Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: DA/00273/2011

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 July 2013	**On 19th July 2013**

Before

UPPER TRIBUNAL JUDGE MOULDEN
UPPER TRIBUNAL JUDGE KEKIĆ

Between

ALEX THIBAULT GNAYORO
AKA ALEX ASHLEY DOUGLAS

Appellant

and

SECRETARY OF STATE

Respondent

Representation
For the appellant: Ms S Jegarajah, Counsel instructed by Duncan Lewis & Co Solicitors
For the respondent: Mr K Norton, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before the Upper Tribunal as a result of a consent order made on 28 February 2013 by the Court of Appeal directing a fresh hearing. The members of this panel have shared the preparation of this determination.

2. The appellant is a citizen of Côte d'Ivoire born on 14 July 1986. He arrived in the UK on 24 August 1992, aged six, and was admitted for six months. His mother had arrived here in November 1990 and she then applied to include him as a dependant of her asylum claim. On 19 August 1999 the appellant and his mother were granted indefinite leave to remain outside the rules under a backlog clearance exercise. On 25

February 2009, as a result of criminal offending and convictions, the Secretary of State notified the appellant of his liability to deportation and on 22 April 2009 a deportation order was signed and served upon him along with a letter giving reasons for same. A subsequent decision under section 32 (5) of the UK Borders Act 2007 was made on 4 March 2011. An appeal against that decision has led to these proceedings.

3. The appellant's history of convictions, adjudications against him whilst in prison/detention, aliases he has used, attempted removals and failures to report is as follows;

Offending history:

1 July 1998, cautioned for assault.

26 January 2002 pleaded guilty at Camberwell Green youth court to handling stolen goods. Convicted on 22 May 2002 and received a sentence of a four-month referral order.

21 November 2005 pleaded guilty at Bournemouth Crown Court to failing to surrender to custody at an appointed time.

24 February 2006 pleaded guilty at Bournemouth Crown Court for failing to surrender to custody at an appointed time.

30 March 2006 convicted at Bournemouth Crown Court, following guilty pleas, of the following offences on 1 September 2005: using a vehicle while uninsured (sentenced to 6 months' driving disqualification), driving without a licence (no separate penalty received), assault occasioning actual bodily harm (sentenced to a community order for 18 months with a requirement to participate in Think First and an unpaid work requirement of 60 hours before 30 March 2007 under supervision) and assault with intent to resist arrest (sentenced to a community order for 18 months with a requirement to participate in Think First, an unpaid work requirement of 60 hours before 30 March 2007 under supervision and compensation of £175.99). There were also two convictions with no separate penalty for failing to surrender to custody at an appointed time on 21 November 2005 and 24 February 2006.

11 September 2006 pleaded guilty at Bournemouth Crown Court to a breach of a community order resulting from the conviction of 30 March 2006

20 October 2006 convicted on a guilty plea at West London Magistrates Court to obstructing powers of search for drugs on 10 October 2006. Sentenced to a conditional discharge of six months and a forfeiture/confiscation order. Also convicted of failing to surrender to custody as soon as practicable after appointed time on 16 October. Fined £75.

12 January 2007 convicted at Bournemouth Crown Court of a breach of a community order on 11 September 2006 resulting from the conviction of 30 March 2006. Order revoked and re-sentenced to a community order of 18 months, an unpaid work requirement of 60 hours and a programme requirement to attend Think First. Also convicted of failing to surrender to custody at an appointed time on 27 October 2006; sentenced to costs of £150.

26 January 2007 pleaded guilty at Exeter Crown Court to a breach of a community order resulting from the conviction on 12 January 2007. The sentence was for the order to continue for 18 months and an unpaid work requirement for 20 hours.

16 March 2007 pleaded guilty at Exeter Crown Court to breaching a community order resulting from the original conviction of 12 January 2007. The community order was continued for 18 months with an unpaid work requirement of 20 hours.

11 May 2007 convicted at Exeter Crown Court of a breach of a community order on 24 March 2007 resulting from the original conviction of 12 January 2007. Order revoked and the appellant was re-sentenced for the original offences to imprisonment of 39 weeks, suspended for two years and a supervision order of 12 months and unpaid work requirement for 100 hours.

9 August 2007 convicted at Exeter Crown Court of breach of suspended imprisonment on 23 May 2007 unserved from original sentence of 11 May 2007, suspended sentence activated, imprisonment two months.

27 January 2008 pleaded guilty at Exeter Crown Court to assault occasioning actual bodily harm. Convicted on 12 September 2008. Sentenced to 50 weeks imprisonment.

11 October 2008 pleaded guilty at Exeter Crown Court to wounding. Convicted on 15 January 2009. Sentenced to 18 months imprisonment.

The remarks of the sentencing judges in 2008 and 2009:

12 September 2008:

"Stand up please Mr Gnayoro. Mr Gnayoro, I sentence you on Count 6 of this indictment, the Crown having accepted your pleas of not guilty on the remaining counts. On the facts as presented to this court it was indeed a sustained attack on a woman, sustained as demonstrated objectively by the extent of her injuries. Mr Evans, I think, is right in saying that they were not life threatening but they were extensive and to various parts of her body quite clearly indicative of a good kicking. She would of course at the time have been in very real fear of you; she was at the time defenceless. The siting of the injuries, including those to her face, tell me that. You come before the court as a man with an indifferent record; apparently you are already demonstrating indifference to the hurt to others and a (in)different response to community orders as and when they would be imposed. I take into account your plea; it was late, it was at the door of the court. It was always open to you, Mr Gnayoro, to say that what you had told the police in respect of the assault was not right and

that your were prepared to plead to that single count. I take into account the guidelines to which I have been directed; they are of course guidelines only…the sentence of the court is one of 50 weeks custody".

