



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

Appeal no: **DA/01606/2013**

THE IMMIGRATION ACTS

At **Field House**
on **27.10.2014**

Decision signed:
sent **31.10.2014**
out:
04.11.2014

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Daniel Stephen CABRERA Torres

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: *Olanrewaju Oke* (counsel instructed by Universal)

For the respondent: Mr S Kandola

DETERMINATION AND REASONS

This is an appeal, by the respondent to the original appeal against the decision of the First-tier Tribunal (Judge Lawrence Lobo and a lay member), sitting at Taylor House on 30 May, to allow a deportation appeal by a citizen of Ecuador, born 22 October 1991. On 31 May 2011 he was found guilty by a jury of robbery, and on 1 July that year sentenced to six years' detention in a young offenders' institution [YOI]. That sentence was later reduced by the Court of Appeal to one of five years' detention; but the judgment, giving reasons for that decision, was not produced by either side.

2. Three young men were involved in the offence, of whom Castro was also found guilty of manslaughter. The sentencing judge, addressing all of them, said this: the victim

... was very drunk. You could see his condition on the video ... I have no doubt that you regarded him as easy prey. ... you, Castro, delivered a very heavy punch to [the victim]'s face. The punch fractured his jaw and sent him on an accelerated fall to the ground where his head struck the pavement. As a result of that fall the base of his skull was fractured and his brain was damaged. Within moments of him hitting the ground, all three of you were upon him looking for what you might take from him. In fact, possibly the only thing that was taken was a mobile phone ...

3. The judge found that the injuries the victim had received were a substantial cause of his death, partly because they had contributed to his failure to take the hydrocortisone on which he depended to relieve the condition, possibly Addison's disease, from which he suffered. The heavy punch landed on him had not been necessary; probably a mere threat of force would have enabled the robbery to be carried out. As the judge had directed the jury, they would have had to be satisfied, before finding either this appellant, or the other young man, Bustillos, guilty of robbery, that he had been aware of Castro's plan to use force on the victim before he landed the punch.
4. The judge sentenced Castro, 20 at the time of the offence, and with one previous conviction for robbery, to ten years' imprisonment for that and the manslaughter concurrently; Bustillos, 23 at the time, and with three previous robberies, received seven for this one. The judge took full account, in all their cases, of the negligent treatment the victim had received in hospital; and, sentencing this appellant, still 19 at the time, and with no previous convictions at all, he made what he described as "some further distinction" between him and Bustillos, reducing his sentence to six. Perhaps the Court of Appeal thought that was not enough difference: that of course is speculation, but certainly nothing else is apparent from the judge's remarks which could have taken his final sentence down to five.
5. The panel directed themselves in accordance with Masih (deportation - public interest - basic principles) Pakistan [2012] UKUT 46 (IAC) as to the sentencing judge's remarks being the starting-point for their consideration of the appellant's offence, and its effect on others. They also had in mind MF (Nigeria) [2013] EWCA Civ 1192, which they cited at some length in their paragraph 15, and at 16 noted this from paragraph 45 of the judgment

... the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence.
6. The panel had already pointed out at paragraph 14 the need for such circumstances, if they were to allow the present appeal. However, in their review of the law at 17 - 23, otherwise impeccable, they went on to consider the nature of the balancing exercise in terms no different from those which would have been appropriate before the 'new Rules' (in force from 9 July 2012) made it necessary for cases which did not satisfy them to show exceptional or compelling features, as set out in MF (Nigeria).

