Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00594/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport
On 31 July 2013

Determination Promulgated
On 21 August 2013

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

E O M

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Joseph, instructed by Turpin & Miller Solicitors
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

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The Background

2. The appellant is a citizen of Venezuela who was born on 15 March 1993. On 10 January 2011, the appellant was convicted at the Inner London Crown Court, following a trial, of robbery contrary to s.8 of the Theft Act 1968. He was sentenced to a term of six years' detention in a Youth Offender Institution. At the time of his conviction the appellant was 17 years of age. On 1 March 2013, the Secretary of State made a decision to make a deportation order against the appellant by virtue of s.3(5)(a) of the Immigration Act 1971. The Secretary of State concluded that the appellant's deportation was "conducive to the public good" and there were "no exceptional circumstances" to outweigh the public interest presumption in para 296 of the Immigration Rules (HC 395 as amended). The Secretary of State concluded that the appellant's deportation would not breach Art 8 of the ECHR.

3. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 29 April 2013, the First-tier Tribunal (Judge Cresswell and Mr P Bompas) dismissed the appellant's appeal. The First-tier Tribunal found that the appellant's deportation would not breach Art 8.

4. On 17 May 2013, the First-tier Tribunal (Judge Froom) granted the appellant permission to appeal to the Upper Tribunal. The reasons for the grant of permission were as follows:

> "I grant permission to appeal because it is arguable the panel misunderstood the decision under appeal. The decision was made under section 3(5)(a) of the Immigration Act 1971. The panel directed themselves in terms of section 32 of the UK Borders Act 2007, even though the appellant was under 18 at the date of his conviction. In particular, at paragraph 16, the panel recorded that the respondent was obliged to make a deportation order and the appellant was liable to deportation in accordance with section 32. Further argument may be necessary to determine whether this error turns out to have been material."

5. Thus, the appeal came before me.

The Appellant's Case

6. Mr Joseph's submissions on behalf of the appellant fell into two categories. First, he submitted that the Tribunal had been wrong to approach the appellant's appeal on the basis that he was subject to the automatic deportation provisions in the UK Borders Act 2007. Those provisions were, he submitted, not applicable as the appellant was under the age of 18 at the date of conviction (see s.33(3) of the 2007 Act). As a result, Mr Joseph submitted that the Tribunal had failed to consider whether the appellant was "liable to deportation" under s.3(5)(a) of the Immigration Act 1971 and whether the public interest justified his deportation. Mr Joseph also submitted that this error spilled over into the Tribunal's Art 8 assessment which could not, as a consequence, stand.

7. Secondly, Mr Joseph made a number of submissions challenging the Tribunal finding that the appellant's deportation would be proportionate and to dismiss his appeal under Art 8.

The Automatic Deportation Issue

8. I begin with Mr Joseph's first submission.

9. At para 16 of its determination the Tribunal clearly considered that it was dealing with a case governed by the automatic deportation provisions in the UK Borders Act 2007. The Tribunal said this:

> "16. The Appellant is not a British citizen and was convicted of an offence of robbery and sentenced to 6 years detention; he is a foreign criminal and the Respondent was obliged to make her deportation order. He is, therefore, liable to deportation in accordance with Section 32 Borders Act 2007. We will consider whether an exception applies on the basis pleaded by the Appellant of a breach of his Article 8 rights."

10. Having then considered the application of the Immigration Rules, namely paras 397-399A, the Tribunal at paras 19-33 considered whether the appellant's deportation breached Art 8. In concluding in para 33 that his deportation was proportionate, the Tribunal concluded:

> "There is here no Exception within Section 33 of the UKBA."

11. The Tribunal was wrong to approach the appellant's appeal on the basis that it was governed by the automatic deportation provisions in the UK Borders Act 2007. Although the appellant was undoubtedly a "foreign criminal" to which, in principle, the 2007 Act applied, he fell within "Exception 2" in s.33(3) because he was "under the age of 18 on the date of conviction".

12. Accepting that error, the crucial question is whether it made any material difference to the Tribunal's decision. Mr Joseph referred me to the Upper Tribunal's decision in Bah (*EO (Turkey)* – liability to deport) [2012] UKUT 0019 (IAC). That decision considered the proper approach to be followed in a deportation appeal not falling within s.32 of the UK Borders Act 2007. The three-stage approach identified by the UT is helpfully set out in the italic words of that decision as follows:

> "In a deportation appeal not falling within section 32 of the UK Borders Act 2007, the sequence of decision making set out in EO (deportation appeals: scope and process) Turkey [2007] UKAIT 62 still applies but the first step is expanded as follows:
>
> i) Consider whether the person is liable to be deported on the grounds set out by the Secretary of State. This will normally involve the judge examining:-
>
> a. Whether the material facts alleged by the Secretary of State are accepted and if not whether they are made out to the civil standard flexibly applied;
>
> b. Whether on the facts established viewed as a whole the conduct character or associations reach such a level of seriousness as to justify a decision to deport;

c. In considering b) the judge will take account of any lawful policy of the Secretary of State relevant to the exercise of the discretion to deport and whether the discretion has been exercised in accordance with that policy;

ii) If the person is liable to deportation, then the next question to consider is whether a human rights or protection claim precludes deportation. In cases of private or family life, this will require an assessment of the proportionality of the measures against the family or private life in question, and a weighing of all relevant factors.

iii) If the two previous steps are decided against the appellant, then the question whether the discretion to deport has been exercised in accordance with the Immigration Rules applicable is the third step in the process. The present wording of the rules assumes that a person who is liable to deportation and whose deportation would not be contrary to the law and in breach of human rights should normally be deported absent exceptional circumstances to be assessed in the light of all relevant information placed before the Tribunal."