15 January 2009:

"Alex Gnayoro, you have pleaded guilty, I accept at the first opportunity, to an offence contrary to Section 20 of the Offences Against the Person Act 1861, unlawful wounding, or causing grievous bodily harm. On 11 October, within a short time of being released from prison on 12 September – that was last year – you become involved again in a violent incident, as you know. I accept what Miss Scrivener has said on your behalf – that there was an element of provocation; I accept that you did not invite the eventual injury, or the assault, on Mr Passmore, but he sustained serious injuries in the incident in which you have pleaded guilty; he sustained wounds to his cheek and thumb, and required stitches for those injuries; and you, and you alone, are responsible for those injuries, as you know.

I accept that this was not a premeditated assault, as Miss Scrivener has submitted; I also accept what she says on your behalf that in relation to your last conviction you in fact ended up serving some 3 months or so longer as a sentence than the court eventually considered was required. I do, as I say, give you the maximum credit for your plea. You know of course that this offence easily passes the custody threshold, and you know the risks you run by becoming involved in violent incidents. You need, when you are faced with this situation again, to walk away immediately before it develops into a situation in which you become involved.

In all the circumstances I accept Miss Scrivener's submission to me and the sentence of the court will be one of 18 months' imprisonment".

4. The appellant is known to have used 10 aliases:
Ashley Douglas
Ellis Johns
Alex Gnaoro
Alex Thibault
Alixe Gnayoio
Alrx Tiboult Gnayono
Alex Gnayoro
Alex Thbault Gnayoro
Alex Thibault Gnayoro
Alex Thiboult Gnayoro

And two different dates of birth:
24 March 1984
17 July 1986.

5. Whilst in prison and immigration detention there have been adjudications against the appellant. Those which follow, between 31 March 2010 and 25 January 2012 are taken from the bail summary in the appellant's bundle 2 (green folder) submitted by the appellant's representatives;

31 March 2010 "having a fight and using an unauthorised drug".

18 May 2010 "having an unauthorised item in his possession".

6 June 2010 "being in a place where he shouldn't be".

18 June 2010 "being in a place where he shouldn't be".

30 June 2010 "using an unauthorised drug and fighting".

3 June 2011 "possession of an unauthorised item".

4 July 2011 "assault on a prison officer".

17 November 2011 "possession of cannabis and fighting with another prisoner".

25 January 2012 "fighting with another prisoner

The bail summary ends on 30 January 2012. We have not been provided with any official list of adjudications since then. However, the appellant has provided information about adjudications against him since that date. We take the following from his witness statement;

27 July 2012 he pleaded guilty to having a controlled drug in his urine (cannabis). It is not clear what his sentence was but it was suspended for three months.

2 August 2012 he pleaded guilty to assault and was sentenced to 14 days solitary confinement.

17 January 2013 he pleaded guilty to having a controlled drug (cannabis) in his urine.

20 February and 22 March 2013 the appellant was accused but cleared of having a controlled drug (cannabis) in his urine. He says that his explanation that his drinks had been spiked was accepted.

26 March 2013 the appellant pleaded guilty to assaulting prison officers and was sentenced to 28 days solitary confinement.

15 April 2013 the appellant pleaded guilty to assault and destruction of property. It was said that he had spat in the face of a prison officer and ripped a notice board off the wall.

10 June 2013 the appellant was accused of disobeying a lawful order. He says that the hearing has been adjourned.

6. Removal directions set and cancelled:

27 July 2010: disruptive behaviour
11 August 2010: disruptive behaviour
7 October 2010: disruptive behaviour
14 October 2010: dirty protest
30 November 2010: disruptive behaviour
3 December 2010: asylum application received
16 January 2012: appeal resurrected after signing of disclaimer

7. There have also been several failures to report to the Immigration Service whilst on bail and/or temporary release:

5 November 2009
6 November 2009
14 December 2009
21 December 2009

8. According to the bail summary and the appellant's oral testimony, he entered immigration detention on 9 April 2010. There is some contradiction in his evidence over whether he has remained incarcerated ever since. His witness statement of 15 May 2011 (at paragraph 11) records that he was released on bail from immigration detention in October 2010 but recalled on 23 December 2010 for two violations of his bail but the contents of the bail summary indicate that these events occurred in 2009 and not 2010.

9. Litigation history:

The appeal against the deportation order made on 22 April 2009 under the provisions of section 32 of the 2007 Act was dismissed by First-tier Tribunal Judge Osborne on 23 June 2009. Reconsideration was ordered but the appeal was dismissed again by Designated First-tier Tribunal Judge Manuell on 29 April 2010 and an application for permission to appeal was refused by the Upper Tribunal on 17 June 2010. Grounds for a judicial review were lodged on 27 July 2010 however permission was refused on 10 September 2010.

10. Removal directions were set for 7 October 2010, 14 October 2010 and 30 November 2010 however due to the appellant's disruptive behaviour on each occasion; the removals had to be cancelled.

11. On 2 December 2010 the appellant claimed asylum on the basis that he would be at risk on account of his religion (Islam), his tribe (unspecified) and the political activities of his father. A screening interview was conducted on 8 December 2010, the appellant was interviewed on 22 December 2010 and the application was refused on 4 March 2011. In refusing the application, the respondent noted that the deportation

order of 2009 remained valid, that the appellant would not be at risk of serious harm if returned to the Côte d'Ivoire and that despite his long residence here, removal would not be disproportionate under Article 8. He was also refused humanitarian protection.

12. The appeal against that decision was heard at Richmond Magistrates Court on 15 August 2011 by a panel chaired by First-tier Tribunal Judge Lingard and dismissed by way of a determination promulgated on 30 August 2011. Permission to appeal was refused by Upper Tribunal Judge McGeachy on 19 September 2011 but was granted on renewal by Upper Tribunal Judge Warr on 14 October 2011, it being found arguable that the panel needed to engage more specifically with the principles in Maslov v Austria (1638/03) [2008] ECHR 546 and Űner v Netherlands [2006] ECHR 873 bearing in mind the appellant's length of residence.

