



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/00166/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 4 September 2013**

**Determination
Promulgated
On 28 November 2013**

Before

**LORD BANNATYNE, SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE KOPIECZEK**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ABDULLAH HASHIM MAHAMODHOSSEN

Respondent

Representation:

For the Appellant: Mr Avery, Home Office Presenting Officer
For the Respondent: Mr S Gokhool, Solicitor

DETERMINATION AND REASONS

Introduction

1. This matter came before us as an appeal on behalf of the Secretary of State against a determination of the First-tier Tribunal (“Tribunal”) promulgated on 23 May 2013.

2. Permission to appeal against the determination was granted on 13 June 2013.
3. The Tribunal heard an appeal against a decision of the Secretary of State dated 8 January 2013 to make a deportation order by virtue of Section 3(5) (a) of the Immigration Act 1971. The Tribunal decided: (1) to dismiss the appeal in terms of the Immigration Rules and (2) to allow the appeal in terms of Article 8 of the Human Rights Convention. It was against the second decision that the Secretary of State appealed.

Background

4. The respondent is a citizen of Mauritius born on 26 December 1994. He is a single man with no dependants. The respondent first came to the United Kingdom on 31 March 2004 when he was 9 years old. He was a dependent of his mother and was granted six months leave along with his father and younger sister. Further leave was granted to him in this category up to and including an application made on 29 November 2010. The respondent's family's application was refused on 17 March 2011 owing to issues about maintenance/funding. The family's appeal rights were exhausted on 26 February 2013. They submitted a further application for leave to remain on 15 May 2013, which application had not been dealt with at the time of the hearing before the Tribunal.
5. Since his arrival in the United Kingdom, the respondent has only visited Mauritius on one occasion. He was taken to Mauritius in 2007 by his father. The reason for this visit was that he had been bullied in school and he had been taken to Mauritius to get away from things in the United Kingdom. On that occasion he spent one month in Mauritius.
6. The respondent has relatives in Mauritius, namely: his paternal grandmother and his paternal uncles.
7. On 25 February 2011 the respondent was convicted of violent crimes; these were: attempting to cause grievous bodily harm; possession and/or use of an offensive weapon (non-firearms); and assault occasioning actual bodily harm. He was sentenced to three years and three months' imprisonment.
8. The respondent has a number of previous convictions, beginning in August 2009 which include, in addition to his recent offences, common assault, robbery, burglary, theft, using abusive words or behaviour, possession of a controlled drug and attempted robbery. The sanctions imposed for those earlier offences ranged from a ten month referral order, a twelve month supervision order, a conditional discharge, a fine and a youth rehabilitation order.
9. When sentencing the respondent on 25 February 2011 the trial judge noted that the respondent's criminal behaviour was escalating and took

into account the fact that as a youth then aged 16, he was more able if so inclined to change. Beginning with a custodial sentence at the top end of the range of eight years, the judge reduced the sentence to 39 months to reflect the fact that the most recent incident was charged as an attempt. In addition, the age of the respondent and his guilty plea were also taken into account.

Submissions on Behalf of the Secretary of State

10. Mr Avery on behalf of the Secretary of State opened his submissions by drawing to our attention that the Tribunal had applied a two stage test in its consideration of the case. First, it had considered the respondent's case in terms of the Immigration Rules and then turned to examine, separately, the respondent's case in terms of Article 8. This approach, he submitted, was wrong in law. In elaboration of that contention, he argued, that paragraphs 398, 399 and 399A of the Immigration Rules reflect the **Maslov/Boultif** principles in a way that ensures consistency of assessment. The Rules cover the key **Maslov** factors on the seriousness of the criminality, relationships with family members such as spouses or children, and long term residence and private life. In addition there is the ability to take into account exceptional factors as set out at paragraphs 397 and 398. Given that such a comprehensive approach was taken in the relevant Rules, he submitted that it was an error of law to apply a two stage test.
11. The second branch of his argument was to this effect: that even if the proper approach to the matter was to apply a two stage test then when making the assessment in terms of Article 8, the Tribunal must give significant weight to the relevant Rules. In advancing that proposition, Mr Avery relied on the decision of the Upper Tribunal in **MF (Nigeria) (Article 8 - new rules) [2012] UKUT 00393 (IAC)**.
12. The background to **MF (Nigeria)** was the consideration of the (at that time) newly promulgated Immigration Rules and their impact on Article 8 claims, and at paragraph 43 the Upper Tribunal observed regarding these new Rules:

