Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00177/2013

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 11 November 2013	**On : 13 November 2013**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD MARCEL THOMASI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr P Collins, instructed by R.O.C.K Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Thomasi's appeal against a decision to deport him from the United Kingdom. For the purposes of this decision, I shall refer to the Secretary of State as the respondent and Mr Thomasi as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

2. The appellant is a citizen of Gambia, born on 15 August 1978. He entered the United Kingdom lawfully on 10 September 1992, aged 14 years, on a settlement visa which conferred indefinite leave to remain. On 9 September 1996, aged 18, he received his first convictions for which he was given six 18 month probation orders and six community service orders to be served concurrently. Up until his last convictions on 26 January 2012 he was convicted of a further 46 offences. He received custodial sentences on separate occasions, in regard to these offences, of eight weeks for theft, eight weeks for possession of class B drugs, three months for possession of a blade and, on 4 April 2003, of 42 months' imprisonment for robbery.

3. On 26 January 2012 the appellant was convicted at Highbury Corner Magistrates Court of burglary, theft from a vehicle and failure to surrender to custody at the appointed time. On 2 March 2012 he was sentenced at Blackfriars Crown Court to respective terms of imprisonment of 20 months, two months (consecutive) and seven days (concurrent). He was also sentenced that day for breach of community orders which were handed down on 1 November 2011 in respect of possession of a class A controlled drug - heroin, possession of a class A controlled drug - cocaine and possession of a class C controlled drug - cannabis, for which he received respective prison sentences of two months (consecutive), two months (concurrent) and two months (concurrent), making a total prison sentence of 24 months.

4. As a result of those convictions the appellant was considered for automatic deportation under section 32(5) of the UK Borders Act 2007 and on 27 March 2012 he was served with a notice of liability for deportation. He responded to that notice on 30 March 2012 and in that response referred to his daughter, born on 14 February 2007 to a British mother with whom he was no longer in a relationship. In response to further enquiries he advised the respondent, in a letter dated 14 November 2012, that he did not know his daughter's whereabouts and had not seen her since December 2011. A deportation order was signed on 3 January 2013 and a decision subsequently made that section 32(5) applied.

5. The respondent, in making that decision, gave consideration to the immigration rules with respect to Article 8 of the ECHR, concluding that the appellant fell within paragraph 398(b), applicable to offences leading to a sentence of imprisonment of less than four years but at least twelve months. The respondent did not accept that paragraph 399(a) applied to the appellant since it was not accepted that he was in a genuine subsisting relationship with his daughter and it was considered in any event that her mother would continue to care for her in the United Kingdom. Neither was it accepted that paragraph 339(b) applied, since his relationship with the mother of his daughter had ended, or that paragraph 399A applied, since his continuous residence in the United Kingdom for the purposes of that provision was 17 years and three months and thus below 20 years and he had failed to establish that he had no ties to Gambia. The respondent did not accept that there were exceptional circumstances such that the appellant's right to family and/or private life outweighed the public interest in his deportation. It was accordingly concluded that his deportation would not breach Article 8.

Appeal before the First-tier Tribunal

6. The appellant's appeal against that decision was heard in the First-tier Tribunal on 6 June 2013, before a panel consisting of First-tier Tribunal Judge Flynn and Mrs M Padfield JP. The panel heard from the appellant and his mother. They recorded the appellant's evidence that he had not seen his daughter since November 2011 and was no longer in a relationship with her mother, that he had not started any contact proceedings and had had no response to the letters he had written; that he had left home at the age of 16 and had returned there when he was 18 or 19; that he had never seen his biological father but had lived with his mother and his step-father; that he used to see his daughter from the time she was born and would take her to see his mother, but that her mother had terminated contact when he was arrested. They also recorded the evidence of the appellant's mother.

7. The panel found the appellant and his mother to be credible witnesses. They accepted the appellant's evidence that he had not communicated with his daughter or her mother since his imprisonment in November 2011. They accepted that he wanted to continue the relationship with his daughter and had tried unsuccessfully to make contact and that until late 2011 he had seen her regularly. They accepted that the gap in contact was due to events beyond the appellant's control and considered that the relationship would be resumed as soon as he was able to re-establish contact. The panel noted that the respondent considered the appellant unable to meet the requirements of the immigration rules for the purposes of Article 8 and accordingly went on to consider Article 8 under the R (Razgar) v SSHD (2004) UKHL 27 principles. They accepted that he had established a family and private life with his daughter and mother. With regard to proportionality, they considered the matter as "finely balanced", but on the basis that the appellant had no ties to Gambia and no family or support network there and that he had had a change of heart and should now be regarded as presenting a low risk of re-offending, they considered that his removal would be disproportionate and in breach of Article 8. They accordingly allowed the appeal on Article 8 human rights grounds.