13. The matter then came before Upper Tribunal Judge Kebede at Field House on 18 April 2012; she dismissed the appeal on 23 April 2012. An application for leave to appeal against that decision was refused on 24 May 2012 but, undeterred, the appellant applied for a second appeal to the Court of Appeal. The matter came before the Right Honourable Sir Stephen Sedley who, on 2 August 2012, adjourned the application pending compliance with certain directions for missing evidence. Thereafter, on 5 December 2012, permission to appeal was granted. A statement of reasons was agreed between the parties and on 28 February 2013 the court ordered that the case be remitted to the Upper Tribunal for reconsideration upon Maslov grounds and without any consideration, directly or indirectly, of the statements of Constables Pounder and Back which had been put before the Tribunal on previous occasions.

14. At subsequent hearings before Upper Tribunal Judge Freeman on 29 April and 16 May 2013, documents relating to the intelligence reports were removed from the Tribunal file altogether and the respondent was directed to redact certain parts of the OASys report which referred to them. The matter then came before us on 11 July 2013.

The hearing

15. Upon the commencement of the hearing, efforts were made to ensure that all the documents relied upon by the parties had been received by the Tribunal. Both sides submitted additional documents.

16. We heard oral evidence from the appellant and his mother. The appellant adopted his witness statement in Appellant's Bundle 1 (AB1) and confirmed he was happy to rely on its contents. He also adopted the statement in Appellant's Bundle 2 (AB2) which he explained had been prepared for one of his bail hearings. He stated that the police had attended three bail hearings and at one of those hearings an officer had given evidence for some seven minutes about matters not related to his convictions.

17. The appellant stated that he had never indulged in any drugs other than cannabis. He had been on prescribed medication which included co-codemol, diazepam, fluoxetine and antibiotics. He explained that he had smoked cannabis in prison due to depression and peer pressure. As a result of the adjudications he had received in prison, he had lost privileges. He stated that if allowed to remain in the UK, he would not smoke cannabis or commit further crimes. He attributed taking drugs to depression and anxiety over his mother's health. He explained that he had been prescribed fluoxetine some 2 ½ years ago but had stopped taking it for about a year because he had to wake up early in order to receive it. He resumed taking it after his transfer to HMP Thamesmead where he "got into trouble" again. The appellant confirmed that he had been in four different institutions during his immigration detention; two were immigration detention centres and two were prisons. He was currently in prison. He did not have the same mental health team looking after him but his history was known to the new team each time he moved. He did, however, think that little attention had been paid to him whilst at the immigration detention centres. He stated that he thought he had been on suicide watch about three times. He had seen a psychiatrist once.

18. With respect to his criminal offences and adjudications, the appellant stated that he had been young when he had committed his crimes and had made many mistakes. He stated his mother was ill and the only thing that would make her happy would be if he went to college. He had thought of following a plumbing course or becoming a fitness instructor. He stated he was haunted by his last offence. He served 12 months in prison for it and was then on licence with a curfew between 7 PM and 7 AM and a requirement to see his probation officer once a week. He stated that he had been in immigration detention since completing his sentence. That completed the examination in chief. There was no re-examination.

19. In response to questions from the bench, the appellant stated that he had raised mitigating circumstances for the adjudications in prison. He said he had been in prison for four years and had spent a lot of time thinking about his life. He had seen the stress and pain his mother had gone through. He wanted to make her happy. He stated that he had always lived with her. When he was reminded that he had stated in other evidence (at his hearing before Judge Manuell) that he had been living with his girlfriend in Exeter, he said he only spent three days a week with her and the rest of the time lived at home and attended church every Sunday. He was asked to clarify why he had claimed to be a Muslim when he claimed asylum. He stated that he had converted to Islam whilst in detention in 2009 or 2010 but had reverted to Christianity since. The appellant stated that he was his mother's only child. His father had two additional sons, Yves and Gregory. When asked if he knew Diwo Aboubakar Seni (said by his mother in her statement to be her son), the appellant agreed that he was his stepbrother but maintained they did not get on. His father had passed away in 2011. He had previously claimed that his father had died because his mother had always said that he was dead. The appellant stated that he had been back to visit the Cote d'Ivoire twice. His mother had also been twice, with him. There were no questions arising from either representative.

20. We then heard evidence in French from the appellant's mother, Dede Jacqueline Lipke. She confirmed her address and stated that she was generally in poor health. She had arrived in the UK in 1990 and had been working ever since as a cleaner. She had finished her morning shift before the hearing, having worked from 6:30 AM until 9 AM. She spent her money on rent, taxes and her family, specifically the appellant. Prior to obtaining legal aid, she had paid for the appellant's representation.

21. The witness was asked about her ability to influence the appellant in respect of his criminal behaviour. She stated that she had tried to talk to him as a mother and whilst he was in prison she had visited regularly and they had spoken a lot. She thought that she would have influence over him. She stated that her visit had also helped the appellant as he knew that she was there to support him. His removal would impact upon her. He had no other family. She had two children, the appellant and Seni. That completed the examination in chief. There was no re-examination.

22. In response to questions from the bench, the witness stated that Seni was with his father (not the appellant's father) in Ghana. She confirmed that was the reason for her visit to Ghana. She stated that she had travelled to the Côte d'Ivoire on two occasions since losing her mother and to Ghana once. She travelled alone. She had funded her journeys herself.

23. In response to questions from Mr. Norton, the witness stated that she had travelled when her mother died; that was the last occasion. She had been twice with the appellant when his father was still alive. The purpose of the visit had been to meet up with him. She clarified that in total she had been back on two occasions. That completed the oral evidence.

24. Ms Jegarajah's submissions were lengthy. In her skeleton argument she raised three issues which had not formed part of the consent order. These were that, in accordance with UKBA policy, the respondent and the Tribunal should not have any regard to the appellant's spent convictions, that the respondent had acted unlawfully and prejudicially by introducing intelligence from the police relating to the appellant's non-convictions and thirdly, that the respondent had pressured the appellant into signing a disclaimer to withdraw his asylum appeal after permission to appeal had been granted. As Mr. Norton did not object to any of these arguments being introduced, counsel was given leave to argue them.

25. We sought clarification from the parties as to the nature of the present appeal, there being no fresh deportation order, no indication that the 2009 order had been withdrawn and no evidence that the appellant had sought a revocation of that order. After some discussion, Counsel conceded that the present appeal was a pure Article 8 case which had to be assessed in the light of the extant deportation order. We have, therefore, proceeded on that basis.