13. Mr Joseph submitted that the Tribunal had failed to consider properly the first step set out in Bah, namely whether the appellant was liable to be deported on the basis of his criminality. He submitted that the Tribunal in para 16 had been wrong to apply s.32(4) that states that:

> "For the purposes of Section 3(5)a of the Immigration Act 1971, the deportation of a foreign criminal is conducive to the public good."

14. Mr Joseph referred me to s.33(7) which stated that:

> "The application of an exception -
>
> ....
>
> (b) results in its being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good; but section 32(4) applies despite the application of Exception 1 or 4."

15. As s.33(7) makes plain, whilst s.32(4) continues to apply and deem an individual's deportation to be "conductive to the public good" if Exception 1 (breach of Convention or Refugee Convention) or 4 (extradition etc) applies, it does not apply if Exception 2 is applicable as it is in this appeal. On the face of it, therefore, the prior question of whether the appellant was "liable to deportation" under s.3(5)(a) fell to be decided by the Tribunal before considering whether Art 8 prevented the appellant's deportation. That said, there are, in my judgment, two reasons why Mr Joseph's submissions on this point cannot succeed.

16. First, there was the stance taken on behalf of the appellant before the First-tier Tribunal. It was no part of the appellant's case before the First-tier Tribunal that he was not "liable to deportation" under s.3(5)(a) of the Immigration Act 1971 or that, given his offending, his deportation was not justified other than to argue it would breach Art 8. The notice of appeal to the First-tier Tribunal relies exclusively upon Art 8. Likewise, the skeleton argument dated 25 April 2013 prepared, it would appear, by Counsel also relies exclusively on Art 8 and the appellant's private life in the UK. The Tribunal's Record of Proceedings shows that Mr Joseph (who

represented the appellant before the Tribunal) did not seek to expand beyond the grounds of appeal and his skeleton argument. It is clear, therefore, that the First-tier Tribunal was not invited to find that the appellant was not "liable to deportation" or that deportation was not justified in the public interest other than on the basis that his deportation would breach Art 8. Given that stance, it is difficult to see how the Tribunal's error could have led it to make a finding on this issue in the appellant's favour since the appellant did not seek such a finding.

17. Secondly, in any event, there is no realistic basis upon which the Tribunal could have made such a finding in the appellant's favour. When I enquired of Mr Joseph whether he was now submitting that the appellant's offending did not make him "liable to deportation" as being conducive to the public good, Mr Joseph was not able to summon up any argument in the appellant's favour. In my judgment, that merely reflects the hopeless nature of any argument that the appellant's offending did not make his deportation "conducive to the public good". The appellant was convicted of robbery and sentenced to six years' detention in a YOI. In her decision letter, the Secretary of State set out her reason for concluding that the appellant's deportation was conducive to the public good and that the public interest justified his deportation as follows:

> "**Circumstances of the offence**
>
> The Secretary of State regards as particularly serious those offences involving violence, sex, arson and drugs. Also taken into account is the sentencing Court's view of the seriousness of the offence, as reflected in the sentence imposed, as well as the effect of that type of crime on the wider community. The type of offence and its seriousness, together with the need to protect the public from serious crime and its effects are important factors when considering whether deportation is in the public interest. In addition to these factors your personal circumstances together with the circumstances of your offence(s) have been carefully looked at.
>
> In your case the sentencing judge made the following comments;
>
> *[EOM], would you stand up, please. You were convicted of an extremely violent robbery back in January in which you, with other persons, stalked the victim as he walked from the Fulham Road towards Battersea Bridge. He was drunk, as you clearly realised. The CCTV shows that you were following with others and, in my view, waiting for your opportunity to jump him and rob him. The moment came when he got to the bottom of Church Street and was on the embankment. The victim's injuries were serious. They included a left shattered cheek bone, his right cheek bone was caved in. He had two steel plates inserted on the left side of his face. There was a manipulation necessary of his cheek bone. It was a very painful operation. He has been left with significant numbness. He was in hospital for five days and I read, and it has been read out, the victim impact statement from the victim, which you have heard as well in this court, which indicates that the victim is living with the permanent consequences of this attack upon him.*
>
> You have two previous convictions namely on 18 August 2010 you were convicted of using disorderly behaviour and two counts of assaulting a constable, for which you were sentenced to one year youth rehabilitation order; and on 23 November 2010 you were convicted of wounding/inflicting grievous bodily harm and were sentenced to a year youth rehabilitation order.

> **Presumption in favour of deportation**
>
> In view of this, consideration has been given as to whether or not deportation is the appropriate course in your case. Specific regard has been given to paragraph 396 of the Immigration Rules (as amended). Paragraph 396 provides that there is a presumption that the public interest requires the deportation of a person who is liable to deportation. In considering whether the presumption is outweighed in any particular case all relevant factors are taken into account, including whether the decision to take deportation action would place the United Kingdom in breach of any of its obligations under the European Convention on Human Rights (ECHR). Therefore we are obliged in making any decision to consider whether you have any claim to remain which would outweigh the presumption to deport.
>
> Your representations have been taken into account but for the reasons stated below it is not considered that they are sufficient to demonstrate that you should not be removed to Venezuela. It is considered there are no exceptional circumstances to outweigh the public interest presumption. It is therefore concluded that in your case it is appropriate to deport you to Venezuela."