“Whereas previously it has been open to judges, within certain limits, to reach their own view of what the public interest is and the weight to be attached to it, the scope for doing so is now more limited.”
13. At paragraph 48 of its determination, the Upper Tribunal reinforced the foregoing observation when it said this:

The new Rules have: “enhanced judicial understanding of the public interest.”
14. Mr Avery contended that the Rules were now a clear expression of the public interest and the weight attached to it, as set out by the Secretary of

State and endorsed by Parliament. The Tribunal, he submitted, must have regard to the nature and weight of that public interest as expressed in the Rules when assessing a claim under Article 8. He again found support for his position in **MF (Nigeria)** and in particular from the observations of the Upper Tribunal at paragraph 70 where it said this:

“That (the appellant) has failed to meet the requirements of the new rules is a very significant consideration and the reasons why he has been found to fail are also relevant when conducting our proportionality assessment.”

15. Mr Avery submitted that on a proper reading of the Tribunal’s determination it had failed to consider the Rules and the appellant’s failure to meet the requirements thereof in the course of its assessment of the Article 8 claim and thus, having regard to the guidance in **MF (Nigeria)**, had erred in law.
16. The third leg of the argument on behalf of the Secretary of State was this: At paragraph 32, the Tribunal had found that it would be speculative to come to a conclusion about the future enjoyment of the respondent’s family life in Mauritius whilst his parents and siblings’ immigration status was unconfirmed. It was Mr Avery’s position that the Tribunal had failed to provide adequate reasons why the respondent’s family’s immigration status was not relevant. The Tribunal were aware that the respondent’s family had exhausted their appeal rights as of 26 February 2013, and whilst they had submitted an application for leave to remain on 15 May 2013, the Tribunal had failed to provide adequate reasons as to why this application would have had any prospect of success given that they had so recently had their previous appeal dismissed by the Tribunal.
17. He submitted that in these circumstances the respondent’s family’s immigration status was entirely relevant, and given their immigration status was uncertain, he submitted that his family was likely to have to return to Mauritius to continue their family life and therefore the respondent would have family support in Mauritius.
18. In any event, even if his family did remain in the UK, it was his position that the respondent had spent his formative years in Mauritius, had family members there who he could turn to for support and had visited Mauritius. In those circumstances he submitted that he did have ties to Mauritius. The respondent was an adult and there was no evidence of any dependency upon his parents or siblings, beyond normal emotional ties, and moreover his parents could send him financial support from the UK, if they did not return with him.
19. Lastly, he directed our attention to paragraph 38 of the Tribunal’s determination where it was found that the respondent had been assessed as posing a high risk of harm to the public and a medium risk of reoffending in the Pre-Sentence report. He submitted that the Tribunal

had failed, in light of the said finding, to provide any reasons as to their own findings of his risk of harm and reoffending. Additionally, given that the assessment stated that the respondent would require family support to reduce these risks and to remain drug-free, the Tribunal had failed to provide adequate reasons as to his risk if his family were removed to Mauritius, which given their immigration history was likely, and which would thus increase his risks.

20. It was submitted that each of the foregoing errors amounted to a material error of law and that in any event, when taken together, they amounted to a material error of law, and he moved that we should grant the appeal.

