Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00332/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5 September 2013	**On 23 September 2013**
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Before

LORD BANNATYNE
UPPER TRIBUNAL JUDGE KOPIECZEK

Between

DB
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E. Wilford, Counsel instructed by D. J. Webb & Co, Solicitors
For the Respondent: Mr C. Avery, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before us following the appellant's unsuccessful appeal to the First-tier Tribunal against a decision to make a deportation order under the automatic deportation provisions of the UK Borders Act 2007. The Panel of the

First-tier Tribunal (First-tier Tribunal Judge Thanki and Mr D. R. Bremner) heard the appeal on 25 March 2013.

2. The appellant is a citizen of Jamaica, born on 15 August 1986 who arrived in the UK on 13 July 1998 when he was 12 years of age. The decision to deport at him followed his convictions for three offences of supplying class A drugs, namely crack cocaine and heroin. On 25 November 2011 he received a sentence of three years' imprisonment.

3. The grounds of appeal to the Upper Tribunal, in summary, concern alleged failure to have proper regard to the best interests of the appellant's daughter, D, who was born on 28 June 2010, failure to consider the favourable evidence as to the risk of reoffending, and coming to conclusions contrary to authority in assessing the proportionality of removal.

Submissions

4. Mr Wilford relied on the grounds of appeal to the Upper Tribunal. It was submitted that the First-tier Tribunal did not take into account the assessment that the appellant was at low risk of reoffending. The deterrence factor in the proportionality assessment is affected by the assessment of the risk of reoffending. It was speculative for the Panel to have stated at [30] that the appellant remains vulnerable (to reoffending) if he returns to drug abuse.

5. The appellant had been lawfully in the UK since he was aged 11. The principle in Maslov is that a cumulative approach to proportionality is required and very serious reasons were required before it could be considered proportionate to remove this appellant in the circumstances of his case.

6. Although the length of the appellant's relationship with his daughter was a factor in that it had been of relatively short duration, his future relationship with her needed to be considered.

7. Mr Avery submitted that the determination proceeds on the premise that it is in the appellant's daughter's best interests for him to remain in the UK. There was no error of law in the best interests assessment.

8. The offence of itself was serious enough to make his removal proportionate. Deterrence is a key factor and is not reliant on a risk assessment. In any event, there was nothing wrong with the Panel's assessment of the risk of reoffending, it being noted that there was a medium risk to the public.

Error of law- our assessment

9. Grounds 1 and 2 concern the way the First-tier Tribunal dealt with the best interests of the appellant's daughter, the suggestion being that the panel did not make an explicit finding in terms of whether the appellant's removal is in her best interests or what the impact of his removal would be on her.

10. The grounds at [7] suggest that the Panel inaccurately paraphrased the principle in ZH (Tanzania) [2011] UKSC 4, whereby the Panel stated at [33] that the interests of D are a primary concern. However, this fails to take into account what the Panel said earlier at [31], namely that "the best interest of [D] is a primary consideration"; a correct expression of the principle. In that paragraph there is express reference to ZH.

11. We do not accept the proposition at [9] of the grounds that the First-tier Tribunal failed to determine whether the appellant's deportation and subsequent exclusion would be in her best interests. It is true that the Panel did not state explicitly that the appellant's deportation would not be in her best interests, but that they came to the view that it was not in her best interests for him to be removed is clear enough from the determination. At [31] it is accepted that the appellant does spend time with his daughter as had been suggested. At [32] the Panel said as follows:

> "While the interest of [D] is a primary concern in the assessment of Article 8 rights, we do not consider that her interests trump all other factors in relation to the removal of a foreign criminal who has committed crimes in the UK. It is inevitable that [there] will be a severance of the relationship between the appellant and his child, which is inevitable when her rights are considered against the needs of the society in deporting criminals who have committed serious crimes."

12. We consider that it is implicit in the determination that the Panel did consider that D's best interests were to the effect that the appellant should remain in the UK and to maintain the contact that he presently has with her. Hence the Panel's express recognition that her best interests are not the only consideration. No doubt it would have been better had the Panel stated explicitly where D's best interests lay, but we cannot see that there is any error of law in terms of any failure to determine her best interests.