8. The respondent sought permission to appeal to the Upper Tribunal on the following grounds: that the panel had erred by following a two-stage approach to Article 8; that they had erred by finding that the appellant had an established family life with his mother; that they had speculated about future contact between the appellant and his daughter and that, on the facts at the date of the hearing, and in line with the principles in SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550, his deportation would not interfere with any family or private life established with his daughter; that the panel had erred in their assessment of risk of re-offending; and that they had failed to give weight to the Secretary of State's public interest policies.

9. Permission to appeal was initially refused, but was subsequently granted on a renewed application on 28 August 2013, on the grounds that the panel's family life findings were inadequately reasoned and that it had arguably misdirected itself in failing to give adequate consideration to the public interest when assessing proportionality.

Appeal before the Upper Tribunal

10. The appeal came before me on 11 November 2013. The appellant was not brought from prison, but in any event it was, at that point, unlikely that he would be required to give any oral evidence.

11. Mr Collins requested an adjournment of the proceedings on other grounds, however, namely that instructing solicitors had sent the paperwork only at 5pm on Friday, that he had picked up the paperwork during the weekend and that that paperwork did not include the First-tier Tribunal's decision, the grounds of appeal or the grant of permission which he had only seen that morning. Further, he was not aware of some of the authorities referred to by the respondent in the grounds of appeal, including MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192. Mr Melvin objected to an adjournment on that basis, as the appellant's solicitors had had plenty of time to prepare the case and instruct counsel.

12. I considered there to be no reason why Mr Collins, if given some time, could not prepare his case, as he now had all the papers and there was no excuse for him not being aware of the Court of Appeal judgement in MF (Nigeria). I offered him as much time as he needed and also suggested that he may wish to take instructions from the appellant's family members as to any developments since the hearing before the First-tier Tribunal, in particular with respect to the appellant's contact with his daughter, so as to inform any later decision on re-making the appeal, in the event that an error of law was found. After breaking for over one and a half hours, Mr Collins agreed that he was ready to proceed.

Error of Law

13. Mr Melvin relied upon the grounds of appeal, although he had little to say about the first ground. He submitted that the panel's findings about the resumption of contact between the appellant and his daughter were speculative and that the panel had erred by failing to make an assessment of her best interests. Their views, with regard to family life with his daughter, as well as with his mother, showed perversity and irrationality. Inadequate reasons were given for concluding that the appellant was dependent upon his mother, particularly as there were long periods when he was not living at home and since it was clear that his mother was unable to exert any influence over him. The panel had materially misdirected themselves in law. Their consideration of Maslov v. Austria - 1638/03 [2008] ECHR 546 and RG (Automatic deport Section 33(2) (a) exception) Nepal [2010] UKUT 273 was erroneous: Maslov applied to juvenile offenders, which the appellant was not, and RG (Nepal) had been overturned by the Court of Appeal and re-heard and dismissed by the Upper Tribunal. The panel had failed to consider the principles in SS (Nigeria) and MF (Nigeria).

14. Mr Collins opposed the appeal, submitting that the panel had considered the case in the round and had considered all the circumstances. Their credibility findings had not been challenged and it was therefore accepted that there was a strong bond between the

appellant and his mother and that he intended to maintain a role in his daughter's life. The panel were entitled to assess the risk of re-offending as they did. With regard to the principles in SS (Nigeria), Mr Collins submitted that that case required there to be a balancing exercise, which is what the panel did. As for MF (Nigeria), Mr Collins submitted that paragraph 46 was crucial and, after some deliberation, said that it was for the Upper Tribunal to consider if the panel had erred in law.

15. I advised the parties that, in my view, the panel had materially erred in law. I considered their findings on family life with regard to the appellant's relationship with his daughter and mother to be inadequately reasoned and their findings on Article 8 "outside the rules" to be inconsistent with the principles in SS (Nigeria) and MF (Nigeria), as failing to take proper account of the strength of the public interest in the deportation of foreign criminals.