26. In view of the new issues raised, Ms Jegarajah led the submissions. She reminded us that following guidance in Maslov, very serious reasons were required to justify expulsion. The Tribunal should recognise not just that the appellant entered as a minor and committed offences as a minor, but also that he had spent a very long time living in the UK which meant that great weight should be attached to his private life. It was submitted that the appellant's mother was seriously unwell and evidence of this was contained in the bundle. There was a genuine close relationship between them.

27. Ms Jegarajah then took us through the appellant's convictions and maintained that all those prior to 16 March 2007 were spent. She withdrew her earlier submission, and accepted that the appellant had been a minor only when the first offence in 2002 had been committed. It was accepted thereafter he had reached his majority. Reliance was placed upon section 4 of the Rehabilitation of Offenders Act 1974 and it was argued that the appellant should be treated as someone who had never been convicted with regard to the spent convictions. Ms Jegarajah submitted that in accordance with section 7 (3), it was a question of discretion as to whether those convictions were considered by the Tribunal. She submitted that items 1, 2 (i), and 2 (ii) on the PNC list were spent although upon further examination of the dates of conviction, the appellant's date of birth and the date the deportation order was signed, she accepted that they had not been spent when the respondent signed the order. She argued that because the appellant had been in immigration detention since the completion of his last sentence, he had not had any opportunity to show his rehabilitation. She stated he would be permanently ostracised if he had to keep referring to spent convictions. It was not the case here that the appellant had a history of serious convictions which had escalated in violence or seriousness. There was a public interest in rehabilitating foreign deportees. The OASys report was the only evaluation of the appellant's conduct and re-offending. She submitted there were concerns about the report because the conclusions had been reached with non-admissible information in mind. As such, little weight should be given to it. She submitted that with respect to the last offence, the sentencing judge had accepted that alcohol had been involved and that the injured party was not the intended victim.

28. It was submitted that there had been a long litigation history because material not relevant to the appellant's convictions had been put forward. The Secretary of State had attempted in this way to submit incriminating material and had acted in a way that damaged the appellant's case. She questioned why this had been done. She reminded us that a police officer had attended the bail hearing and given oral testimony about non-convictions. She submitted that prejudicial information had adversely affected the appellant. He had been in immigration detention since 2010. He had been on suicide watch as a result of his lengthy detention. She referred us to the medical notes which she submitted painted a different picture of the appellant then that depicted by the respondent. He was trying to rehabilitate himself. In conclusion she submitted that the appellant's expulsion was disproportionate given the length of his residence and the guidance in cases such as Maslov and Űner.

29. We then heard submissions from Mr. Norton. He took us to the determination of Designated First-tier Tribunal judge Manuell which, he reminded us, had not been set aside. He pointed out that Judge Manuell specifically attached no weight to what had been described as prejudicial evidence. He further submitted that this had not been relied on by Judge Lingard either. He submitted that the reason the respondent had agreed to a consent order was because the reasoning of Judge Lingard on Maslov principles was not clear. He submitted that the respondent had not sought to rely on the police reports following Judge Manuell's determination and this had been specifically clarified in the submissions made by the Presenting Officer before Judge Lingard. He argued that the details set out in the bail summaries had nothing to do with the police reports. In any event, he rejected the submission that evidence of non-convictions was unlawful or inadmissible and he referred us to the cases of Bah (EO-Turkey - liability to deport) [2012] UKUT 00196 (IAC) and Farquharson (removal – proof of conduct) [2013] UKUT 00146 (IAC) both of which dealt with such evidence. He submitted that the relevance of such information had to be assessed and that it was then a matter of weight. He accepted that it was open to the Tribunal to attach less or no weight to conduct which did not result in a conviction but this did not mean that such evidence should be disregarded. He also referred us to the judgment in V [2009] EWHC 1902 (Admin) in the respondent's bundle (at paragraph 48).

30. With respect to the issue of spent convictions, Mr. Norton relied on AA (spent convictions) Pakistan [2008] UKAIT 0027. He also argued an analogy with AG (Kosovo) [2007] UKAIT 00082 and maintained that where a conviction was unspent at the date of the decision (in this case the deportation order on 22 April 2009), an appellant should not benefit from it being spent at a later date simply due to the protracted appeal procedure. He submitted that only the 2002 conviction of receiving stolen goods was irrelevant to the Tribunal's consideration as the appellant had been 16 at the time that offence had been committed.

31. As regards the allegation that the respondent had pressured the appellant into signing a disclaimer, he submitted that the circumstances in which the disclaimer was signed were set out in AB2. Contrary to what was argued, it was the Secretary of State who made concerted efforts to have the appeal reinstated.

32. Mr. Norton submitted that the appellant had a serious offending history and had been found to be of high risk of harm to the public and of reconviction. He accepted that time had passed since the OASys report had been prepared but he drew our attention to the appellant's behaviour in custody and the number of adjudications against him as relevant evidence of his conduct. He pointed to the findings of fact made in the determination of Judge Manuell and submitted that nothing had changed in relation to those facts. In conclusion, he relied on the reasons for refusal letter of April 2011 which, he submitted, dealt in depth with the Article 8 claim. He asked that the appeal be dismissed.

33. Ms Jegarajah made a brief reply. She asked that we look carefully at the grant of permission by the Court of Appeal which raised concerns about the continuing validity of the judgment in V. She also pointed out that Bah related to old style deportation appeals.

34. Submissions having been completed, we reserved our determination.

Appellant's case

35. The appellant's claim is contained in his oral evidence (detailed above) and in the three witness statements prepared during the course of this lengthy litigation. Essentially the appellant relies on his relationship with his mother who is said to be his only close relative. His relationship with his girlfriend in Exeter, which was relied upon in an earlier appeal hearing, ended a few years ago whilst he was in prison. Although he received an education at primary and secondary schools in London, he obtained very few or no qualifications (it is not clear which). His maternal aunt and her family also live in the UK. The appellant maintains that he feels himself to be an Englishman and that he has no family or connections with the Cote d'Ivoire. He has no employment history other than brief intermittent work in a restaurant. He expresses great remorse for his criminal offending and assures the Tribunal that he will not re-offend.