18. The Secretary of State's decision took into account the Crown Court judge's sentencing remarks concerning the circumstances of the index offence of the appellant. The decision letter was, of course, before the Tribunal which referred to it at paras 6 and the sentencing judge's remarks at para 15(xii)-(xiv).

19. At para 18 of its determination, the Tribunal records the position of Mr Joseph on behalf of the appellant in relation to the application of the 'new Article 8 Rules', namely paras 399 and 399A. There, the Tribunal notes that he did not suggest that there were: "any exceptional circumstance such that the public interest in deportation could be outweighed by other factors." The Tribunal added in para 18, "We could see none either".

20. In considering the legality of the appellant's deportation without reference to Art 8, para 396 of the Rules states that:

> "Where a person is liable to deportation the presumption shall be that the public interest requires deportation."

21. Paragraph 397 then goes on to state:

> "Where deportation would not be contrary to [the Refugee Convention or the Human Rights Convention], it will only be <u>in exceptional circumstances</u> that the public interest in deportation is outweighed". (my emphasis).

22. In truth, the appellant effectively conceded that there was nothing "exceptional" about his case that prevented his deportation under the Rules. That concession was made specifically in relation to the 'single Article 8 Rules' in para 398 but was, in truth, no less a statement of the reality in applying para 397.

23. Before the First-tier Tribunal, the appellant unequivocally relied exclusively upon Art 8. He no doubt did so on the basis that he had no prospect of succeeding otherwise. Although the Tribunal was wrong to approach the appeal on the basis that the automatic deportation provisions applied, the appellant had no prospect of

succeeding on the basis that his deportation was not "conducive to the public good" (s.3(5)(a) of the 1971 Act) or that there were "exceptional circumstances" which outweighed the public interest given his criminality (para 397). Any error by the Tribunal was not material to its decision and do not justify setting that decision aside.

24. For these reasons, I reject Mr Joseph's first submission.

The Article 8 Issues

25. I now turn to Mr Joseph's submissions made in relation to the Tribunal's finding that the appellant's deportation was proportionate and not a breach of Art 8. I begin, however, with the Tribunal's reasons which it is helpful to set out in some detail.

1. *The FtT's decision*

26. Before the First-tier Tribunal, the appellant relied upon his private life in the UK. He had come to the UK from Venezuela in August 2003 with his brother and sister to join his father. At that time he was 10 years of age. He was granted leave to remain and on 21 May 2008 he was granted indefinite leave to remain. He was, therefore, settled in the UK.

27. The First-tier Tribunal had before it a body of evidence concerning the appellant's offending history and the index offence, as well as evidence about his personal circumstances in the UK. The appellant also gave oral evidence before the First-tier Tribunal as did his stepmother with whom he had lived on arriving in the UK in 2003 until she left the family home sometime in 2009 when she separated from the appellant's father. Until 2009, the appellant also lived with his father and his stepsister. The Tribunal made detailed findings of fact at para 15(i)-(xxi) as follows:

> "15. We find the following material facts. We emphasise that we have come to our findings after considering the evidence as a whole and that the order of findings in this determination does not indicate the order in which we came to our findings. We had the benefit of seeing and listening most carefully to the Appellant as he gave his evidence. In coming to our conclusions we had regard to all the evidence before us.
>
> (i) We start by recording the Appellant's history. He first came to the UK from Venezuela on 6 August 2003 with is brother and sister to join his father. On 16 December 2003, he was granted leave to remain as a dependant of his father, which leave was renewed on 27 May 2006 and was followed by a grant of indefinite leave to remain on 21 May 2008.
>
> (ii) The Appellant's father married the witness, [CCP] ("Mrs P"), on 5 November 2004. Mrs P had a daughter by her previous husband, [FLGC] ([L]).
>
> (iii) There was disharmony in the home. Mrs P found it difficult to get on with the appellant's brother and sister, the brother being involved with drugs, and eventually the brother and sister returned to Venezuela where their mother had remained. The brother was in fact deported to Venezuela. The

Appellant was not treated well by his father and there were violent incidents.

(iv) In 2009, the Appellant moved with his father and Mrs P to a new address, leaving L at the old address. Mrs P discovered that the Appellant's father was having an affair and that brought her relationship with him to an end.

(v) In June 2009, the Appellant committed the offence of robbery, more details of which we will provide later. He was arrested in August 2009 and was then on bail until his trial and sentence, which we have detailed above.

(vi) The Appellant has a history of offending. He was first reprimanded by the Police on 21 February 2007 for possessing an offensive weapon on school premises earlier that month. He was then warned on 20 October 2008, again by the Police, for theft from a person on 30 July 2008. As we have indicated above, he then committed the robbery on 7 June 2009, which we will return to later.

(vii) Having been arrested in August 2009 in relation to the robbery, the Appellant came under the assistance of the local Youth Offending Team. In July 2010, Sue Edwards, a Youth Justice Officer, met him and she provided him with temporary accommodation because he could not return home to his father because their relationship was so poor.

(viii) On 1 August 2010, the Appellant was guilty of using disorderly behaviour or threatening/abusive/insulting words likely to cause harassment, alarm or distress and assaulting two constables for which he was sentenced on 18 August 2010 at Camberwell Green Juvenile Court to a Referral Order for 6 months.

