Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00537/2012

THE IMMIGRATION ACTS

Heard at Field House
on 23 July 2013

Determination promulgated
On 1 August 2013

Before

UPPER TRIBUNAL JUDGE McGEACHY
UPPER TRIBUNAL JUDGE MACLEMAN

Between

ALI MIRZA NAVEED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr A Vaughan, Counsel, instructed by Rodman Pearce, Solicitors
For the Respondent: Mr Wilding, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1) The appellant is a citizen of Pakistan, born on 20 July 1971. He appeals against a determination by a panel of the First-tier Tribunal comprising Judge Conrath and Dr Okitikpi, promulgated on 25 March 2013, dismissing his appeal against deportation.

2) The appellant sought permission to appeal to the Upper Tribunal, on 4 grounds. Permission was granted on grounds 2 and 3 but not on grounds 1 and 4. Mr Vaughan did not seek to argue the grounds excluded from the grant of permission.

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3) Ground 2 is that the panel failed to consider or apply the criterion set out at paragraph 75 of Maslov v Austria, European Court of Human Rights, Grand Chamber, application no 1638/03, judgment dated 23 June 2008:

> 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 …

4) Ground 3 alleges failure to take into account and to make findings on evidence relevant to the appellant's Article 8 private life interests, in particular:

> … the report from the country expert and anthropologist Dr Roger Ballard … which argued *inter alia* that the absence of attempt by the appellant to nurture familial links in Pakistan now makes it … extremely difficult for the appellant to rely on such familial links … The report also analyses the extent to which the appellant has culturally assimilated into UK culture as opposed to the Pakistan side of his identity … all of this is ignored by the panel.

5) We indicated at the outset that we had significant reservations about absence from the determination of reference to (a) the principle in Maslov and (b) Dr Ballard's report. In view of the conclusions we have reached and the nature of the case, we can summarise the submissions on error in law briefly.

6) Mr Wilding argued as follows. In light of SS (Nigeria) v SSHD [2013] EWCA Civ 550 the "Maslov test" although not irrelevant has been so watered down that absence of reference to it did not constitute an error of any significance. The Tribunal was clearly aware of the report by Dr Ballard, which is mentioned at paragraph 15. The thrust of the findings at paragraphs 27-28 is such that the report must have been taken into account. In any event Dr Ballard's report so far crossed the line from objective expert reporting into advocacy for the appellant as to lose all objectivity, and dealt with so many matters which were not in the proper province of the expert that it could not have advanced the appellant's case.

7) Mr Vaughan submitted that nothing in SS watered down the principles of Maslov; that the lack of reference to Maslov, which had been cited to the First-tier Tribunal, could not be immaterial; and that although the report by Dr Ballard went outside its proper field of expertise, that did not excuse failure to consider those parts of the report which were relevant.

8) Parties agreed that if we were to find error, the decision should be remade on the basis of further submissions, which they were ready to present. Mr Vaughan did, without conviction, advance the possibility of adjourning to obtain an updated psychiatric report on the appellant. He acknowledged that there were directions reminding parties of the requirement to give notice of any proposed further evidence, and that no such notice had been given. He also advised us that no report has been instructed. In those circumstances, we were not willing to adjourn.

9) As to remaking the decision, Mr Wilding relied upon the respondent's refusal letter and, to the extent that they were relevant, to the submissions made under the heading of legal error. He pointed out that the appellant has been convicted on 21 occasions of

a total of 41 offences. He received a sentence of 4½ years imprisonment in 1997. He was warned then by the Secretary of State that any future offending was likely to lead to deportation. The appellant ignored the warning, and was convicted of various offences which led to service of notice of a decision to make a deportation order on 20 October 2006. He attempted to lodge a late appeal on 5 January 2007 but had exhausted his appeal rights by 31 January 2007. He was convicted of further offences on 17 December 2007 and sentenced to 4 months and 28 days imprisonment. A deportation order was made on 2 July 2008. After sundry procedure he appealed successfully against refusal to revoke that order in case IA/14080/2008. The determination by Judge Lucas of that appeal, promulgated on 30 December 2008, showed that the appellant's case was clearly then "touch and go". The determination warned:

> Clearly … if this appellant were to reoffend he would have no realistic or further objection to his immediate deportation.