36. The appellant also sets out mitigating circumstances for some of the adjudications listed above and for his crimes.

37. There are a number of contradictions in his evidence with respect to his father, his and his mother's visits to the Cote d'Ivoire and the number and whereabouts of his siblings. He has repeatedly stated that he is his mother's only child whereas her evidence is that she has two sons. When this was put to him at the hearing, he conceded he had a half brother on his mother's side. He also has two half-brothers on his father's side. The OASys report records that the appellant said he had a brother living in France working as an engineer for a large mobile phone company and another aged 24 (now 28) studying computer engineering in London. His father is said to have nine children living in the Côte d'Ivoire (six boys and three girls).

38. In his oral evidence and his witness statement of 19 September 2012, the appellant maintains that he has visited the Cote d'Ivoire on two occasions in 1999 and 2005. He states on both occasions he visited his father and other relatives. According to endorsements in this passport, however, he visited in 2001, 2002 and twice in 2004. Although his mother maintained in her evidence that she had only visited twice, the written evidence indicates that she visited on the same occasions as the appellant and additionally in 2010.

39. He states that he only speaks broken French however at his interview he gave French as one of the two languages that he spoke and it is the case that his mother with whom he claims to have a close relationship speaks very little English.

40. He attributed his criminality to the use of cannabis, alcohol, peer pressure, school problems and depression on account of his mother's ill health.

41. His father has been said at different times to be living in Togo, France or to have been killed prior to November 1990 or at some point thereafter, or to have died of cancer in 2011.

42. The appellant maintains that his mother is very ill and needs his help. He claimed both that he always lived with her and that he had moved to Exeter to live with a girlfriend.

Discussion, findings and conclusions

Spent Convictions

43. Although not referred to in her skeleton argument Ms Jegarajah submitted that some of the appellant's convictions were spent under the provisions of the Rehabilitation of Offenders Act 1974, should not have been relied on by the respondent and could not be taken into account by the Tribunal. She said that the point had been mentioned at earlier hearings. Whilst Mr Norton might have argued that the respondent had not had notice of the point he did not object and said that he was prepared to deal with it. We heard submissions from both representatives. Ms Jegarajah provided us with an extract from the respondent's Immigration Directorate Instructions (IDIs). During the course of the hearing we accumulated copies of the Rehabilitation of Offenders Act 1974, AA (spent convictions) Pakistan [2008] UKAIT 0027 and R on the application of V [2009] EWHC 1902 (Admin). We have also drawn assistance from Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 60 (IAC).

44. Section 7(3) of the Rehabilitation of Offenders Act 1974 provides as follows:

> "If at any stage in any proceedings before a judicial authority in Great Britain … the authority is satisfied, in the light of any considerations which appear to it to be relevant (including any evidence which has been or may thereafter be put before it), that justice cannot be done in the case except by admitting or requiring evidence relating to a person's spent convictions or to circumstances ancillary thereto, that authority may admit or, as the case may be, require the evidence in question notwithstanding the provisions of subsection (1) of section 4 above, and may determine any issue to which the evidence relates in disregard, so far as necessary, of those provisions"

45. We find that the summary of AA, prepared by the author of the determination, correctly summarises the law. It states; "Convictions that are 'spent' for the purposes of the Rehabilitation of Offenders Act 1974 should not normally be the subject of reference in appeals before the Tribunal. The exception is in s 7(3) of the Act, which allows spent convictions to be proved if the interests of justice require it: it is for the Respondent to prove that they do."

46. Paragraphs 40 and 41 of Ogundimu state;

> "40. In a case of this sort, where the Secretary of State relies on a persistent course of conduct rather than a single serious offence to justify deportation, it is of importance to look at the appellant's offending behaviour as a whole. It is the Secretary of State's case that the appellant's offending behaviour escalated and would continue to do so. It would be artificial in such circumstances to consider only the most very recent convictions. We therefore directed that we would admit the whole of the appellant's criminal record when we re-made the decision, in order to obtain a complete picture. The weight to be attached to spent convictions is a very different matter, but their relevance is the information they throw on the strength of the public interest in deporting the appellant for his most recent offending.
>
> 41. We also observe that where persistent criminal conduct is relied on, it is important for the judge to have the full Criminal Record Office printout rather than just a summary of the dates of convictions. The full list assists discovery of when the offending occurred, whether it was in breach of a Community Order, whether the appellant was on bail at the time of the offending, and other data about the sequence of the offending. We pointed out at the hearing that any suggestion that the Data Protection Act restricted disclosure of such information to a court is misconceived."

47. The question also arose as to the date at which the assessment of whether a conviction was spent should be made. Ms Jegarajah submitted that it should be the date of the hearing before us. Mr Norton argued that it should be the date of the respondent's decision. Neither gave as any authority for their proposition. We find that if such an assessment has to be made it should be made at the date of the respondent's relevant decision. As long as the correct date is identified it is then a fixed point which does not change during the course of protracted proceedings such as these. Ms Jegarajah's submission would result in a moving target with the result that for the same appellant in the same proceedings convictions properly considered at one point would become spent over time and potentially fall out of consideration. We conclude that this would not be the correct approach and find that the point of decision, throughout the proceedings, is the date of the respondent's decision. Normally that is not difficult to ascertain. In this case there are two possible dates. We find that the correct date is the earlier date on which the respondent made the deportation decision, namely 22 April 2009.

48. If we assess the question of what convictions were spent as at 22 April 2009 there were two; his caution for assault on 1 July 1998 and his conviction for handling stolen goods (receiving) at Camberwell Green Youth Court on 26 January 2002 where the outcome was a referral order for four months. Coincidently these were the two offences which preceded his 18th birthday.