(ix) On 30 August 2010, the Appellant wounded/inflicted grievous bodily harm on a person, for which he was sentenced on 23 November 2010 at Waltham Forest Juvenile Court to a Youth Rehabilitation Order for 1 year with a supervision requirement and for which he was ordered to pay compensation of £300, the Youth Rehabilitation Order being also substituted for his earlier Referral Order. The Pre Sentence Report records that this offence involved the Appellant biting a relative on the face during an argument at a family gathering, inflicting injuries which required stitches. The Appellant told us that he had bitten the man.

(x) The Appellant started a BTEC Level 2 Diploma in Sport in September 2010 at Haringey Sixth Form Centre.

(xi) The Appellant subsequently moved to accommodation at YMCA in about January 2011.

(xii) As we observe from the sentencing remarks of His Honour Judge Bishop, the Appellant was 'convicted of an extremely violent robbery' which involved the stalking of a man who was drunk on the embankment of the Thames. The appellant and others could be seen on CCTV following the man with the intention of jumping him and robbing him. The man's 'injuries were serious. They included a left shattered cheekbone, his right cheekbone was caved in. He had 2 steel plates inserted on the left side of his face. There was a manipulation necessary of his cheekbone. It was a very painful operation. He has been left with significant numbness. He was in hospital for 5 days and' from the victim impact statement 'is living with the

permanent consequences of this attack upon him'. The Appellant was recognised from the CCTV and the victim's mobile phone was found in the Appellant's room. He lied to the Police about his acquisition of the phone and clearly lied at his trial as to how he had obtained it too. It is apparent from the Pre Sentence Report that he told the author of the report that he told the Police three different stories before finally telling the truth as he remembered it, which was clearly not accepted to be the truth by the jury.

(xiii) The Judge concluded that the Appellant's version of events given for the Pre Sentence Report was not truthful and that he was a full participant in the violent attack upon the man and that he was stalking the man for that purpose.

(xiv) The Judge took account of the fact that the Appellant was 16 at the time of the offence and 17 at the time of sentence and took account also of the difficulties that he had had in his childhood and noted the improvement in his life since he was housed at the YMCA and his involvement with sports activities and his training course as a fitness instructor. The Judge also took account of the aggravating factors of a group attack, an attack at night and the attack being upon a vulnerable person who was stalked. The Judge concluded that the Appellant did not meet the statutory definition of 'dangerous'. The Judge was able to mitigate a 7-year sentence to one of 6 years.

(xv) The Appellant has clearly had a history of violence and dishonesty. We have detailed the nature of his offences. Two of the offences involve dishonesty in the form of theft and it is also clear from what we have detailed that he has not been honest when apprehended in relation to the robbery. We found him to be a reluctant witness and one who did not always tell us the truth. To give one example, with some reluctance he accepted that he had spoken to his brother after his brother's deportation to Venezuela; L told us that the Appellant had also spoken to his brother whilst his brother was in detention. We did not believe the Appellant's evidence to the effect that he did not know why his brother had been deported and that the reason for the deportation never came up during the conversations.

(xvi) Indeed, it was clear to us that the Appellant was seeking to minimise his connection with Venezuela and his family there with a view to 'pulling the wool over our eyes'.

(xvii) It was clear to us that the Appellant does enjoy a very good relationship with L. It was apparent that she had provided him with support over the years that he has been in the UK. We had no reason to find other than that she was a wholly honest witness. It was she who had represented him at school and when he was interviewed in relation to the robbery, and there was evidence of regular correspondence between him and her and of her visiting him in detention.

(xviii) The evidence of Mrs P was less convincing. We noted that there was no reference at all to Mrs P within the comments which the Appellant made to the author of the Pre Sentence Report. Mrs P clearly does not have a solid grasp of the English language and gave her evidence via a Spanish interpreter. Her evidence was to the effect that the Appellant would struggle in Venezuela because he had been in a Colombian-speaking household in the UK. This, however, ignored the fact that he was living with his father and for some time his brother and sister. It also ignored the

fact, as she acknowledged in her oral evidence, that there is not a great deal of variation between the Spanish spoken in Colombia and that in Venezuela. We also noted that a letter from a Pastor [JP] within the Appellant's bundle told us that the Appellant was 'a gifted communicator whose proficiency in conversing in English and Spanish with our church members has been exemplary'.

(xix) We found it significant that the Appellant has a wider family in Venezuela than was known to either L or Mrs P. The Appellant told us that he has uncles and aunts on his mother's side and upon his father's side too. The Pre Sentence Report paints a different picture to that which the Appellant has attempted to paint during his appeal. The author of the report, who saw the Appellant on two occasions, recorded that the Appellant could not understand why he could not live with his mother and missed her a great deal. He told the author that he really missed his mother and would like to establish contact with her. He told her that he still had a good relationship with his brother and that they communicated from abroad and that she advised the Appellant to seek contact with his mother via his brother.

(xx) The Pre Sentence Report placed the Appellant as being at a medium risk of re-offending and a medium risk of harm to the community. It recorded that alcohol had played a part in his offending and that he had an inability to control his temper. The author said: 'All matters have been associated with violence or potential violence towards others and this is concerning'. The Appellant told us that at one stage he was drinking 2 to 3 bottles of brandy in a day every few days. Sue Edwards recorded that the Appellant was 'an angry young man when I met him, but during our time together we discussed his alcohol use and how this triggered his anger, and E O M began to understand that his anger came from how he had been treated by his father fuelled his anger, and the use of alcohol to release him from these feelings was actually making things worse.' She recorded that whilst being supervised the Appellant was attending college, paying his bills and taking responsibility for his own behaviour. She saw him mature and effect change in his own life during the time she worked with him.