10) Our attention was next drawn to passages in the sentencing remarks of Judge Beech on 12 April 2010:

> On 17 March of this year you were convicted of an offence of assault with intent to rob … you approached your victim … in the street and asked him for money. When he declined to give you any you threatened him with the fact that you were a boxer and you would go crazy if he did not give you any money. You then punched him twice and grabbed his clothing in the vicinity of his neck. He agreed to give you money, but when you released him he ran off with you chasing. When he got to an off licence you stopped in your pursuit and got into a car of someone you know, in all likelihood a drug dealer. The effect upon your victim … has been profound … he has been significantly traumatised …
>
> You are 38 years of age with 20 convictions for 40 offences …
>
> You have rejected assistance for your drug dependency from the Probation Service … I reject your assertion that you have been in a drug rehabilitation programme on a voluntary basis in 2006 … you have rejected intervention from the Community Mental Health Team, although whether such intervention is needed is open to doubt.
>
> I sentence you to a determinate sentence of imprisonment. You have a dreadful record and you show absolutely no remorse … You first of all required [your victim] to give evidence because you denied that it was you that had attacked him … Now you assert that it was he that attacked you … Your account of what happened … is, quite frankly, laughable, bearing in mind the build of your victim when compared to you. He was a slight man whereas you have the physique of a boxer. This was a serious attack at night with violence. Both of those features are aggravating features.
>
> … I now sentence you to a term of imprisonment of 5 years and 6 months. That sentence should also result in automatic deportation to Pakistan.

11) Mr Wilding submitted that the significant criminal history and the public interest in deportation of serious criminals constituted very serious reasons to justify deportation, and that no more was required.

12) He next argued that the appellant's position became even weaker upon reference to the OASYS Report instructed by his own solicitors, Part A of his bundle in the First-tier

Tribunal. This is a report by Ms Marshall, independent risk assessor, dated 19 February 2013, with an appendix dated 19 February 2013. Mr Wilding said that that this was a reliable report save for speculation on the likely effects of removal to Pakistan upon the appellant and for the author's beliefs about whether the appellant should be deported, matters not within her remit or expertise. The report concludes that the appellant poses a high risk in the community.

13) As to factors upon which the appellant appeared to rely on his favour, Mr Wilding pointed out that although he has a relationship with his mother, that was previously found not to constitute family life. It was relevant to private life, but it was a stronger factor that the further extended family members in the UK have completely distanced themselves from the appellant. There was very little difference in the quality of family links which he would enjoy either in the UK or in Pakistan.

14) Mr Wilding turned finally to the report by Dr Ballard. He submitted that pages 1-10 are only repetition of material made available to the author. Dr Ballard conducted no interview with the appellant, and only extrapolated from materials given to him. He speculated on medical issues, not within his province. The psychiatric report was obtained at a later date. Dr Ballard made conjectures about the appellant's life history and criminal behaviour, matters which did not seem to be within the province of his "anthropologically based assessment." The nature of such an assessment was not explained. The author said that he was "by no means certain" as to how far the respondent's decision maker's conclusion that the appellant had a criminal history could stand up to serious scrutiny, and offered the alternative explanation that the appellant had extreme difficulties in adjusting to his new environment in the UK when he arrived at age 7. The report amounted to spin on the appellant's behalf. At 3.7 the author went so far as to say that if returned to Pakistan the appellant's "life expectancy in such a position of kinlessness would in my opinion be extremely short", for which there was no adequate basis. Section 4 of the report, dealing with family life and legal issues, was pure advocacy and should not have appeared in an expert report. There was nothing in the report which told significantly against the force of the public interest in deportation.

15) In short, Mr Wilding argued that the appellant's position had been on a knife edge in 2008, and having re-offended significantly since then, he has reached the end of the road.