49. The application of Maslov principles (Maslov v. Austria - 1638/03 [2008] ECHR 546 (23 June 2008) where one of the essential factors is the nature and gravity of the offences committed by the appellant means that in our judgement we need to look at the whole history and any pattern of offending, the seriousness of the offences and the appellant's ages when offending started and finished. If one or more offences are

excluded because they are spent it could give a misleading picture. In this case the offences which would fall out of consideration if treated as spent would be those committed before the appellant became an adult. In 1998 the appellant was 11 or 12 years of age. In 2002 he was 15 or 16. Whilst the offence of handling stolen goods in 2002 does not fit the overall pattern of offending, the assault in 1998 is relevant to the offences of violence which followed. We find that the respondent has proved that the interests of justice require all of the appellant's criminal record to be taken into account.

The prejudice point

50. In paragraph 11 of her skeleton Ms Jegarajah submits that; "The weight to be attached to the public interest in preventing crime and disorder must be greatly reduced in this appeal because of the way in which the SSHD has acted towards the A(ppellant). She has sought to prejudice the appellant's case by (1) attempting to make him withdraw his appeal after PTA (permission to appeal) had been granted, (2) attempting to subvert the rule of law by introducing materials that are now accepted were included unlawfully and (3) by seeking to detain the appellant by introducing evidence that would not be admitted in this appeal. For those reasons the weight to be attached to the deployment of the public interest in this particular case should be greatly reduced". We have added numbers to this passage to make it easier to identify the three elements it contains.

51. In reply to our question, Ms Jegarajah accepted that the points which we have numbered 1 and 3 had not been raised before the Tribunal or notified to the respondent prior to the delivery of her skeleton argument on the morning of the hearing. She said that point 2 was a natural consequence of the matters raised before the Court of Appeal. However, Mr Norton did not object and indicated that he was ready to deal with these points.

52. The accusation that the respondent has sought to prejudice the appellant's case is a serious one and it is for the appellant to prove this, to the standard of the balance of probabilities. In relation to the first point, that the respondent attempted to make the appellant withdraw his appeal after permission to appeal had been granted, Ms Jegarajah's submissions shed no light on this. We have not been told how it arises, who is alleged to have done what and whether there are any relevant documents. The point is not made out.

53. In her submissions Ms Jegarajah accepted that the second and third points are interrelated. They relate to the same or very similar evidence. Paragraph 2 of the judgement of Hughes LJ in this case (28 February 2013) refers to the question of whether any Tribunal judge or panel dealing with this appeal erred by taking into account; "Two statements of police officers which recounted intelligence information received by the police suggesting unlawful (principally drug supply) activity by the appellant and association with firearms. The sources of that information was stated generally, although not entirely, to be informants unidentified, but with the kind of assessment of general reliability which such reports are generally given". The order of the Court of Appeal dated 28 February 2013 stated, in paragraph 3, "On remission there be

no direct or indirect reference to the witness statements of PC Pounder and DC Back or the information contained therein". We have not seen these statements and documents before us have been redacted to remove reference to them.

54. It is alleged that the respondent introduced "materials that are now accepted were included unlawfully". It is recorded in paragraph 14 of the Statement of Reasons annexed to the order of the Court of Appeal that the respondent no longer relied on the police intelligence reports. The Court of Appeal declined to adjudicate on the point. We have not been shown any evidence which either states or implies that the respondent accepted that this material was included unlawfully. No such inference can be drawn from the fact that it was no longer relied on by the respondent. We find that there has been no acceptance or finding that materials were included unlawfully. The evidence before us does not established that it was included unlawfully.

55. In relation to point 3 Ms Jegarajah submitted that a police officer attended bail hearings before the First-Tier Tribunal and gave evidence in relation to what were described as "non-convictions" which, we are given to understand, is similar material to that complained of in the proceedings before the Court of Appeal. She accepted that there was nothing in principle which would make it inappropriate for a police officer to attend and give evidence at a bail hearing. She drew our attention to a report from the representative who appeared for the appellant at the bail hearing 21 January 2013 (page 31A of the new bundle), which includes the passage; "There was evidence given by DC Burrows, at the invitation of the IJ. He repeated the opinion that he gave on page 8 of the remand application, to the effect that Mr G posed a significant threat to the public if released. However, in cross-examination he accepted that this opinion was based in part on the non-convictions disposals and that the actual convictions provided a much lower degree of support."

56. Page 29A of the same bundle containing the judge's reasons for refusing bail which includes the passage; "Today I heard from DC Burrows. I find that his evidence is persuasive and I give it some weight. I do not pay any regard to the "non-convictions". Even though the appellant has been in detention for a long time and even though he is not imminently removable I find that his attitude to bail and restrictions in the past taken together with the risk which he poses to the public make him unsuitable as a candidate for bail."

57. In his evidence in chief before us the appellant adopted and confirmed the accuracy of his witness statement dated 19 September 2012 which appears between pages 20 and 24 of the same new bundle. We are surprised that he should have been asked to do so or that once he had done so we were not asked to exclude some or all of it from our consideration. A large part of the statement is taken up by explaining why had not been involved in an attempted rape (falsely accused), possession of a firearm with intent in an incident where shots were fired at the police (not involved), robbery (arrested but never charged, actual bodily harm (for which he was convicted), grievous bodily harm (for which he was convicted) and non-compliance with bail conditions (explained as a minor infraction).

58. We have studied the voluminous material contained in the appellant's new bundle submitted on the day of the hearing. Whilst they share common factors we prefer the judge's reasons for refusing bail to the note prepared by the appellant's representative. The appellant had a long history of failure to comply with the reporting requirements of the criminal courts, several failures to report to the immigration authorities, had used a number of aliases and the two most recent offences before he was sent to prison involved serious violence. We find that the appellant has not established that impermissible evidence was submitted which caused or contributed to the appellant being refused bail. For the reasons we have already given the appellant has not established that material was included unlawfully in the appeal (as opposed to the bail) proceedings so that there is no conclusion which can be carried over for the benefit of his arguments in relation to the bail proceedings. We also find that the appellant has not established that the respondent has prejudiced or attempted to prejudice his case or subvert the rule of law. She has not relied on material which was unlawful.