(xxi) We do take account of the letters and statement of support for the appellant within his bundle."

28. Having set out a number of domestic and Strasbourg authorities at paras 20-31 of its determination, the Tribunal concluded as follows at para 32:

"32. We have considered the provisions of Article 8 and the cases to which we have referred and we find that the removal does interfere with private life for the purposes of Article 8(1). In short, we find that there is an interference with the right to respect for private life; that interference is in accordance with the law. However, we find that the interference has legitimate aims to the extent that immigration control and the prevention of crime is in itself a legitimate aim."

29. Then, in para 33 the Tribunal went on to consider the proportionality of the appellant's deportation as follows:

33. Finally, we find that the interference is proportionate in a democratic society to the legitimate aim to be achieved. We take full account of the Appellant's circumstances, that he has lived in the UK for 10 years from the age of 10 and attended school where he appears to have done relatively well; that he has a step-

mother and step-sister in the UK who hold him in regard and affection and came to support him at the hearing; that there were documents showing support for him and he is likely to have other friends too; that he is relatively young; that he has had a difficult and challenging childhood and has been an alcohol abuser. He is still in prison, completing his sentence. We were not told about his future living circumstances. He has not shown remorse for the brutal offence which had a serious impact upon the victim and he continues to deny his offending in that respect. The appellant had been in the UK from the age of 10, which meant that some of his formative years were spent here; on the other hand, he had reached 10 immersed in the culture of Venezuela and had lived with his Venezuelan family members of father, brother and sister in the UK, with his father until only a year or so before his incarceration, and his mother visited him for some months in 2008, and he has been in communication with his brother since he was deported, all of which would have maintained his cultural links. He has maintained contact with his brother in Venezuela and wanted to renew contact with his mother. He did commit his offences as a youth, but the offences appeared to have not been simply the actions of immature youth, as they continued as he approached adulthood. We found it significant that, after committing the vicious assault upon the robbery victim, after being initially remanded in custody for that offence and then remanded on strict bail conditions, he nevertheless went on to commit two further incidents of violence in August 2010 and at a time when he was being assisted by both L and the Youth Offending Team and when he was about to start his sports training course. The Appellant's private life in the UK appears to be of a shallow nature, with the exception of the relationship with L and his wish to continue his sports studies. He told us he would like to continue his sports studies. There were no actual plans for future training. He appears to fit all of the relevant factors outlined in **N (Kenya)**, and we have taken full account of the **Boultif** and **Maslov** guidance and the guidance in the other cases to which we have referred in concluding as we have. The Appellant committed a very serious offence followed by a further serious offence of unlawful wounding and has a background of offences of violence and dishonesty and alcohol abuse. He spent the majority of his formative years (when his time in detention is discounted) in Venezuela with his family of mother, brother and sister and those family members live there now. He will not be a stranger to the culture or the language. He can maintain contact with people in the UK in just the same way he has been able to maintain contact with his family (his brother) in Venezuela to date, although we recognise that separation from L in particular, apart from visits she and Mrs P may make to Venezuela, will hit him hard. He will return as an adult with skills in English and the benefit of a school education. We also remind ourselves that the Appellant alone has brought about his current situation; he has committed a serious offence despite the assistance he was given by L and Mrs P and carried on committing offences when assisted also by YOT. Although he continues to deny the robbery offence, he clearly knew what he was doing was very wrong and dangerous to others and took the actions that he did take in committing the offences of robbery and later unlawful wounding with that knowledge. When we consider the balance that we must, we do not find that the deportation prejudices the private life of the Appellant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. There is here no Exception within Section 33 of UKBA."

2. *Discusssion*

30. First, Mr Joseph submitted that the Tribunal had been wrong to rely upon the pre-sentence report prepared by the Waltham Forest Youth Offending Team on 21 February 2011. He submitted that in relying upon the report's conclusion (at para

15(xx)) that the appellant presented a "medium risk of reoffending and a medium risk of harm to the community", the Tribunal had failed to take into account that the report was over two years old. Mr Joseph did not submit that it was wrong for the Tribunal to have regard to it but it was wrong to take its views at face value given the passage of time.

31. The difficulty with this submission is that no more recent evidence was placed before the Tribunal. It was, of course, open to the appellant to present evidence that sought to demonstrate that his risk of offending was other than stated in the PSR. The Tribunal referred to the letter from Sue Edwards, a Youth Justice Officer, dated 19 April 2013 concerning the appellant's circumstances, as she saw them, during her dealings with him from July 2010 until June 2011. (The latter date must be an error since the appellant was sentenced to six years' detention on 3 March 2011). It was, of course, during this time that the appellant was convicted of the s.20 offence. Mr Joseph was unable to point to any material which had been placed before the First-tier Tribunal in relation to the appellant's conduct, behaviour and any progress during his detention. In these circumstances, it was properly open to the Tribunal to accept the PSR report's finding as to his risk of reoffending.