16) Mr Vaughan submitted that the factors to be considered on the appellant's side are as follows. He has resided in the UK for 37 years, from the age of 7. At least 34 of these years have been with indefinite leave to remain. He is heavily integrated into UK society. He had supportive statements from his mother and from his boxing coach, with whom he has worked to benefit the community. The positive aspects of the mother and son relationship had to be given weight from both sides. Mr Vaughan accepted that relationships with siblings and further extended family in the UK were very limited, but such relationships did exist. By contrast, there was no family in Pakistan prepared to offer any support. Mr Vaughan sought to rely on section 3.7 of

Dr Ballard's report (and on no other sections). This section describes the absence of familial resources in Pakistan and ends with the passage which was criticised by the Presenting Officer. Mr Vaughan submitted that the fact that the appellant had no relatives either on the paternal or maternal side to help him in Pakistan was substantiated by the evidence and was within Dr Ballard's expertise and country knowledge. This showed that on return the appellant would be alone and would have to fend for himself. A relapse in his mental health would be likely. In this connection Mr Vaughan referred to the psychiatric report by Dr A Kharbteng, Part C of the appellant's First-tier Tribunal bundle dated 14 February 2013. The diagnosis at section 6 is as follows:

> At the time of the assessment Mr Mirza was in good mental health with no symptoms of a psychotic disorder or of a mood disorder.
>
> Based on a long history of psychosis, there is a very strong possibility that Mr Mirza suffers from paranoid schizophrenia …
>
> Schizophrenia is a relapsing and remitting condition that can be caused to flare up in periods of stress or the use of psychoactive substances such as illicit drugs. People with schizophrenia have their illness for life …
>
> The appellant's poor memory warrants further investigation as this could be due to low IQ, brain damage due to schizophrenia, brain damage due to drugs, brain damage due to boxing …

17) At section 8 the report states that the appellant is currently well and not in need of specific interventions apart from preventive measures such as reduction of stress and not using illicit substances. It is said that destitution could have a significant impact, as he would be at high risk of relapsing into schizophrenic psychosis. The report continues:

> Removal to Pakistan would have a devastating effect on his mental health. Although he has familial and historical links … it is largely an alien environment … the stress … would have a high likelihood of precipitating a major relapse …
>
> Access to mental health care in Pakistan is very limited. State provision is almost non existent and reserved for those that are severely ill. Private provision is available but it is expensive … community mental health care is non-existent.

18) Mr Vaughan referred to the respondent's Country of Origin Information Report (COIR) at 27.31-39 on mental health provision and at 13.01 on prison conditions. This information showed that the appellant would have no access to treatment on his probable relapse. It was likely that he would re-offend and thereby end up in prison, where conditions are known to be very poor and where there is an absence of mental health provision. There would thus be a significantly adverse impact on his physical and moral integrity, weighing on his side in the Article 8 scales. There has also been filed background information on the backward attitudes held in many parts of Pakistan towards the mentally ill.

19) Mr Vaughan said that while the appellant could not meet the requirements of the Immigration Rules to remain in the UK, his inability to meet them was of no significance, because the Rules ignore residence for a period of less than 20 years, ignore the degree of a party's integration into UK society, and ignore a childhood spent in the UK. These factors also fed into the Maslov related assessment and the justification for the high test of very serious reasons. Mr Vaughan accepted that on the other side of the scales there is the persistence and seriousness of the appellant's offending, which had to be given significant weight. He did not accept that higher legal tests are established by SS. He pointed out that the appellant appeared to have stayed clear of trouble for some time prior to the index offence, having previously last offended in 2007. That fitted with the suggestion in the medical evidence that he was not using drugs during that period. The statement from his boxing coach showed that he had been in the process of establishing a regular and useful routine and of contributing to society by helping at the boxing club and with younger members. It was unfortunate that he relapsed again into offending. It was relevant that his mental health history showed that he had an inability to learn from his mistakes. That placed him in a different category from other offenders who simply refuse to learn from their mistakes or to desist from their behaviour. There were some cases such that even serious offending ought not to lead to deportation. The appellant's 35 years residence compensated for the length of the period of imprisonment, and this was an appeal which should be allowed. It would be disproportionate to deport an individual who to all intents and purposes is British to a situation of destitution and other dire consequences in Pakistan.

20) We reserved our determination.