Reply on Behalf of the Respondent

21. Mr Gokhool commenced his submissions by contending that the Tribunal had properly addressed the Immigration Rules and that the two-step test which it had adopted was correct.
22. He submitted that as regards family life the Tribunal had correctly analysed this (see: paragraph 32 of the determination).
23. Under reference to paragraph 29 of the determination, he contended that the Tribunal had analysed the position regarding his ties to Mauritius and correctly held that he had no ties thereto.
24. His position was that the Tribunal had properly analysed the issue of risk of reoffending. It started its consideration at paragraph 39 by accepting the seriousness of the offence with which the respondent had been convicted and his very poor record of offending. However, the Tribunal had then accepted the respondent's position that he had changed and that his family was willing to support him. He laid particular emphasis on the last sentence in paragraph 39 of the determination:

“He (the respondent) is still a very young man who if removed at present would lose the practical and emotional support which comes from living with his family that he needs to keep him out of trouble.”

25. He submitted that overall the Tribunal had properly carried out the balancing exercise when considering the issue of proportionality.

Discussion

26. As regards the first branch of the Secretary of State's argument, we have no difficulty in rejecting this. **MF (Nigeria)** and **Izuazu v SSHD [2013] UKUT 45 (IAC)** make it clear that the correct approach, in such circumstances, is a two step one: first, a consideration of the Immigration Rules and secondly a separate consideration of Article 8.

27. However, it appears to us that there is considerably more force in the second branch of Mr Avery's argument. It is clear from **MF (Nigeria)** that when conducting the proportionality assessment in terms of Article 8 a decision maker must have regard to the nature and weight of the public interest as expressed in the Immigration Rules.
28. The Tribunal's discussion of the Article 8 issue is between paragraphs 31 and 40 of the determination. When these paragraphs are considered, we are unable to identify any point at which the Tribunal, when conducting its proportionality assessment, has regard to the Immigration Rules, the respondent's failure to meet the requirements of the Rules, and the reasons for his failure. These are significant considerations and the failure to engage with these issues in our judgment amounts to a material error of law.
29. Turning to the third leg of Mr Avery's argument, we believe that there is substantial merit in this submission.
30. The Tribunal at paragraph 32 fails to engage with the issue of the immigration status of the respondent's family. This issue is clearly of relevance. It is of relevance in the consideration of proportionality in that, if the expectation or likelihood is that the respondent's family will be returned to Mauritius then the respondent's family life would not be likely to be interfered with to any material extent were he to be deported to Mauritius.
31. Given that the respondent's family had exhausted their appeal rights as of 26 February 2013 then on balance, the likelihood is that they would be returned to Mauritius. Accordingly, it appears to us that it would not have been "speculation" as asserted by the Tribunal "to come to a conclusion about the future enjoyment of family life in Mauritius".
32. At paragraph 39 of their determination the Tribunal says this:

"He is still a very young man who if removed at present would lose the practical and emotional support which comes from living with his family that he needs to keep him out of trouble."
33. This finding highlights the relevance of the immigration status of the respondent's family, in that if they were not in the United Kingdom then they could not offer support to the respondent in the United Kingdom. It is clear in looking at the Tribunal's whole reasoning on the Article 8 issue, and particularly when the above passage is looked at, that the Tribunal has assumed the respondent's family will remain in the United Kingdom. For this conclusion there is no basis in the evidence.
34. For these reasons we believe that the foregoing amounts to a further material error of law.

35. Turning to the last chapter in Mr Avery's submissions, we observe that at paragraph 29 the Tribunal notes that in a Pre Sentence report prepared regarding him the respondent was said to be:

“assessed as posing a high risk of harm to the public, medium risk of reoffending.”

36. It is implicit in the Tribunal's determination that it has downgraded these findings and arrived at its own conclusion as to risk (see: paragraph 39 of the determination).

37. In arriving at its own view as to risk, the Tribunal has failed to provide adequate reasons. The factors to which the Tribunal refers at paragraph 39, in reaching its said decision, are almost entirely factors which were had regard to in the Pre Sentence report and therefore do not justify any downgrading of the risk which the respondent poses.

38. In addition in paragraph 39 no consideration is given to the prospect of the respondent not having the support of his family. His having their support is a critical factor in the Tribunal's Article 8 assessment. We have, earlier in this determination, opined as to the likelihood of their being in the United Kingdom given their immigration status. Accordingly in its Article 8 assessment the Tribunal had to have regard to this factor. It did not do so.