32. Secondly. Mr Joseph also submitted that in taking into account the appellant's s.20 offence committed whilst he was on bail for the index offence, the Tribunal failed to have regard to the circumstances which led to that offence. That is unsustainable. The offence is dealt with on the third page of the PSR as follows:

> "Through further discussion, [the appellant] informed me that the circumstances surrounding the wounding with intent matter *(sic)* he was at a family gathering. This was at a time when his relationship with his father was particularly volatile and he got into an argument with a relative who got intense and he assaulted the relative by biting the man on his face. The injuries required stitches. [The appellant] informed me that he was heavily inebriated at the time."

33. In para 15(ix), the Tribunal made specific reference to the PSR and the circumstances of this offence. It is simply untenable to suggest that the Tribunal did not have well in mind the circumstances which led to the appellant's conviction for the serious violence offence under s.20 of the Offences Against the Person Act 1861, including that he was "heavily inebriated" at the time.

34. Thirdly, Mr Joseph submitted that the Tribunal had been wrong to rely on the PSR in concluding that the appellant had "not shown remorse" for the offence and "continues to deny his offending". This submission also fails in the face of no reliable evidence being placed before the Tribunal that the appellant's attitude has changed since the PSR. It is not clear whether the appellant expressed any remorse in his oral evidence before the First-tier Tribunal. But even if he did, which is doubtful, the Tribunal took a dim view of the appellant whom they described in para 15(xv) as: "a reluctant witness and one who did not always tell us the truth."

35. Fourthly, Mr Joseph submitted that the Tribunal had also erred in finding that the appellant had maintained ties with Venezuela, in particular that he was in contact

with his brother and that he wished to renew contact with his mother who lived there. The latter, Mr Joseph submitted, was again based on the PSR. I do not understand why it is said that the PSR is unreliable in respect of the appellant's intention to renew contact with his mother. There was no evidence before the Tribunal to which Mr Joseph directed my attention that the appellant's intention had changed since he has been in detention. In any event, as I have already referred to, the Tribunal simply did not (having heard his evidence) consider the appellant to be a reliable witness. At para 15(vi) they stated:

> "... it was clear to us that the appellant was seeking to minimise his connection with Venezuela and his family there with a view to 'pulling the wool over our eyes'."

36. The Tribunal had the advantage of seeing the appellant and hearing him give evidence. There is no conceivable legal basis for undermining this finding based upon their assessment of the appellant. The Tribunal was entitled to find that the appellant had maintained (and wished to further) his links with his family in Venezuela despite the fact that he had lived in the UK since 2003. His brother had lived here previously before being himself deported to Venezuela.

37. Fifthly, Mr Joseph challenged the Tribunal's finding in para 33 that apart from his relationship with his stepsister and his wish to continue his sports studies: "The appellant's private life in the UK appears to be of a shallow nature". Mr Joseph drew my attention to evidence at pages 19 and 21 *et seq* relating to the appellant's life in the UK and supporting letters. Mr Joseph submitted that the appellant had lived here for eight years before being detained and had fully integrated into the UK.

38. The Tribunal dealt with the appellant's private life in the latter part of para 33 of its determination. Although describing, with the two exceptions, the appellant's private life to be "shallow", the Tribunal commented that he could maintain contact with his friends and family in the UK and particularly recognised that his separation from his stepsister (with whom he had a close relationship) and his stepmother, "will hit him hard". The Tribunal clearly had in mind that the appellant had lived in the UK since the age of 10 and that "some of his formative years were spent here". In my judgment, it cannot be said that the Tribunal erred in its assessment of the scope and nature of the appellant's private life in the UK.

39. Finally, Mr Joseph submitted that the Tribunal's error in treating the appellant as being subject to the automatic deportation provisions of the 2007 Act had tainted its assessment of proportionality under Art 8. As I understood Mr Joseph's submission it was that, in effect, the Tribunal had necessarily given improper weight to the public interest because, treating the appeal as one governed by the UK Borders Act 2007, the Tribunal will have had in mind the legislative dictate set out in s.32(4) of the 2007 Act that "the deportation of a foreign criminal is conducive to the public good."

40. In my judgment, Mr Joseph's submissions on this issue simply do not hit their target. It is abundantly clear that the legislative dictate in s.32(4) has nothing to do with the application of Art 8 itself. That is made clear by the initial phrase in s.32(4) that the legislative dictate applies:

"for the purposes of section 3(5)(a) of the Immigration Act 1971".

41. It is, of course, clear also that the deportation of a "foreign criminal" is "conducive to the public good" even if the "foreign criminal" cannot be deported because that would breach a Convention right, such as Art 8 and so the individual would fall with in Exception 1 in s.33(2) of the 2007 Act. Section 33(7) makes this clear when it states that:

> "The application of an Exception –
>
> .....
>
> (b) results in it being assumed neither that the deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good; but section 32(4) applies despite the application of Exception 1 or 4." (my emphasis)

42. The point, however, remains that, even in a case where an individual's deportation would breach Art 8, the prerequisite for making a deportation order under s.3(5)(a) of the 1971 Act nevertheless exists and, as s.33(7)(a) states, the application of an Exception "does not prevent the making of a deportation order". The order cannot have effect or be enforced if it would breach Art 8 of the ECHR to deport an individual but there is, nevertheless, a lawful basis for making the order under ss. 3(5)(a) and 5 of the Immigration Act 1971.

43. In short, therefore, s.32(4) would appear to have no relevance to the question of whether an individual's deportation would breach Art 8 and, in particular, whether the legitimate aim of the "prevention of disorder or crime" outweighs the individual's right to respect for his or her private and family life.

