



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

Appeal Number: DA/02097/2013

THE IMMIGRATION ACTS

Heard at Field House

On 26 January 2016

**Decision sent to parties
on:**

On 8 March 2016

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

KRISTON KORI KEN ANTHONY MARSHALL

[NO ANONYMITY ORDER]

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms Rachel Francis of Counsel, instructed by Irving & Co, solicitors.

For the respondent: Mr Ian Jarvis, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal to deport him to his country of origin as a foreign criminal pursuant to sections 32 and 33 of the UK Borders Act 2007 and paragraphs 398 and 399A of the Immigration Rules HC395 (as amended). The appellant is a citizen of Jamaica.

Background

2. The appellant came to the United Kingdom with his mother in December 1993 when he was just a year old. He was granted indefinite leave to remain, along with his mother, in 2001. He came to adverse attention on 4 June 2006, age 15, when he was convicted of possessing a bladed knife and sentenced to a 9-month referral order. The appellant's criminal history and conduct thereafter is set out in the deportation decision made on 1 October 2013. The index offence, for which the appellant was arrested with his mother, was one of possession of a Class A drug (heroin) with intent to supply, for which the appellant was convicted and received 2 sentences of 18 months.
3. The respondent concluded that he could not bring himself within the exclusions in section 32(5) of the 2007 Act, and in particular, she rejected his human rights claim. She did not consider that there were any exceptional circumstances for which leave to remain should be given.
4. The appellant appealed to the First-tier Tribunal.

First-tier Tribunal decision

5. The First-tier Tribunal set out the appellant's history, and the respondent's evidence, which comprised two witness statements from police officers before the First-tier Tribunal. PC Dunkason did not give evidence. His statement concerned his work with Chaucer Safer Neighbourhood Team (Chaucer SNT). Before arriving he had been aware of the appellant through his work on Operation Wasp, which was an undercover drugs operation in which the appellant had been arrested for the index offence. In his statement, PC Duncan recorded that when he arrived at Chaucer SNT:

"...the estate was quiet and relatively peaceful. Residents remarked to me that they were grateful for police assistance in incarcerating [the appellant] and returning their estate to a pleasant place to live. However, this all changed shortly after his release in December 2011. Residents started to report youths hanging round the gardens of [the appellant's address] again and in the stairwells of surrounding blocks every day at all hours.

These youths are well known criminals who intimidate the local residents. Numerous reports were made to Southwark Council about the noise and antisocial behaviour caused by [the appellant] and his friends, who were drawn in from surrounding estates.

It appeared that [the appellant's address] was a magnet for all crime and all complaints on the estate. The stairwells would be covered in spit and litter

and loud music would be played until late at night from mobile phones. Residents were intimidated to walk past these groups in stairwells and felt unable to confront them through fear of reprisals. Children stopped playing around the blocks and an atmosphere of tension and uncertainty returned to the estate. In an effort to remove this problem, the local authority attempted to evict [the appellant's] mother from her home, however this failed.

Chaucer SNT started to receive intelligence reports in February 2012 reporting that dealing had started again on the ...Estate and at the centre of it was [the appellant and his home address]. He was then given a warning for possession of cannabis and convicted of possession of a knife in May 2012. ... In my opinion he remains actively involved in criminality and is a blight on the local area. ... His removal from the United Kingdom will make Chaucer Ward a better place to live."

The appellant's Counsel did not have the opportunity to cross-examine PC Dunkason on that devastating assessment.