Re-making the Decision

16. It was agreed by the parties that the decision could be re-made on the basis of the evidence before the First-tier Tribunal, as had been envisaged in the grant of permission. No further documentary evidence had been produced by the appellant's representatives. Mr Collins confirmed that, having had an opportunity to speak to the appellant's family members who were present at the hearing, there was no further information or evidence to be considered and neither were there any further submissions that he could make, other than rehearsing the arguments already made. He was therefore content for me to proceed to re-make the decision.

17. Mr Melvin had no further submissions to make, other than to state that he was relying upon his written submissions and to reiterate that, with regard to the lack of any support network for the appellant in Gambia, it was relevant to consider that he was a healthy 35-year-old man who had managed to establish an independent life.

Consideration and findings

18. The appellant relies upon his family and private life pursuant to Article 8 of the ECHR as giving rise to an exception from automatic deportation under section 33 of the 2007 Act.

19. The facts in this case are, on the whole, not in issue: the appellant came to the United Kingdom as a child of 14 years of age in 1992 and was granted indefinite leave to remain to settle with his mother who had arrived some seven years earlier in 1985; he lived with his mother and step-father on and off until his arrest, although that precise period is undetermined; he had a relationship with a British woman and as a result has a British daughter born on 14 February 2007 with whom he has had no contact since being sent to prison in November/December 2011; and he is no longer in a relationship with his daughter's mother who has now withdrawn all contact with his family.

20. It was the finding of the First-tier Tribunal that the appellant was dependent upon his mother and that the ties between them went beyond the normal family ties, such that family life was established between them. As already stated, I have found that finding to be inadequately reasoned and thus an error of law. One of the reasons given by the Tribunal for that finding, at paragraph 43, was that the appellant had been abandoned by his father and had no close family remaining in Gambia, but that ignored the appellant's own evidence that, whilst he never knew his biological father, he had grown up in the United Kingdom with his step-father whom he considered as his own father and was very close to him. The panel otherwise failed to give any explanation as to why it considered the appellant, a 34-year-old man who had spent substantial periods living apart from his mother, was nevertheless dependent upon her. Its acceptance of family life being established between the appellant and his mother, as based upon the fact that he had lived with her for the majority of his life in the United Kingdom and intended to return to her home if allowed to do so (paragraph 38), failed to take account of the considerable number of inconsistencies in the evidence in that regard.

21. According to the OASys report, at page 11, the appellant lived with his parents from the age of 14 to 16, but then ran away from home and was sleeping rough from that time until his arrest, with only intermittent returns to their house or to his sister's or ex-partner's house (see also page 8, paragraph 3.3). As an aside, and as Mr Collins himself observed, the references in the OASys report to the appellant's sister appear to be inconsistent with his description of himself as an only child. The appellant's mother's evidence in her statement was that he had never lived away from her in the United Kingdom, but her oral evidence before the First-tier Tribunal was that he left home when he was 16, returned when aged 19, and then remained there for two years, with no information as to where he lived thereafter (paragraph 17). Moreover, the appellant's claimed intention to return to live with his mother and step-father was at odds with the information he had provided to the probation officer, as recorded in the OASys report at pages 8 and 12, namely that he wanted to return to live in the area where his sister resided, in Enfield, and that he wanted to stay away from the Islington area and remain permanently in the Enfield area.

22. The evidence of the periods of time in which the appellant lived with his mother was and is therefore extremely vague and inconsistent and, when taken together with the fact that she had left him behind in Gambia at the age of seven and remained apart from him until he joined her in the United Kingdom seven years later, that she was thereafter evidently unable to exert any influence over him as regards his offending, that he entered into a relationship and had a child, and that he spent substantial periods of time either sleeping rough or with his sister or friends or ex-girlfriend, there are simply no reasonable or proper grounds for concluding that their relationship fell within the principles in Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31. I find no basis upon which the Tribunal could properly have concluded that the appellant's relationship with his mother consisted of anything beyond the normal emotional ties between an adult child and their parents and, in re-making the decision in that respect, whilst I accept that the appellant's relationship with his mother (and step-father) forms

part of his private life in the United Kingdom, I do not accept that he has established family life in the United Kingdom on the basis of that relationship.