44. Further, whether a decision to deport an individual is or is not based upon the automatic deportation provisions in the UK Borders Act 2007, it is for the Tribunal (on appeal) to assess the weight to be given to the public interest reflected in the individual's offending and to weigh that against the individual's rights.

45. Prior to the UK Borders Act 2007, the Court of Appeal in a series of cases beginning most prominently with N (Kenya) v SSHD [2004] EWCA Civ 1094 set out the facets of the public interest that had to be weighed against an individual's interest, both in deciding whether the deportation was in accordance with the (then) Immigration Rules and also in assessing whether the individual's deportation would be a disproportionate interference with the right to respect for his family life. The facets of the public interest were summarised by Wilson LJ (as he then was) in OH (Serbia) v SSHD [2008] EWCA Civ 694 at [15] in the following terms:

> "(a) The risk of reoffending is one facet of the public interest but, in the case of very serious crimes, not the most important fact.
>
> (b) Another important facet is the need to deter foreign nationals from committing serious crimes by leading them to understand that, whatever the other circumstances, one consequence of them may well be deportation.

(c) A further important facet is the role of a deportation order as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes.

(d) Primary responsibility for the public interest, whose view of it is likely to be wider and better informed than that of a tribunal, resides in the respondent and accordingly a tribunal hearing an appeal against a decision to deport should not only consider for itself all the facets of the public interest but should weigh, as a linked but independent feature, the approach to them adopted by the respondent in the context of the facts of the case."

46. The subsequent case law of the Court of Appeal makes plain that the public policy factors identified in OH (Serbia) continue to apply in automatic deportation cases.

47. RU (Bangladesh) v SSHD [2011] EWCA Civ 651 is an automatic deportation case. At [30]-[35], Aikens LJ (with whose judgment Longmore and Elias LJJ agreed) summarised the changes brought about by ss.32 and 33 of the 2007 Act. At [36] he continued:

"36. Because, by statute, the deportation of *'foreign criminals'* is deemed to be conducive to the public good, I think the constituents of that 'public good' must continue to include those particular facets of 'the public interest summarised by Wilson LJ in *OH (Serbia)* and set out at [33] above. Therefore, if a *'foreign criminal'* asserts that removal by a deportation order pursuant to **section 32(5)** of the UKBA would be a disproportionate interference with his Article 8(1) rights, both the SSHD and any reviewing tribunal must be obliged to take those public interest factors into account when performing the 'proportionality' balancing exercise."

48. At [37], Aikens LJ addressed two questions. First, what weight is generally to be attached to those public interest factors in the proportionality exercise; is it the same or more than was accorded under the pre-UKBA regime?; and secondly, whether any separate or additional weight was to be given to the Secretary of State's own judgment on the weight of those factors as expressed in a decision letter. Aikens LJ continued at [37] and [38]:

"37. .... Both questions were raised, but not answered, by Sedley LJ sitting in the Upper Tribunal, in his judgment in *SSHD v BK*. The questions were also raised by this court in its recent decision in *AP (Trinidad and Tobago) v SSHD*. In that case counsel for the SSHD had not argued that the effect of the 2008 Act was that greater weight had to be given to the public interest factors in cases where a *'foreign criminal'* resisted a deportation order on grounds that removal would infringe his Article 8 rights under the ECHR. Nor did counsel for the appellant (Mr Chirico) argue that the public interest factors in favour of deportation summarised in ***OH (Serbia)*** were now less important in such cases.

38. At [44] of his judgment in *AP (Trinidad and Tobago)* Carnwath LJ said:

'... Although the executive's policy as such as been superseded, it is readily inferred that the policy factors identified in *OH (Serbia)* were impliedly endorsed and if anything reinforced, by Parliament's intervention. 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 [counsel for the SSHD] 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'."

49. At [39], whilst recognising that it was not necessary to resolve the question in RU, Aikens LJ stated that:

> "I respectfully agree with the view expressed by Carnwath LJ ... but these questions will be open for argument if relevant in future cases."

50. At [40], Aikens LJ reiterated that the policy factors identified in OH (Serbia) continued to apply in automatic deportation proceedings. He said this:

> "40. At all events on an appeal from the SSHD's decision that ***section 32(5)*** applies in a case where the *'foreign criminal'* has argued that removal pursuant an automatic deportation order would infringe his Article 8(1) rights and be disproportionate, the tribunal or court concerned must recognise and give due weight to all the public policy factors identified in *OH (Serbia)*. It must acknowledge that the SSHD is entitled, indeed obliged, to give due weight to them. The tribunal or court must also acknowledge and give due weight to them when drawing the *'proportionality balance'* under Article 8(2)."

51. Those passages may appear to give some support to Mr Joseph's submissions that, in principle, the weight to be attached to the public interest factor is greater in an automatic deportation appeal when carrying out the balancing exercise inherent in proportionality. Aikens LJ, nevertheless, left the matter open for future argument.

52. As I have already indicated, it is perhaps not immediately apparent why s.32(4), limited as it is in its application to s.3(5)(a) of the Immigration Act 1971, has any direct relevance when assessing proportionality under Art 8. In any event, [40] of Aikens LJ's judgment emphasises, in an automatic deportation case, the facets of public policy identified in OH (Serbia) remain the essential features of an assessment of the legitimate aim of preventing disorder or crime under Art 8.2. (Subsequently, the basis principles and approach in automatic deportation cases were drawn together by the Upper Tribunal in Masih (deportation – public interest – basic principles) Pakistan [2012] UKUT 00046 (IAC) at [11]).