7. The 'new Rules' of course contained such a requirement at paragraph 398: since this appellant had been sentenced to a term of at least four years (realistically, Mr Oke did not seek to make any distinction for this purpose between imprisonment and detention in a YOI), he could not benefit from the qualifications in paragraphs 399 or 399A. It followed that, whether under the terms of paragraph 398 or the law as set out in *MF (Nigeria)*, this appellant needed to show such "...exceptional circumstances that the public interest in deportation will be outweighed by other factors."
8. At paragraph 33, the panel set out at (a) - (e) the usual general considerations: at (f), they noted the factors in this appellant's favour. Then, without further reference back to the sentencing judge's remarks or the facts of the offence (though they had said something about the appellant's involvement in it at 32 (c) - (d)), they went on to say this at 33 (g)
- The respondent has failed to persuade us that there are "very serious reasons" to justify the deportation of the appellant to Ecuador.
9. The phrase quoted came of course from the well-known decision of the European Court of Human Rights in *Maslov v. Austria* - 1638/03 [2008] ECHR 546, which the panel had cited at paragraph 20. The need for such reasons applied to this appellant because he was a 'settled migrant' who had lawfully spent all or most of his childhood and youth in this country, though he had not been a 'juvenile' in terms of the age of majority in this or most other European countries when he committed his offence.
10. The Upper Tribunal permission judge made this observation
- It may be that the judge [*he meant of course the panel*] has wrongly shifted the focus from a search for whether the *appellant* [*his emphasis*] has identified the exceptional circumstances demanded by paragraph 398 of the rules to an assessment of whether the *respondent* has identified the very serious reasons discussed in *Maslov* : see now *R (Akpinar) v SSHD* [2014] EWCA Civ 937.
11. *Akpinar* of course contains an exhaustive review, both of the facts of the two cases concerned, and of *Maslov* and the rest of the relevant jurisprudence. However, perhaps the most interesting part for present purposes comes at paragraphs 55 - 56, where the Court of Appeal considered the application of the law to Akpinar's case. He was even younger than this appellant, apparently not yet 18 when he committed the offence in question; but unlike him, he had a substantial, though not particularly serious record of previous offending. Again unlike him, however, he was sentenced to no more than the minimum term, 12 months' detention, entailing his automatic deportation. It followed that he could have benefited from the provisions of paragraph 399A (b) of the Rules, if appropriate, which may have been one reason why (see next paragraph) the Court of Appeal referred to his continuing ties with Turkey.
12. At paragraph 55, the Court of Appeal (Sir Stanley Burnton, delivering the only reasoned judgment) referred to the need for exceptional circumstances, and went on:

The [*First-tier*] Tribunal found that there were none, and in my judgment there was ample material before them: the seriousness of the violent disorder offence, the lack of remorse, the number of his offences, and his connections with Turkey and its culture. Applying the judgment of this Court in *MF*, I conclude that Mr Akpinar's appeal must fail.

- 13.** At paragraph 56 Sir Stanley Burnton noted that the best point made for Akpinar was that the First-tier Tribunal had not cited the relevant paragraph, 75, of *Maslov*, and had not expressly found that there were very strong reasons justifying his expulsion:

... however the Tribunal referred to "the *Maslov* principles" and must have had paragraph 75 in mind. In any event, reading the determination as a whole, it is clear that the Tribunal considered all relevant factors and I think it did consider that there were very serious reasons in the context of his case to justify deportation.

- 14.** Clearly *Akpinar*, without going for the moment into the relevant differences in the facts, was a case where the panel had gone straight to consideration of the 'exceptional circumstances' question, though without losing sight of the need for 'very serious reasons', on their assessment of the case as a whole. In the present case, on the other hand, the panel stopped short at their finding that there were no 'very serious reasons', without going on to consider whether, in the context of the case as a whole, there were 'exceptional circumstances' to justify this appellant's not being deported. It is clear from the way in which the Court of Appeal dealt with Akpinar's case that this was what they needed to do.
- 15.** Realistically, Mr Oke accepted that the facts of this appellant's offence were capable of showing 'very serious reasons' for his deportation. If the panel had regarded the answer to that question as a step on the way to resolution of the final issue before them, as opposed to the decisive point itself, as it is clear from *Akpinar* that they should have done, then considering those facts, they might well have taken the view that there was only one answer to it, that indeed there were 'very serious reasons' for the appellant's deportation. The result is that the way in which they approached their decision did indeed involve a material error of law, requiring it to be re-made, essentially for the reason given by the permission judge.
- 16.** Both advocates were content for me to go ahead and do this, on the basis of the panel's findings of fact. There was a good deal to be said in favour of this appellant, and Mr Oke took me, with commendable economy, through what the panel had said about him. At paragraph 30 they set out the appellant's family and individual history; after summing up their view of the law at 31, they went on at 32, noting
- (a) the final sentence on appeal;
 - (b) his lack of previous convictions;
 - (c) Castro's causing the victim's death, together with the medical treatment he had had, and what the sentencing judge had recognised as the appellant's lower level of involvement;
 - (d) the appellant's remorse and awareness of the consequences for the victim's family;

- (e) the low risk of his re-offending;
- (f) his full co-operation with the Probation Service and pursuit of his own studies;
- (g) his age when sentenced;
- (h) his immigration history, going back from his present age of 21 to his arrival here when he was ten, and his grant of indefinite leave to remain in 2009, covering the formative years of his life, which he shared with his mother and three siblings;
- (i) this being closer than normal, owing to their flight from Ecuador “because of the appellant’s father’s political views”; but his father had been sent back there in 2006, though later he moved to Italy, and since then they had had to get on here without him, with the appellant’s mother speaking no English;
- (j) the appellant’s having no friends or family in Ecuador, not speaking fluent Spanish, though he could understand his mother; and finally
- (k) his not having started a family life of his own.

