provide sufficient excuse for his offending or place him in a special category. Insofar as the appellant is within such a special category, I take full account of all the circumstances and reject the suggestion that he will not reoffend.

14. In my judgment that passage runs counter to the relevant jurisprudence which expressly requires the judicial decision maker to consider juvenile offending as requiring separate consideration and to avoid treating juvenile offending as indicative of future offending.

15. Were the judge to have given consideration to these factors, his decision on whether the appellant could *now* be classified as a persistent offender might have been different and will require reconsideration.

16. I set aside the decision of the First-tier Tribunal. The re-making of the decision will be conducted in the Upper Tribunal.

I direct

If the appellant seeks to adduce further evidence, he must file and serve an additional bundle of material within 28 days of the date of this direction.

ANDREW JORDAN
UPPER TRIBUNAL JUDGE
18 October 2017