39. When taken cumulatively, these errors of law go to the core of the reasoning of the Tribunal in reaching its decision regarding proportionality and are clearly therefore material errors of law. In these circumstances the decision of the Tribunal must be set aside.

40. Having orally advised parties that we had concluded that there were material errors of law, we moved on to hear submissions regarding the remaking of the decision.

Remaking of the Decision

41. Mr Gokhool made the following submissions. He reminded us that the respondent had arrived in the United Kingdom at the age of 9 and had completed his primary education here and had had all of his secondary education in this country. It was his position that the respondent had changed since serving his prison sentence. He had committed no offences since his release. He had been to Mauritius only once since he had come to this country. He had built a private life in this country. He had a family life here and was particularly dependent upon his parents. He reminded us that the respondent was only fifteen to sixteen when the offences earlier noted had been committed. He had been part of a gang. He had paid the consequences for his offences.

Reply for the Secretary of State

42. Mr Avery relied on the terms of the Secretary of State's decision letter. In addition he relied on his earlier submissions made regarding the issue of error of law. He pointed out that the respondent had always been in the United Kingdom in a temporary capacity and must accordingly always have thought that he was returning to Mauritius. The expectation was, given his family's immigration status, that they would also be returning to Mauritius.
43. He submitted that considerable weight must be placed on the nature and seriousness of the offence last committed by the respondent, his history of offending and his risk to the public. He submitted, having regard to these factors, that there was a clear public interest in his removal.

Discussion

44. As a starting point, we have had regard to the guidance provided in **MF (Nigeria)** and have had regard when assessing this claim under Article 8 to the nature and weight of the public interest as expressed in the Immigration Rules.
45. Secondly, in making our Article 8 assessment, we have had regard to the observations of the ECHR in **Maslov v Austria [2008] ECHR (GC) 1638/03**, namely:

“Although Article 8 provides no absolute protection against expulsion for any category of aliens, including those who were born in the host country or moved here in their early childhood, the court has already found that regard is to be had to the special situation of aliens who have spent most, if not all, of their childhood in the host country, or brought up there and received their education there.

In short, the court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country, very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile.”

46. In considering the impact of **Maslov** in the instant case we would observe that the respondent could not be described as a “settled migrant” given that his status in this country was always temporary, being dependent upon his mother who was making a series of applications based on her status as a student. However, despite this we accept that in the whole circumstances of this case, very serious reasons are required to justify the expulsion of the respondent.
47. In considering whether such very serious reasons exist we have had regard to the following factors:

- (i) Seriousness of the index offences. The circumstances of the offences as set out in the sentencing judge's sentencing remarks are these:

"The circumstances of those offences are that on the day in question there had been an argument between your girlfriend ... and Ms ..., a schoolgirl then aged 15, during which a physical altercation took place.

After that had taken place your girlfriend shouted to Ms ... that she was dead, and she then called you to come and sort her out, which you did.

As a result of that call you armed yourself with a large kitchen knife and then went to the area where the incident occurred.

You saw Ms ... walking along the road with a friend as she was making her way to a recreation centre. You chased her across the road and then deliberately tripped her up, causing her to suffer the injuries which I have seen on the photographs that have been handed up to me.

She had a serious abrasion, bruising to her left elbow and bruising to her torso and her legs.

Having caused her to fall to the ground, you then took out the knife that you had taken with you, holding it in your right gloved hand, and interestingly you did not have a glove on your left hand, you then attempted to stab her with the knife.

Fortunately for her she is a lot taller than you so was able to use her legs to kick out as you repeatedly attempted to stab her. But as a result of her kicking out she prevented you from being able to achieve your objective.

You were eventually stopped by a passerby ... who shouted at you to stop, confronted you and at which stage you then brandished the knife at him."