6. PC David Glicksman was called by the respondent to deal with the Operation Nexus material. The officer accepted that there were no statements from complainants and that in a number of cases the appellant had been arrested but not charged. The 'agenda of the witness' in respect of allegations made was not part of the CRIS records, which were a running log, rather than a diary. His understanding was that the appellant belonged, not to a street gang but to organised crime gangs, mixing not with kids but with adult criminal groups. He had pleaded guilty to possession of Class A drugs with intent to supply, and had been in possession over 90 wraps of drugs, indicating that he had been part of the group which provided those drugs.
7. PC Glickman was unaware of the appellant's involvement with Kids Company or the St Giles Trust. An imitation Glock firearm had been found in his bedroom during a search: the police believed it was there to protect his drugs. After setting out the appellant's history and his associates, which included several incidents where he was arrested for possessing a bladed article, use of cannabis, dealing crack cocaine and heroin, using an Oyster card which did not belong to him, engaging in illegal dog fighting and numerous other offences.
8. As regards the evidence on the appellant's side, that consisted simply of the appellant and his mother. His evidence concerned 3 of his partners, whom I will call P1, P2 and P3 in order of time. P1 had not said she was pregnant, though the appellant observed that she could have done so. The appellant accepted that P1 might have told the police that he was still involved with the Rockingham Boys gang: their relationship had ended in the middle of 2014, when the appellant was charged with criminal damage to P1's car and had assaulted her during the ensuing altercation. He had been ordered to attend a domestic violence course but had not done so: the appellant did not consider that he had a problem with domestic violence.

9. P2 was pregnant with his child: they were intending to co-parent the child, with the support of P2's key worker. He had been seeing P3 for 3-4 months when the appeal was heard in January 2015. She did not attend court.
10. The appellant gave various explanations in relation to offences of which he had been convicted, seeking to minimise them. He said he was no longer associated with people who could be a bad influence on him. He considered the influence of his Kids Company key worker, Will Foster, to be positive, although it had not prevented him from continuing to commit crimes.
11. He could not remember whether his mother had ever returned to Jamaica since arriving in the United Kingdom. He had lived independently but had gone back to live with his mother because he did not wish to live alone, and she was suffering from shingles.
12. The appellant had started but not completed a Mechanics course at Croydon College. He had changed to a creative media course instead. He had last been stopped by the police 2 weeks ago, in December 2014: the area where he lived was a high crime area and the police stopped him regularly.
13. The appellant's mother gave evidence, saying that she had various relatively minor ailments and would not herself return to Jamaica because she had a violent ex-husband there, whom she still feared. She was on employment support allowance and had no relatives living nearby other than her children, the appellant and his sister, who both lived with her: the appellant helped with the shopping and cooking, and took his nephew and niece to school. She did not want to accept help from social services. She also considered that St Giles and Kids Company were a good influence on the appellant, though she was aware that he had 2 recent convictions.
14. Mr Will Foster of Kids Company had written letters of support and gave evidence. In his oral evidence, he said that he was a senior worker at Kids Company who had known the appellant since about 2012. He was the appellant's mentor. The appellant had taken advantage of all the help Kids Company offered; he knew the appellant was working well with St Giles Trust. The appellant was remorseful and the witness' opinion was that he only smoked marijuana and was 'drugs free'. No drugs tests had been done to establish whether that was the case. The witness was not aware of the situation in Jamaica, but had spent many hours working with the appellant at Kids Company, including working on the domestic violence issue.

Grounds of appeal

15. The appellant identified 7 grounds of appeal, arguing in each case that the First-tier Tribunal had misdirected itself in law and failed to consider material facts. The proposed grounds may be summarised as follows:

A. Misdirection and failure to consider material facts

Grounds 1-2 The appellant argues that the First-tier Tribunal failed to make specific findings as to whether family life exists between the appellant and each of his family members: his mother, his sister, his child's mother, and his nephew and niece. In particular, he complains that there is no finding about the support he provides for his mother which would otherwise be provided by social services. The appellant contends that the relationship between him and his mother is one of *Kugathas* dependency and relies on his Counsel's skeleton argument before the First-tier Tribunal.

Ground 3 The interests of the affected children have not been treated as a primary consideration for Article 8 ECHR purposes and there is no express self-direction to that effect in the decision.

Ground 4 The appellant accepts that there is a public interest in deporting a person who has committed a serious crime. However, he contends that such weight should be reduced by reason of significant steps towards rehabilitation which he has taken. Again, he relies on submissions in his Counsel's skeleton argument prepared for the First-tier Tribunal hearing. He also relies on his 'turbulent childhood and the links between those traumas, his strong community and rehabilitative engagement, and his offending'.

Ground 7 This ground is not fully expressed. The appellant's argument seems to be that the First-tier Tribunal did not properly consider paragraph 398 of the Rules.