13. Similarly, we do not accept as asserted at [10] of the grounds that the consideration of D's best interests is confined (inadequately) to [33] of the determination. In that paragraph the Panel concluded that in the event of the appellant being deported not all contact between him and his daughter would be lost, referring to the possibility of D being able to visit the appellant, albeit that there may be "some hardship" involved in such a visit. In [31] the Panel referred to D's mother's circumstances, that she has indefinite leave to remain and works part-time and calls on the appellant to bring D to and fro from nursery. The Panel also referred to the duration of the bond that has arisen between the appellant and D, given that she was about 1 year old when the appellant was sentenced, that she visited him in prison and that since his release at the beginning of 2013 contact has been resumed. In the last sentence the Panel stated that it "[does] not minimise the fact that the appellant does spend time with the child." At [32] it is concluded that D may maintain contact with the appellant's family in the UK.

14. It is clear therefore, that the First-tier Tribunal did not undertake a minimalistic assessment of where D's best interests lay; it considered various factors. The

grounds do not identify any evidential matter that has been left out of consideration by the First-tier Tribunal. The criticism of the Panel's use of the word "inevitable" in terms of whether loss of contact between them would be inevitable, rather than whether it would be "likely", does not reveal that the Panel applied "an inappropriate and unlawful test". In conducting the necessary balancing exercise, the Panel gave appropriate consideration to the loss of direct contact between the appellant and his daughter and reasonably concluded that some contact could be maintained. It is plain that the Panel was aware of the fact that that contact would not be of the same 'quality' as it would be were the appellant to remain in the UK.

15. In relation to ground 3, it is said at [17] of the grounds that *the* question for the Panel was whether, at the date of hearing, the appellant presented a "specified risk", reference being made to [28] of ZH. However, that was not the question that the First-tier Tribunal had to determine (putting aside the misquoted phrase from [28] of ZH). It was not necessary for the Panel to decide that the appellant presented a "specific risk to others". The proportionality assessment in this appeal involved an assessment of the seriousness of the offences, as much as, if not more so than the risk of reoffending. We consider in more detail below the issue of the seriousness of the offence.

16. As we understood the submissions made on behalf of the appellant, it was contended that the Panel did not take into account that the appellant was assessed as being at low risk of reoffending, according to the National Offender Management Service ("NOMS") report. We reject that contention. The Panel referred at [18] to the submissions in relation to what was described as the "prison" report stating that he was at low risk of reoffending, which could heighten if he returned to drug abuse. That is in fact a conflation of what is said in the NOMS report about his being a "medium" risk of harm which would be affected by a return to illicit drug use. Nevertheless, the Panel was referred to what was said to be a low risk.

17. More to the point, at [29] it is noted that there is no evidence that the appellant is a serial offender or that there is a record of previous serious offences. It is also noted that this was his first custodial sentence and that he does not (the "not" was omitted in error) have a long record of drug related crimes. At [30] the evidence that the appellant poses a "medium risk to the general public" if he returns to drug use is referred to. It seems to us clear that [29] was dealing with the risk of reoffending and [30] with the separate issue of risk to the public. Again, the determination would have benefited from express reference to what is said in the NOMS report in terms of the risk of reoffending being low, but the Panel's assessment of the risk of harm and of reoffending was free from any error of law.

18. In passing we should state that there is no merit in the criticism made in submissions to us, of the Panel's conclusion that the appellant remains vulnerable in terms of risk if he returns to drug use. That vulnerability is expressly stated in the NOMS report at paragraph 2b.