23. I turn next to the appellant's relationship with his daughter and the panel's finding in that regard and I find myself in agreement with Mr Melvin, that the finding that the relationship would be resumed once the appellant re-established contact, was based upon nothing more than speculation. The panel found the appellant to be a credible witness and accepted that he was telling the truth about the gap in his contact with his daughter. In so doing, they did not appear to note that the appellant's evidence, as recorded in the OASys report at page 11, that he had telephone contact at that time (the report was completed on 23 August 2012) with his daughter, was inconsistent with his oral evidence that he had not communicated with her since going to prison in November 2011. Neither did they appear to note that the appellant's evidence in his witness statement before them, that his mother was in touch with his daughter, was inconsistent with her evidence at the hearing that she had not seen her granddaughter for the past year. Nevertheless, even on the basis of their acceptance of his evidence, there was nothing further, other than pure speculation, to support a finding that contact would be re-established and that the relationship would be resumed. It was the appellant's own evidence that his relationship with his daughter's mother had ended and that he had neither seen nor communicated with her or his daughter for eighteen months, that he had no idea of their whereabouts and that he had not started any contact proceedings and it was his mother's evidence that her granddaughter's mother had ceased all contact with her. In the circumstances, the panel's findings in regard to the relationship are simply not sustainable.

24. In re-making the decision in that regard, I accept that the appellant has family life in the United Kingdom to the very limited extent that he has a British daughter who lives here. However it seems to me that there is little, if any, substance to that family life and that it cannot be said that the relationship is currently a subsisting one. I note that it is now almost two years since the appellant has had any contact with his daughter – Mr Collins advised me that there was no development in the situation since the hearing before the First-tier Tribunal. On that basis it cannot realistically be concluded that his daughter's best interests lie in him remaining in the United Kingdom. However, even if they did, that would be only one consideration, albeit a primary one, in the assessment of proportionality, and would in this case be significantly outweighed by other circumstances.

25. The panel did not give any detailed consideration to the appellant's ability to meet the requirements of the immigration rules relating to private and family life, but at paragraph 35 proceeded on the basis of the respondent's assessment that the requirements were not met. The appellant was plainly not able to meet the requirements of paragraphs 399(a) or (b) or 399A. With regard to paragraph 398, the panel did not go on to undertake any independent assessment of whether exceptional circumstances existed but proceeded to consider Article 8 in its wider context, following the relevant guidance at the time as to the two-stage approach, although without proper regard to recent authorities as to the significant weight to be given to the public interest. The two-stage approach has now been refined by the Court of Appeal in MF (Nigeria) and the assessment of proportionality in

the "wider context" has been explained as forming part of the consideration of "exceptional circumstances" and "other factors" within the terms of the rules themselves.

26. In re-making the decision, I therefore consider whether such circumstances or factors exist. The panel, in concluding that the appellant's deportation would be disproportionate, regarded the matter as "finely balanced" and relied upon the existence of family life between the appellant and his mother and daughter; the appellant's own evidence as to his "change of heart" and "real change in his mindset"; his behaviour in prison; his lack of ties in Gambia; and, crucially, their re-assessment of the risk of re-offending as being a low risk. However I consider those findings, on the whole, to be unsustainable.

27. For the reasons given above, I have not found family life to be established between the appellant and his mother and consider any family life between him and his daughter to be minimal. With regard to the appellant's remaining ties to Gambia, the panel did not appear to note that the evidence in that regard was inconsistent: the appellant's account in his statement was that his last remaining relative was his grandfather who died some weeks after he arrived in the United Kingdom, yet his mother's evidence was that she had left him in Gambia with her mother who passed away three years ago (or alternatively was alive when she recently visited Gambia, as stated at paragraph 15). Clearly, therefore, the evidence as to subsisting ties is not entirely reliable and, in any event, has to be considered in the context of the appellant now being a 35-year-old man who could reasonably be expected to establish a private life for himself in the country in which he spent his first 14 years, whether or not he had family remaining there.