B. Factual errors and perversity

Ground 5 The appellant asserts that the reference at [1-2] to paragraph 298 is erroneous; that he has been in the United Kingdom lawfully for 12 years out of his 22 year old life and that this amounts to 'most of his life'; and that the Tribunal erroneously recorded at [117] that his Kids Company social worker and life coach, Will Foster, gave evidence that he was addicted to cannabis, whereas Mr Foster's evidence, at [77], was that 'no drugs tests had been done on the appellant but believed him to be drugs free...was only aware that the appellant smoked marijuana'.

Ground 6 The First-tier Tribunal applied a standard higher than balance of probabilities when assessing the CRIS reports, by using the phrase 'taken at its highest we find that the CRIS report establishes that the appellant associates with a number of people who have criminal records and was present at times when criminal conduct [occurred]'. He notes the lack of any gang statement in the CRIS reports or the evidence of PC Glickman, the respondent's witness.

Permission to appeal

16. Permission to appeal was granted by First-tier Tribunal Judge White who stated, without particularising his observations, that he was 'satisfied that in reaching its decision the panel arguably made an error of law by failing to apply material facts and misdirecting itself on the applicable law as fully set out in the extensive grounds seeking permission'. I do not derive much assistance from the grant of permission.

Rule 24 Reply

17. The respondent in her Rule 24 Reply observed that the reference to paragraph 298 of the Rules was an obvious typographical error for paragraph 398. The respondent then set out paragraph 399A, observing that, having regard to [105] of the First-tier Tribunal decision, a finding that the appellant had no ties to Jamaica could not be sustained and paragraph 399A did not apply.

18. The respondent contended that the First-tier Tribunal had considered Article 8 ECHR and made adequate findings regarding the appellant's relationship with his mother, sister, and his sister's children; the bond with his mother was not at the *Kugathas* level but was a normal bond between adult parent and child. His relationship with his sister's children was not such as to outweigh the public interest in deporting the appellant, given his drugs convictions and the offences committed since the deportation order.

19. The respondent contended that in taking the evidence 'at its highest' the First-tier Tribunal had not applied the wrong standard of proof. The appellant's explanation of the matters relied on by the respondent in that report had been accepted and his credibility was not further affected. There was nothing in the 'standard of proof' argument.

20. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

21. The appellant was not present at the beginning of the hearing. His Counsel, Ms Francis observed that there was before me no OASys report about the risk of re-offending by this appellant. She referred me to the First-tier Tribunal decision at [82]-[84] and to paragraph 10 of her skeleton argument. The recital of the evidence in this case was insufficient and the family members should have been treated individually. She relied on the evidence concerning the appellant's mother, his sister, and his niece and nephew. The sister had given no evidence, though she was at court for the First-tier Tribunal hearing. *Kugathas* had been incorrectly applied. She relied on the guidance given in the judgment of Sir Stanley Burnton, giving the only reasoned judgment in the Court of Appeal, in *Singh & Anor v The Secretary of State for the Home Department* [2015] EWCA Civ 630, at [24]-[26] thereof.

22. The evidence was that the appellant had lived with his mother when granted immigration bail on 19 February 2012, but then moved to Hackney

for a short period in May or March 2013 as he got into a fight. The St Giles charity arranged the move. He returned to his mother's house in February 2014 and had been looking for a job since then, working casually for a 'man and van' removal company for about 5 months. His sister was now working and living elsewhere, but the appellant still took her children to the park sometimes.