Razgar and Maslov assessments

59. As can be seen from the summary of the appellant's evidence there are a number of contradictions in the appellant's accounts as given at various stages of the proceedings. The most serious discrepancies relate to the appellant's father. He is given different first names in the evidence and at various points has been said to have been killed. In July 2009 the appellant gave instructions to his representatives that his father was in the government and had been murdered (T13). He further claimed that he could only vaguely remember his father as he had not seen him since the age of six. Thereafter in April 2009 his instructions to his representatives as set out in the grounds of appeal and statement of additional grounds (K-12) were that his father had been killed in conflict by rebels prior to his mother's flight from the Cote d'Ivoire in 1990 (at paragraph 5). Those grounds also maintained that the appellant was working hard to tackle his offending behaviour and had not been in trouble since arriving in prison (at paragraph 7). In the grounds for judicial review prepared in September 2010 then it was again maintained that the appellant's father had died when the appellant was very young (at paragraph 3). At his asylum interview, however, he stated that his father was alive and travelled between France and Togo. The medical notes record that he told various medical personnel whilst in custody that his father had died of cancer in France in 2011 and that his body was being flown to the Cote d'Ivoire for burial. When asked to explain at the hearing why he had maintained several times that he had lost his father as a child, the appellant said he was only repeating what his mother had told him. However, his recent witness statement and indeed his mother's oral evidence both indicate that the appellant met up with his father on all his visits back to the Cote d'Ivoire, most recently in 2004 or 2005. No death certificate has been provided in respect of his father. This conflict in the appellant's evidence is unexplained and raises doubts as to whether his father has passed away.

60. We also find the appellant's evidence as regards his siblings to be unreliable. There is no reason he would have lied to the author of the OASys report about the number and whereabouts of brothers and sisters. Indeed, the visits made by the appellant and his mother to the Côte d'Ivoire, despite a modest income on her part and the appellant's lack of employment, support a finding that there are relatives still living there. The return of the appellant's father's body to Côte d'Ivoire for burial (if his death is to be accepted) also suggests ties with the country of origin.

61. In his medical notes he is recorded as having told the doctors that he was left in the care of his mother's friend after she left him in the Cote d'Ivoire and that he was abused by this person (p. 59). His mother's evidence and indeed the evidence in the appellant's witness statement is that he was left in the care of his maternal grandmother.

62. The appellant states that he has always lived with his mother, other than when in custody, but a number of his offences were committed in the south-west of England, as shown by his convictions at Exeter and Bournemouth Crown Court. His place of residence and previous residence as shown on the PNC (respondent's bundle p.35) and on his prison medical notes (AB at page 36) respectively were not London addresses and when giving evidence before the Tribunal in April 2010 he stated that he had been living in Exeter for some years. In his adopted statement of September 2012 he confirms that he had moved to Exeter to live with his former partner at some point prior to September 2008 (at paragraph 18). His mother's witness statement of 9 May 2011 confirms the appellant's account that he was living in Exeter (at paragraph 10).

63. The appellant maintains his mother is very ill and needs his help but her evidence to the Tribunal in 2011 was that she was well and had recovered from the brain haemorrhage she had in 1998. The brief medical evidence submitted indicates that she suffers from hypertension, insomnia and low moods. She has also acted strangely in the past in that some years ago she ran naked down the street. However despite her conditions, her evidence was that she has worked ever since her arrival in 1990 and continues to do so. There is no medical evidence that she suffers from a life threatening condition as the appellant maintains in his statement (at paragraph 20). Moreover it is not the case that she just has church members to turn to (paragraph 22). Her sister lives in London and as can be seen from the medical evidence, assists her as well.

64. There are no statements from the appellant's maternal aunt, her husband or their children. There is no evidence that the appellant has undertaken any courses to rehabilitate himself whilst in prison.

65. In addressing the penalties he received for adjudications when giving oral evidence, the appellant failed to mention the occasion when he was put into solitary confinement for 28 days for his conduct (paragraph 12; statement of 27 June 2013). Although he expresses regret for drugs use and his violent behaviour in that

statement, his poor behaviour continued as the repeated adjudications show. For eg., despite an adjudication for having a controlled drug in his urine on 27 July 2012 and expression of regret and remorse (paragraph 5), it can be seen that an adjudication for the same offence occurred on 17 January 2013 (paragraph 9).

66. The appellant has not founded a family of his own. His relationships with girlfriends have not lasted. He is not now in a relationship and he does not claim to have any children. His case needs to be assessed in line with the principles set out in Maslov.

The nature and seriousness of the offence committed by the applicant;

67. We find that the respondent has proved that the interests of justice require all of the appellant's criminal record to be taken into account. These are set out earlier in this determination. We do not take into account any suggestions that the appellant has committed criminal offences other than those for which he has been convicted or had adjudications against him.

68. We have set out the appellant's convictions and adjudications earlier in this determination.

69. Most of the appellant's offences have been committed as an adult. The OASYS report is dated 8 June 2009. The appellant was assessed as having a high risk of reconviction and, in the community, posing a low risk to children, medium risk to known adults and staff and a high risk to the public. Ms Jegarajah asked us to place little or no weight on it, arguing that it was flawed because of the impermissible input and opinions from police officers. We have not seen what that was, because the passages are redacted. However, not a great deal has been redacted and the lengthy and detailed assessment which remains provides strong support for these conclusions. This is the only risk assessment before us. There is nothing in the appellant's behaviour since then which persuades us that circumstances have changed or that the risk assessment should be at a lower level. His behaviour indicates otherwise.