21) Under the heading of general considerations, Laws LJ said in SS:

> ***THE DEPORTATION OF FOREIGN CRIMINALS***
>
> *(1) THE SOURCE OF THE POLICY: PRIMARY LEGISLATION*
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> 48. With these considerations in mind I may turn to the particular case of the deportation of foreign criminals under the 2007 Act. Where such potential deportees have raised claims under Article 8, seeking to resist deportation by relying on the interests of a child or children having British citizenship, I think with respect that insufficient attention has been paid to the weight to be attached, in virtue of its origin in primary legislation, to the policy of deporting foreign criminals. In *Sanade* the UT observed "[t]he more serious the offending, the stronger is the case for deportation" (paragraph 48). With respect that is no doubt right; but it applies as readily to a case where the offender is not subject to automatic deportation under s.32 of the 2007 Act and his removal is at the Secretary of State's discretion. In Strasbourg, within the *Uner/Maslov* criteria we find a comparable reference to "the nature and seriousness of the offence committed by the applicant".
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> 49. These references say nothing about the policy's origin in primary legislation. The policy's source, however, is as we have seen one of the drivers of the breadth of the decision-maker's margin of discretion when the proportionality of its application in the particular case is being considered. In relation to foreign criminals the point was almost alive in *AP (Trinidad & Tobago)* [2011] EWCA Civ 551, referred to in *Sanade* at paragraph 41, in which Carnwath LJ, as he then was, observed at paragraph 44:

"Indeed, as I have said, Parliamentary endorsement is arguably a matter which should be taken into account in giving *greater* weight to such factors when drawing the balance of proportionality under article 8. Although Ms Patry Hoskins [for the Secretary of State] did not so argue, it seems a little surprising (if she is right) that this apparently definitive statement by Parliament has made no difference in practice, at least where any form of private or family life is involved." (original emphasis)

Carnwath LJ had stated at paragraph 36 that he preferred to leave for another occasion the question whether counsel had been right not to contend that the policy's legislative source made a difference.

50. In *AP* Carnwath LJ also cited the remarks of Sedley LJ at paragraph 24 of *BK*, cited in *Sanade*, which I have already set out. Though somewhat laconic, this passage is one of the few references to the significance of the policy's source being an Act of Parliament. I will repeat the material part:

    "[I]n the case of a 'foreign criminal' the Act places in the proportionality scales a markedly greater weight than in other cases... Arguably the executive's view of policy and its immediate requirements has been superseded by the legislature's."

    Since *AP* there has been *MF* [2012] UKUT 393 in the UT, in which however the reference to s.32 of the 2007 Act misses its significance: at paragraph 42 the UT, citing *AP* among other cases, states that "[i]n deportation cases involving foreign criminals s.32 of the 2007 Act gave clear parliamentary expression to the particular importance the Secretary of State attached to their deportation". But it is the importance attached by *Parliament itself* that matters.

51. Amongst other recent cases is *AM* [2012] EWCA Civ 1634, in which Pitchford LJ cited *N (Kenya)* and *OH (Serbia).* But their emphasis on the public interest in deporting alien criminals arose in the pre-2007 Act legal environment, when the decision was at the Secretary of State's discretion. Then at paragraph 31 Pitchford LJ said this:

    "While the landscape for qualification for deportation has changed in consequence of the 2007 Act by the creation of 'automatic deportation' of 'foreign criminals', it seems to me, in agreement with Aikens LJ in *RU (Bangladesh)* and Sir Stephen Sedley in *Gurung,* inevitable that in measuring proportionality the public interest in deterrence is a material and necessary consideration. The public interest is an important component of the balancing exercise required to test proportionality (for the purpose of section 33(2)(a))..."

    With great respect there is here no acknowledgement of the free-standing importance of the legislative source of the policy as a driver of the decision-maker's margin of discretion when the proportionality of its application in the particular case is being considered.

52. In my opinion, however, this is a central element in the adjudication of Article 8 cases where it is proposed to deport a foreign criminal pursuant to s.32 of the 2007 Act. The width of the primary legislator's discretionary area of judgment is in general vouchsafed by high authority: *Brown*, *Lambert*, *Poplar*, *Marcic*, *Lichniak* and *Eastside Cheese*, cited above. But it is lent added force where, as here, the subject-matter of the legislature's policy lies in the field of moral and political judgment, as to which the first and natural arbiter of the extent to which it represents a "pressing social need" is what I have called the elected arm of government: and especially the primary legislature, whose Acts are the primary democratic voice. What, then, should we make of the weight which the democratic voice has accorded to the policy of deporting foreign criminals?