23. Regarding the best interests of the children, Ms Francis relied on the appellant's witness statement and his sister's letter. She had not been called and her letter stood unchallenged. The best interests of his sister's children had not been treated as a primary consideration. The appellant had taken steps to rehabilitate himself.
24. Ms Frances had no instructions on the information from the Police National Computer (PNC) showing further offences. The appellant had telephoned to say that he was running late. The hearing was adjourned at 11 am for an hour. The appellant had then arrived: he said he was late because his mother had palpitations and also he had received a telephone call from P2 to say that she was going for a job interview. On arrival, he had gone to the wrong building. Ms Frances took instructions and told me that the appellant confirmed that the PNC record was accurate.
25. In relation to rehabilitation, the appellant had worked with Kids Company and St Giles Trust. He was a minor for the first few offences and on the cusp of adulthood for the index offence. *Maslov v. Austria* - 1638/03 [2008] ECHR 546 had not been considered by the First-tier Tribunal, although it was argued in her skeleton argument. The Tribunal should at least have considered the weight to attach to the *Maslov* factors. The appellant had a turbulent childhood and was strongly attached to his community. He had attended numerous primary schools and lived in bed and breakfast accommodation with his mother. The detailed factual background was not mentioned and that was a material error of law.
26. The First-tier Tribunal had made a significant error of fact at [102] in directing itself that the appellant became lawfully resident in the United Kingdom in 2011 not 2001. On that basis he had indeed spent half his life in the United Kingdom and that error infected the First-tier Tribunal's overall assessment. Also, there was no basis for finding him to be *addicted* to cannabis: his Kids Company worker considered him to be drug free. There was no gang statement: if the Home Office wished him to be considered as a gang member, they should have provided a specific statement detailing the basis on which they so perceived him.
27. There were very compelling circumstances which had not been considered, in that the appellant lived at his mother's house, and his sister and her children also lived there now. The disposal of the private and family life in just 3 paragraphs was inadequate and there was no reference to very compelling circumstances. Taken individually or cumulatively, these errors amounted to a material error of law by reason of which the decision of the First-tier Tribunal was unsafe and materially flawed. Ms Francis asked me to

find a material error of law and either allow the appeal or direct a substantive remaking of the decision.

28. For the respondent, Mr Jarvis said that there was no material error of law. The grounds were mostly a disagreement with the findings of the First-tier Tribunal and the outcome of the appeal. As regards Ground 1, it was without substance: it was right that the Tribunal had erroneously approached its assessment on the basis of a free-standing analysis under *Razgar, R (on the application of) v Secretary of State for the Home Department* [2003] EWCA Civ 840 and had failed to direct itself that in relation to deportation the Immigration Rules are a complete code. That was an erroneous but over-generous approach and the appellant's claim had still been dismissed.
29. In relation to ground 2, the First-tier Tribunal had dealt with this at [110]-[111]. There was a finding of fact that there was no *Kugathas/Singh* dependency by the appellant's mother on him, and there was no medical evidence to support his assertion. There were other reasons also why the First-tier Tribunal disbelieved this assertion. The legal argument fell away in the face of those findings. Nor was the appellant dependent on his mother: the test was a simple one and although there was a finding of family life between the appellant and his mother, sister, and her children, the First-tier Tribunal had explained how far they considered that took the appellant.
30. As regards ground 3, his sister's children were not the appellant's children and his relationship with them was relatively arms-length. Their best interests were not irrelevant but on the facts were immaterial and certainly insufficient to outweigh the serious crime and recidivism of the appellant.
31. As regards rehabilitation, the Secretary of State would rely on *Danso v Secretary of State for the Home Department* [2015] EWCA Civ 596 which rejected rehabilitation as an argument, in the judgment of Lord Justice Moore-Bick (the only reasoned judgment) at [20]:

"20. Mr. Dixon submitted that the tribunal should have placed much greater weight on the appellant's rehabilitation and the fact that he did not pose a significant risk of re-offending. He suggested that far too little importance is attached to factors of that kind, with the result that those who commit offences have little incentive to co-operate with the authorities and make a positive effort to change their ways. I have some sympathy with that argument and I should not wish to diminish the importance of rehabilitation. It may be that in a few cases it will amount to an important factor, but the fact is that there is nothing unusual about the appellant's case. ...It must be borne in mind, however, that the protection of the public from harm by way of future offending is only one of the factors that makes it conducive to the public good to deport criminals. Other factors include the need to mark the public's revulsion at the offender's conduct and the need to deter others from acting in a similar way. Fortunately, rehabilitation of the kind exhibited by the appellant in this case is not uncommon and cannot in my view contribute greatly to the existence of the very compelling circumstances required to outweigh the public interest in deportation."

On the facts of this case there was no real rehabilitation, since the appellant was continuing to commit offences, after a brief lull. The PNC showed him as continuing to use cannabis.