19. In any event, the Panel was bound to consider the seriousness of the offences for which the appellant was convicted and it did so. In N (Kenya) [2004] EWCA Civ 1094 consideration was given to the public policy need to deter and to express society's revulsion at the seriousness of the criminality. At [65] it was said that the risk of reoffending is a factor in the balance but not the most important public interest factor in the case of very serious crimes. The principle of deterrence expressed in N (Kenya) is again reiterated in RU (Bangladesh) [2011] EWCA Civ 651 at paragraph 43 in which it was said that:

> "The point about "deterrence" is not whether the deportation of a particular "*foreign criminal*" may or may not have a deterrent effect on other prospective offenders. It concerns a much more fundamental concept which is explained by Judge LJ at [83] of his judgment in ***N (Kenya).*** The UK operates an immigration system by which control is exercised over non-British citizens who enter and remain in the UK. The operation of that system must take account of broad issues of social cohesion in the UK. Moreover, the public has to have confidence in its operation. Those requirements are for the "public good" or are in the "public interest". For both of those to requirements to be fulfilled, the operation of the system must contain an element of deterrence to non-British citizens who are either already in the UK (even if refugees) or who are thinking of coming to the UK, "*so as to ensure that they clearly understand that, whatever the circumstances, one of the consequences of serious crime may well be deportation*". That element of "public interest" or "public good" is a part of the legislative policy, declared by Parliament in ***section 32(4)*** of the UKBA, that the deportation of "*foreign criminals*" is conducive to the public good."

20. In *Sanade and others (British children - Zambrano – Dereci) [2012] UKUT 00048(IAC)*, at [48] the Upper Tribunal said this:

> "It is long established that the legitimate aim of the prevention of disorder or crime does not depend on a person who has been convicted of a particularly serious offence being likely to further threaten the public interest by re-offending. As the decisions of the Court of Appeal in N (Kenya) and OH (Serbia) demonstrate, the maintenance of respect for the law, public indignation at past conduct, the deterrence of others by the adoption of the supplementary measure of deportation in addition to the criminal sentence may all contribute to the legitimate aim and justify deportation providing the interference is proportionate in all the circumstances of the case. The more serious the offending, the stronger is the case for deportation, but Parliament has not stated that every offence serious enough to merit a custodial penalty or a penalty of twelve months or more imprisonment, for that reason makes interference with human rights proportionate."

21. Although the Panel did not refer to those decisions, it plainly had in mind the public interest involved in the deportation of foreign criminals involved in serious crime, expressly referring to it at [33]. When one considers [33] and [35] of the determination it is apparent that the Panel's decision on proportionality was more concerned with the seriousness of the offences than the risk of reoffending. It is expressly stated to be so at [37] where it is said that "The overriding factor for us has been the commission of a very serious offence by the appellant." We also

agree with Mr Avery that on the basis of the seriousness of the offences alone, the Panel was entitled to come to the conclusion that it did on the proportionality of the decision to deport the appellant.

22. Our view in this respect is sufficient to dispose of ground 4 which contends that the Panel failed to take into account the fact that the appellant had gained qualifications whilst in custody being a matter said to be relevant to the risk of reoffending, rather than as a matter relevant to his ability to obtain employment in Jamaica. Besides which, it was a matter for the Panel to assess the relevance and weight to be attached to any particular aspect of the evidence.

23. We do not accept that the First-tier Tribunal failed to make a cumulative assessment of whether the appellant's removal would be disproportionate. At [35] the decision in Maslov v Austria [2008] ECHR 546 is referred to. At [75] the Court in Maslov said that "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." In this case the appellant was not a juvenile when the offences were committed but nevertheless, the "very serious reasons" consideration remains valid.

24. The Panel considered all relevant factors, including the length of time that the appellant has been here, his age when he arrived and his family circumstances here and in Jamaica, as well as the important fact of his relationship with his young daughter here. The grounds do not identify any matter that has been left out of account and we do not consider that any irrelevant matter was taken into account.

25. In summary, we are not satisfied that there is any error of law in the decision of the First-tier Tribunal in any respect.

Decision

26. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision of the First-tier Tribunal to dismiss the appeal therefore stands.

Anonymity

Given that these proceedings involve a child, we make an order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008). Consequently, this determination identifies the appellant's child and the appellant by initials only in order to preserve the anonymity of that child.

Upper Tribunal Judge Kopieczek 6/09/13