    (2) THE NATURE OF THE POLICY: MORAL AND POLITICAL

53. The importance of the moral and political character of the policy shows that the two drivers of the decision-maker's margin of discretion – the policy's nature and its source – operate in tandem. An

Act of Parliament is anyway to be specially respected; but all the more so when it declares policy of this kind. In this case, the policy is general and overarching. It is circumscribed only by five carefully drawn exceptions, of which the first is violation of a person's Convention/Refugee Convention rights. (The others concern minors, EU cases, extradition cases and cases involving persons subject to orders under mental health legislation.) Clearly, Parliament in the 2007 Act has attached very great weight to the policy as a well justified imperative for the protection of the public and to reflect the public's proper condemnation of serious wrongdoers. Sedley LJ was with respect right to state that "in the case of a 'foreign criminal' the Act places in the proportionality scales a markedly greater weight than in other cases".

54. I would draw particular attention to the provision contained in s.33(7): "section 32(4) applies despite the application of Exception 1...", that is to say, a foreign criminal's deportation remains conducive to the public good notwithstanding his successful reliance on Article 8. 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.

(3) SUMMARY

55. None of this, I apprehend, is inconsistent with established principle, and the approach I have outlined is well supported by the authorities concerning the decision-maker's margin of discretion. The leading Supreme Court cases, *ZH* and *H(H)*, demonstrate that the interests of a child affected by a removal decision are a matter of substantial importance, and that the court must proceed on a proper understanding of the facts which illuminate those interests (though upon the latter point I would not with respect accept that the decision in *Tinizaray* should be regarded as establishing anything in the nature of general principle). At the same time *H(H)* shows the impact of a powerful public interest (in that case extradition) on what needs to be demonstrated for an Article 8 claim to prevail over it. Proportionality, the absence of an "exceptionality" rule, and the meaning of "a primary consideration" are all, when properly understood, consonant with the force to be attached in cases of the present kind to the two drivers of the decision-maker's margin of discretion: the policy's source and the policy's nature, and in particular to the great weight which the 2007 Act attributes to the deportation of foreign criminals.

22) Lady Justice Black and Mr Justice Mann both agreed with the judgment of Lord Justice Laws, which Mr Justice Mann described as a “masterful analysis”.

23) This is not a case involving a child. Other than that, the above passage all applies. The facts in this case for and against deportation have all been set out for us, as narrated above.

24) Mr Wilding asked us to find that SS diluted Maslov to vanishing point, and that the force of statute as now interpreted was such that reference to Maslov would now be otiose. Mr Vaughan sought to persuade us that SS makes no difference for our purposes, and in particular that what Lord Justice Laws said at paragraph 54 about justification only by a very strong claim indeed did not detract from earlier jurisprudence and did not lay down any legal rule. For our part we think the judgment speaks for itself and requires no gloss or interpretation from us. We would only say, firstly, that we do not think that SS intends to take anything away from the

principle in Maslov in the case of a criminal who has resided in the UK from childhood and well into adulthood, and, secondly, that our weighing of the proportionate outcome in this case results in a clear striking of the balance against the appellant, and does not turn on any fine shading of legal approach advanced before us.

25) The appellant is likely to find life difficult in Pakistan, although we would not go to the extremes portrayed by Dr Ballard. His approach in this case is highly coloured, and his conclusion goes too far.

26) Resources which might help to rehabilitate the appellant are available in the UK, but the appellant has consistently declined to take advantage of them, as his history and the sentencing remarks make clear. Rehabilitation cannot be forced. That takes a good deal away from the significance of the absence of similar facilities for the appellant in Pakistan. It reinforces the high risk of reoffending which emerges from his own report. His counsel forecasts from the evidence that in Pakistan the appellant is likely to fall into illegal drug taking, criminality and mental relapse. We think that sadly likely, but such possibilities are not significantly less in the UK.

27) The appellant's long residence from childhood in the UK has counted for much in the past, but he poses a high risk of serious offending, he has shown no interest in taking advantage of opportunities to escape from the pattern in which he finds himself, and he has exhausted several clear warnings over a period of many years. The point in his criminal career at which long residence outweighs the public interest in deportation is well behind him. We find that there are very serious reasons why he should be deported.

28) The determination of the First-tier Tribunal is **set aside**. However, the decision which we substitute is that the appeal, as originally brought to the First-tier Tribunal, is again **dismissed**.

29) No anonymity order has been requested or made.

31 July 2013
Judge of the Upper Tribunal