32. In relation to ground 5, the First-tier Tribunal did not err in law by failing expressly to mention *Maslov*, since the principles were in practice inapplicable on the facts of this appeal. The respondent would rely on *MM & Ors, R (On the Application Of) v Secretary of State for the Home Department* [2014] EWCA Civ 985. The appellant had lived away from home for over a year and was not rehabilitated: *Maslov* concerned a child who had not offended for 8 years, after the age of 14. States were entitled to take special measures against drug dealers, as opposed to those who committed offences out of drug need. The First-tier Tribunal had made fair findings on the police material and the police evidence. The appellant had connections with a large number of other criminals and was known to indulge in anti-social behaviour.
33. As to ground 6, if too high a standard had been applied to the respondent's evidence, that was in the appellant's favour, not to his disadvantage.
34. Regarding ground 7, the First-tier Tribunal had performed the broader *Razgar* assessment rather than the narrower assessment required by paragraph 398, and again, even to that broader standard, the appellant had failed. The First-tier Tribunal had made alternative findings at [104] dealing with the paragraph 399A(b) social and cultural integration test. He asked me to dismiss the appeal.
35. I reserved my decision, which I now give.

Discussion

36. In considering whether there is a material error of law in the First-tier Tribunal decision, I discount the question of rehabilitation. It is clear from the PNC records, which the appellant accepts are accurate, that the appellant's criminal career was only briefly interrupted after he came out of prison, and that he continues to use cannabis. He still has a number of criminal associates and is present when criminal conduct occurs. The rehabilitation and *Maslov* arguments therefore fall away.
37. As regards private and family life, the First-tier Tribunal made careful and sound findings on the limited evidence before it as to the links between this family. It comes to this: that the appellant does a bit of cooking and shopping for his mother when living at home, and takes his niece and nephew to the park sometimes. That is not remotely sufficient to meet the *Kugathas/Singh* dependency test. The evidence of the best interests of his sister's children is sparse: they are said to be fond of their uncle but there is no evidence that there will be any particularly harsh effect on them if he is removed.

38. The Immigration Rules are as a complete code in relation to deportation, as set out in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192. Accordingly, the correct approach to the appellant's family circumstances is that set out in paragraphs 398 and 399A, which so far as relevant are as follows:

"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 ...

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(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, their offending has caused serious harm or 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 399 or 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 paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if -

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, ...

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; ...

399A. This paragraph applies where paragraph 398(b) or (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."

39. It is not suggested that any of P1, P2 or P3 meet the test under paragraph 398(b), nor that when the First-tier Tribunal considered this appeal, 398(a) applied, as P2's child had not yet been born. The First-tier Tribunal did not err in discounting paragraph 398. As regards paragraph 399, it is right that the First-tier Tribunal erred in stating that the appellant had not spent most of his life in the United Kingdom. Paragraph 399A(a) does apply to him. But at [104] the Tribunal went on to consider paragraph 399A(b) and 399A(c) and to conclude that the appellant had not discharged the burden of proving that he was socially and culturally integrated into the United Kingdom or that there would be very significant obstacles to his integration into Jamaican culture if he were to be returned there. The reasons given are brief but cogent. There is no perversity or irrationality therein.

40. As regards the observation that paragraph 298 is the wrong paragraph, that is true but nothing turned on it in this decision. Ground 6 which relates to the standard of balance of probabilities not being applied is a misunderstanding: the Tribunal was entitled to conclude, to any standard, that the appellant still has multiple criminal associates and that the respondent had discharged the burden of showing that he did.
41. For all of the above reasons, although there are in this decision errors of law (the failure to recognise that the Immigration Rules are a complete code) and fact (whether the appellant had been in the United Kingdom for 'most of his life'), they are not material to the outcome of the appeal, which would still have been negative had the correct facts been found and the Tribunal approached the appeal narrowly through the prism of the Rules, analysing whether there were compelling compassionate circumstances. There were none in this appeal.
42. I therefore uphold the First-tier Tribunal decision.

DECISION

43. For the foregoing reasons, my decision is as follows:
The making of the previous decision involved the making of an error on a point of law.
I do not set aside the decision but order that it shall stand.

Date: 29 February 2016

Gleeson
Tribunal Judge Gleeson

Signed **Judith AJC**
Upper