- (ii) The respondent's record of offending.
- (iii) The escalation in gravity of this offending, as noted by the Tribunal at paragraph 33 of its determination.
- (iv) The risk the respondent poses, which is set out at paragraph 38 of the Tribunal's determination:

"He was assessed as posing high risk of harm to the public, medium risk of reoffending."

48. The forgoing factors in our view form an extremely pressing public interest case for the appellant's deportation. These factors raise in the starkest terms the need to protect the public from serious crime and its effects. We remind ourselves of the observations in **DS India [2009] EWCA Civ 544** and **JO (Uganda) [2010] EWCA Civ 10** that in deportation cases greater weight can be placed on criminal activity and its effect in the balancing exercise than in other types of cases (see: Rix LJ at paragraph 30 of **DS** and Richards LJ at paragraph 29 of **JO**).
49. Moreover, in our view there is a further aspect of public interest as explained by Aikens LJ in **RU (Bangladesh) v the Secretary of State for the Home Department [2011] EWCA Civ 651** at paragraph 43 where he observes:
- "The point about "deterrence" is not whether the deportation of a particular "foreign criminal" may or may not have a deterrent effect on other prospective offenders. It concerns a much more fundamental concept which is explained by Judge LJ at [83] of his judgement in **N (Kenya)**. The UK operates an immigration system by which control is exercised over non-British citizens who enter and remain in the UK. The operation of that system must take account of broad issues of social cohesion in the UK. Moreover the public has to have confidence in its operation. These requirements are for the "public good" or are in the "public interest". For both of these requirements to be fulfilled the operation of the system must contain an element of deterrence to non-British citizens who are either already in the UK ... or are thinking of coming to the UK" so as to ensure that they clearly understand that, whatever the circumstances, one of the consequences of crime will be deportation."

It seems to us that this is a further factor in the public interest favouring deportation.

50. When taken in cumulo, we consider that these factors amount to very serious reasons in terms of the decision in **Maslov v Austria**.
51. Further, we observe that in relation to the respondent's family life, the expectation is, given his family lack of status in this country, they will not remain here and will return to Mauritius. Accordingly, the respondent would be able to continue his family life and have the support of his family in Mauritius.
52. Assuming the above is wrong and the respondent's family remains in the United Kingdom, we do not believe that the breaching of his family relations to the extent that he was in Mauritius and they were in the United Kingdom would be sufficient to prevail over what we have earlier described as the extremely pressing public interest in the respondent's deportation.

53. We would observe in relation to such disruption as there would be that his family could keep in contact with him, and he could keep in contact with them through modern means of communication. His family could, if they so wished, support him financially in Mauritius. They could visit him in Mauritius. We note that his father took him to Mauritius for a month in 2007 (see: paragraph 29 of the Tribunal's determination). Given the nature of his immigration status in this country, as we have earlier described it, this is not a case where he must have formed a view that he was to remain in this country, rather the view that he would have formed must have been that he would return to Mauritius at some point.

54. In their determination at paragraph 29, the Tribunal says this:

“He (the respondent) has no family there (in Mauritius) on his mother's side; his paternal grandmother is 85 and it was plain from comments made during the hearing that he has little time for his paternal uncles and has no relationship with them. As stated in the recent case of **Ogundimu (Article 8 - new Rules) Nigeria (2013) UKUT 45 (IAC)** the word 'ties' involves there being a continued connection to life in that country and involves something more than merely remote or abstract links to the country of proposed deportation or removal. We are therefore satisfied that the appellant has no ties to Mauritius.”

55. We note what is said in **Ogundimu**. However, given the basis upon which the respondent was in this country, namely a temporary basis based on his mother's applications as a student, and given that his father took him to Mauritius, at a time when he was having difficulties in this country (see: paragraph 29 of the Tribunal's determination), when taken together with his having a grandmother and uncles on the island, we believe that applying the guidance in **Ogundimu** the respondent still has ties to Mauritius.

56. In conclusion, having considered all of the factors, we do not believe it is disproportionate for the respondent to be removed.

Signed

Date

Lord Bannatyne, Sitting as a Judge of the Upper Tribunal