17. These are all of course relevant factors in the balancing exercise, and the panel noted at 33 (a) – (e) that, though the appellant’s removal would infringe his right to family life in terms of article 8, the balance had to be struck between that and the Secretary of State’s right and duty to protect its own citizens. Then they summed up the factors in the appellant’s favour at (f), and, as already noted at **8**, went straight on at (g) to announce their finding on ‘very serious reasons’, which they then treated as conclusive on the appeal as a whole.

18. This was where the panel went wrong, and I have to consider the balancing exercise, not only in terms of ‘very serious reasons’, but of whether, looking at all the factors as a whole, there were exceptional circumstances justifying this appellant’s not being deported. The factor which the panel clearly left out of their consideration of ‘very serious reasons’ involved the facts of the offence itself, which they had only touched on at paragraph 32 (c).

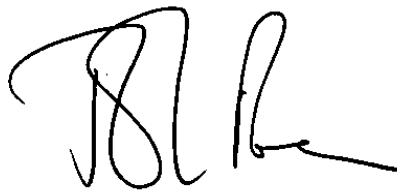
19. I need not repeat the sentencing judge’s remarks, already set out at **2 - 3**, to show that this was a very serious offence indeed, where these three young men had acted in pursuit of a common plan to use violence, whether necessary or not, to rob a relatively helpless victim of whatever they might find on him. Apart from the important fact that only Castro was convicted of manslaughter, the only differences found by the sentencing judge (or, so far as can be seen, the Court of Appeal) between this appellant and the others, and in particular Bustillos, lay in his even younger age, and his complete lack of previous convictions.

20. These factors were of course important too, and the judge made clear he had considered them. The passage in his remarks which shows just how much weight he gave to them comes at pp 7 – 8 of the transcript. There, for reasons he gave, he rejected the defence submission that this should be dealt with, in terms of the sentencing guidelines, as a level 1 robbery, and accepted those of the prosecution, to the effect that it was a level 3 case, involving the use of significant force, and causing serious injury, and normally leading to imprisonment for between seven and 12 years. He also

noted the victim's vulnerability, the number of those involved, and its happening at night-time; and, on the other hand, the lack of proper medical treatment for the victim. All of this resulted, for this appellant, in a final sentence of five years' detention, a very serious one indeed for a young man of his age, especially with no previous convictions.

21. While the panel were no doubt entitled to accept that the appellant sincerely regretted what he had done (unlike for example Akpinar, though his offence was much less serious), I have equally little doubt in saying that the facts of his offence themselves did provide 'very serious reasons' why he should be deported. That is not of course the end of it, because I have also to consider the balancing exercise as a whole. I have thought hard about all the factors in his favour, and in particular the fact that the offence seems to have been very much out of character for him, coming from what is clearly a good, if divided family, and with no previous convictions.
22. However, this was a very unpleasant offence indeed, and the appellant has to bear the full responsibility for his own part in it; it is hardly something to be written off as a mere youthful aberration. It will be deeply unfortunate for him if he has to be parted from his family members in this country, where they are all now British citizens; but, according to his mother, it was because of the pending proceedings for this offence that he could not go through that process too. It will also be unfortunate if he has to go to Ecuador, where the panel found he would have no friends or relations, and cannot speak the language fluently any more. However, he clearly has enough to understand his mother; Spanish is not a hard language at all, and he grew up speaking nothing else till he was ten: it should not be too difficult for him to pick it up again.
23. Sometimes the consequences of crime must be deeply unfortunate, not only for the victim, as here, but for the offender. Despite this appellant's previous good character, and good family, I cannot take the view, on the facts as a whole, that there were exceptional circumstances justifying his not being deported.

**Home Office appeal allowed: decision re-made
Appeal against deportation dismissed**



(a judge of the Upper
Tribunal)

03.11.2014