28. With regard to the risk of re-offending, it seems to me that no adequate reasons were given by the panel for substituting their own assessment for that of the author of the OASys report. Aside from two brief letters of support from a prison officer and an art teacher (who had only known the appellant in the confines and security of the prison), the panel, in re-assessing the level of risk, simply relied upon the appellant's own assurances of having changed. Yet in so doing they failed to acknowledge that similar assurances were made to the probation officer prior to the risk assessment, as seen at paragraph 12.1 of the OASys report. The panel did not appear to give any proper consideration to the pro-criminal attitude described in the OASys report at page 17; to the appellant's resumption of criminal activity following a previous lengthy term of imprisonment, including offences committed whilst still serving community orders and whilst on police bail; to the fact that he had previously failed to surrender to police bail and had breached community orders imposed upon him; to the concerns about breach of trust referred to in the OASys report at R9.3.2 at page 29; or to the comments of the sentencing judge as to the lack of deterrent effect of previous sentences and the number of chances previously given to, but not taken by him. The author of the OASys report considered that the risk of re-offending would be tested only on the appellant's release and that, of course, has not yet occurred. Accordingly, I rely on the conclusions in the OASys report as to the level of risk, of re-offending and of harm to the public, being medium.

29. The appellant's circumstances are thus that he is a repeat offender who has been involved in criminal activity since the age of 18, four years after arriving in the United

Kingdom, and that he poses a medium risk to the public and medium risk of re-offending. The Judge, when sentencing him on 2 March 2012, referred to him having committed 27 theft and similar offences between 1996 and 2012 and five drugs offences and, aside from matters relating to community orders, had been convicted of two other drugs matters. He commented that the appellant had received 42 months imprisonment in 2003 for a robbery but had continued to offend and that the community services imposed on him had not "had the desired effect of stopping you committing further offences". He noted that the appellant had been given many chances over the years and had failed to take up those chances, that he had committed offences whilst on bail, and that his current offences were serious.

30. The redeeming features in the appellant's case are his length of residence in the United Kingdom and the early age at which he first came here, together with his family ties. However, contrary to the circumstances in Maslov, albeit having regard to the requirement to show very strong reasons for expulsion of a settled minor who has lawfully spent all or the major part of his or her childhood and youth in the host country, the appellant did not commit the offences as a juvenile, but as an adult and is, of course, now a 35-year-old man. He has a British daughter but has no current contact with her or means by which to make contact and has not sought to commence legal proceedings for contact. His mother and step-father have clearly failed to have any influence over him in the past 17 years since he commenced his criminal activities. The evidence as to his remaining ties to Gambia is inconsistent, but in any event he is now an adult who could reasonably re-establish himself in that country.

31. Current case law has established that the weight to be given to the public interest in removing foreign criminals is significant. That was emphasised by the Court of Appeal in SS (Nigeria), where Lord Justice Laws stated at paragraph 54:

> "I said at paragraph 46 that while the authorities demonstrate that there is no rule of exceptionality for Article 8, they also clearly show that the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail. The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgment only be justified by a very strong claim indeed."

32. In the very recent case of MF, the Master of the Rolls stated at paragraph 42:

> "in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be "exceptional") is required to outweigh the public interest in removal. In our view, it is no coincidence that the phrase "exceptional circumstances" is used in the new rules in the context of weighing the competing factors for and against deportation of foreign criminals."

33. He went on, at paragraph 43 to state:

> "The general rule in the present context is that, in the case of a foreign prisoner to whom paras 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the "exceptional circumstances".

34. It is the appellant's case that he has demonstrated very compelling reasons that outweigh the public interest in his deportation, by reason in particular of his family ties and the fact that he has spent the majority of his life, including his formative years, in the United Kingdom. However, in the light of what I have said above, I do not accept that those reasons are sufficiently compelling to outweigh the public interest in the prevention of disorder and crime. He has not demonstrated "exceptional circumstances" or "other factors" for the purposes of the immigration rules or on any possible wider interpretation of Article 8.

35. In the circumstances the appellant's deportation is justified in the public interest and would not amount to a breach of Article 8 of the ECHR. Any interference caused to his family and private life in the United Kingdom, and to that of his daughter, as a result of his deportation, is proportionate. The appellant has failed to establish that he falls within the exceptions set out at section 33 of the UK Borders Act 2007.

DECISION

36. The making of the decision of the First-tier Tribunal involved an error on a point of law. The decision of the First-tier Tribunal is therefore set aside. I re-make the decision by dismissing the appeal on all grounds.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I see no reason to continue that order and accordingly I lift the order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed
Upper Tribunal Judge Kebede