The length of the applicant's stay in the country from which he or she is to be expelled;

70. The appellant's mother came to the UK in November 1990. She left the appellant with his grandmother in Côte d'Ivoire. He joined her here in August 1992 when he was six years of age. He has lived here ever since, nearly 21 years. We agree with the finding of the Tribunal in August 2011 that he has made visits to Côte d'Ivoire in 2001, 2002 and 2004. His mother accompanied him and also went there in 2010. We note that their evidence as to the number of occasions has been inconsistent. In August 1999 the appellant and his mother were granted indefinite leave to remain exceptionally outside the Immigration Rules under special measures introduced to clear an asylum backlog. The appellant gained indefinite leave in line with her. Since April 2009 the appellant has been trying to remove the appellant from the country. We have concluded that the appellant has not established that the respondent has prejudiced or attempted to prejudice his case or subvert the rule of law. She has taken legitimate

steps to attempt to remove him. On the other hand, the appellant has gone to great lengths to prolong his stay in this country not only through legitimate appeal processes but other tactics such as failures to report under his bail conditions and preventing removal by disruptive behaviour and dirty protest.

The time elapsed since the offence was committed and the applicant's conduct during that period

71. The last criminal offence committed before the appellant went to prison was in January 2009. He has not had the opportunity to show that he can stay out of trouble outside prison since then because he has been in prison, either serving his sentence or in immigration detention. He has committed further offences in prison both against prison regulations and offences which would be criminal if they were committed outside prison. The most recent was in April 2013. The appellant has provided detailed explanations for each of these adjudications. He attributes the need to use cannabis in prison to the failure to provide him with proper medical treatment and medication. He needed this because of his fear of being deported, depression and concern about his mother. Further explanations as to circumstances of each offence minimise his involvement, place a large element of the blame on others and emphasise his remorse. There are five letters from officers at the appellant's current prison either dated or apparently written in June 2013. They say that his behaviour has improved and that he is compliant with the regime, polite and respectful to staff. It is acknowledged that he has not behaved well in the past. He is now helping other prisoners and staff and forming positive relationships. We accept that these statements accurately reflect the current position over a short period. During this period the appellant has been well aware that his appeal hearing before the Tribunal would take place soon. In view of his past history and repeated assertions that he is a changed man we find that so short a period of improvement is not a reliable indication that he is a reformed character.

The solidity of social, cultural and family ties with the host country and with the country of destination

72. The appellant's first language is French acquired in Côte d'Ivoire. He also speaks and gave evidence in English. His mother's preferred language is French and she gave evidence through a French speaking interpreter. We find that the appellant probably speaks competent French learned in the country to which he would return and maintained in frequent conversations with his mother. He had some schooling in Côte d'Ivoire but was not happy in school. He has been educated in this country but truanted frequently and left school with no or minimal qualifications (it is not clear which). He was not happy at secondary school in this country attributing much of this to racial harassment and a violent environment. He had his face slashed in a knife attack. He has worked for a few months in this country and has received benefits for the rest of the time whilst not in prison. His father, from whom his mother was separated, was influential and well off. In view of the conflicting evidence to which we have referred we do not accept that he is no longer alive and

no longer willing or able to assist the appellant. For most of his time in this country the appellant has lived with his mother. She has a number of family members here including a sister who attended the hearing with her. The appellant has had a number of girlfriends but the relationships have not proved durable and he is not currently in a relationship. It is the appellant's own evidence that he has few friends. He attributed his criminality to the use of cannabis, alcohol, peer pressure from bad company and problems including bullying at school.

73. The appellant's mother has shown him unstinting affection and loyalty. She is on low earnings as a cleaner and has spent a high proportion of them on visiting and giving money to the appellant. She has suffered physical and mental ill-health. She has worked for all or most of the time and was working on the morning of the hearing. She is reluctant to agree to the medical treatment which she needs fearing that it may prevent her from visiting and helping the appellant. She has family members including a sister in this country. She has two children, the appellant and an elder half brother who may be living in Ghana. History shows that she has not been able to exercise effective control over the appellant's behaviour. We find that the appellant has only integrated into society in this country to a very limited extent. He has a close relationship with his mother, closer on her side than on his. He is prepared to accept a substantial proportion of her earnings.

Conclusions

74. The decision making and appeal history in this case is not entirely clear. However, it is now common ground, agreed by both representatives, that the appellant's appeal rights against the deportation order dated 22 April 2009 have been exhausted so that the decision stands. The subsequent decision of 4 March 2011 to refuse the appellant asylum is the decision against which this appeal was brought albeit that it is now pursued only on Article 8 private life grounds. If his appeal succeeds he cannot be deported. If it fails the deportation order stands. Ms Jegarajah confirmed that the appellant relied on Article 8 private life in this country, not on any family life.

75. We find that the first three of the Razgar questions are answered in the affirmative (Razgar, R (on the Application of) v. Secretary of State for the Home Department [2004] UKHL 27). This appeal turns on the fourth and fifth of the tests; "(4) Is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?" and (5) "If so, is such interference proportionate to the legitimate public end sought to be achieved?"

76. Following the guidance in Maslov, we find that the interference serves a legitimate aim, namely the "prevention of disorder or crime". The main issue to be determined is whether the interference is "necessary in a democratic society". It will not be unless the respondent can show that there are very serious reasons to justify expulsion. The relevant criteria are those which we have set out under the above

headings. In paragraph 75 of Maslov it is stated; "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." Here the appellant has spent the major part of his childhood and youth in the UK but almost all of the offences we have taken into account were committed after he became an adult. Looking at all the evidence including the factors which we have set out in the round we conclude that the respondent has shown that there are very serious reasons to justify the expulsion of the appellant.

77. In these circumstances we consider whether such interference is proportionate to the legitimate public end sought to be achieved? We have found that, in relation to the legitimate public end sought to be achieved, there are very serious reasons to justify the expulsion of the appellant. The strongest elements of the appellant's private life in this country are his life with his mother and the length of time he has been here. He has few friends, no other close personal relationship, has found it difficult to assimilate and has only worked for a very short period. He has not acquired significant job skills. We do not believe that he lacks relatives in Côte d'Ivoire who could assist him and we find that even if his original French is rusty it was his first language and sufficient to live there whilst full fluency is re-established. We conclude that the appellant has established that the removal of the appellant from the UK would be a proportionate interference with his Article 8 human rights.

78. We dismiss the appellant's appeal on the only grounds which he has pursued that is the Article 8 human rights grounds.

Signed:.....
Upper Tribunal Judge KEKIĆ **Dated 18 July 2013**