53. I must refer to two further decisions of the Court of Appeal. The first is Rocky Gurung v SSHD [2012] EWCA Civ 62 (Rix and McFarlane LJJ and Sir Stephen Sedley). Sir Stephen Sedley (delivering the judgment of the Court of Appeal), having cited [37]-[39] of the judgment of Aikens LJ in RU (Bangladesh), addressed at [11]-[12] the two questions posed by Aikens LJ as follows:

> "11. ... The answers, in our view, are those advanced or accepted by Ms Giovannetti and Mr Chirico in *RU* and by Charles Bourne (for the Home Secretary) and Zane Malik (for Mr Gurung) in the present case. The public interest is not only to be treated as by definition served, subject to the United Kingdom's international obligations, by deporting foreign criminals; it is also among the factors capable of affecting the proportionality of deporting them if this arises. This means that, while the public interest in deportation has already been established by legislation, its content and extent in the particular case have to be separately evaluated, initially by the Home Secretary and thereafter if necessary by the tribunal, if the proportionality of deportation comes into question.

> 12. The tribunal should accordingly entertain both sides' submissions on the public interest, along with such elements as the nature and gravity of the offence; but the fact that one estimation of the public interest (or of any other element) is the Home Secretary's, whether leaning towards or against deportation in the particular case, commands no additional weight. To let it do so – as counsel for the Home Secretary have implicitly recognised – would be to upset the equal footing on which the Crown and the individual come before this country's tribunals and courts, not least when Parliament has already decided where, other things being equal, the public interest lies. It would also impinge on the independence and impartiality of the tribunal by requiring it to defer to one side's judgment of a material question."

54. Rocky Gurung was an automatic deportation case. Sir Stephen Sedley, delivering the judgment of the Court of Appeal, agreed with the submission that had been made by both Counsel in RU and by both Counsel in Rocky Gurung that, first the public interest factors summarised in OH (Serbia) were no less important in automatic deportation appeals; secondly that the effect of s.32(4) of the 2007 Act made "no difference in practice" in assessing proportionality under Art 8.2; and thirdly, a Tribunal was required to consider, for itself, the "content and extent" of the public interest having regard to the public interest factors summarised in OH (Serbia).

55. Finally, there is the case of AM v SSHD [2012] EWCA Civ 1634 (Ward, Elias and Pitchford LJJ). That case was also one concerned with the automatic deportation provisions in the 2007 Act. Pitchford LJ, having cited earlier Court of Appeal case law such as N (Kenya), and RU (Bangladesh), continued at [29]:

> " ... It follows, as Sir Stephen Sedley said at paragraph 9 of *Gurung v SSHD* [2012] EWCA Civ 62 when commenting upon *RU (Bangladesh)* that there is no longer any requirement upon the Home Secretary to form her own view of the public interest in deporting a foreign criminal who is sentenced to not less than 12 months imprisonment. She is bound by section 32 (subject to 33) to make an order for deportation when the conditions of section 32 are satisfied."

56. Citing [9] of Sir Stephen Sedley's judgment in Gurung, Pitchford LJ recognised that the effect of s.32(4) was to provide the lawful basis (without the need for specific consideration by the Secretary of State) for the making of a deportation order as being conducive to the public good under s.3(5)(a) and s.5 of the Immigration Act 1971.

57. Having cited, without dissent, [11] and [12] of the judgment in Gurung (which I set out above), Pitchford LJ set out the facets of public policy in Wilson LJ's judgment at [16] in OH (Serbia). At [31] Pitchford LJ continued as follows:

> "31. 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)) whether or not the Secretary of State expressly says so in her decision letter or in the presenting officer's submissions to a tribunal. It is an indelible feature of the balancing exercise that the decision maker weighs the

> consequences of deportation against the full import of the legitimate aim to be achieved."

58. Pitchford LJ continued to recognise the centrality of the public interest facets summarised in OH (Serbia) and the need for the Tribunal to assess those facets and to weigh them against the individual right to respect for his or her private and family life.

59. In a concurring judgment, Elias LJ (agreeing with Pitchford LJ's reasons) adopted the same approach. At [42] he emphasised the continuing importance of N (Kenya) and OH (Serbia) in automatic deportation cases:

> "42. The decisions of this court in *N (Kenya)*, *OH* and *RU (Bangladesh)* all emphasise the importance of a tribunal giving full weight to these different aspects of the public interest in the proportionality assessment."

60. Elias LJ went on to analyse the approach of the First-tier Tribunal in that appeal to Article 8 applying the principles enunciated by the Strasbourg Court in its leading case law of Boultif v Switzerland [2002] 33 EHRR 117; Üner v Netherlands [2007] INLR 273 and Maslov v Austria [2008] ECHR 508.

61. Ward LJ in his concurring judgment agreed with the reasoning of Pitchford and Elias LJJ.

62. Drawing the threads of the Court of Appeal's case law together, there is no basis for the premise of Mr Joseph's submission that the Tribunal in this appeal must have approached the balancing exercise under Article 8.2 wrongly because the legislative dictate in s.32(4) resulted in the Tribunal (necessarily) placing improper weight upon the public interest arising in from the appellant's offending. The case law, in particular Gurung, provides no basis for such a submission. The correct approach remains that summarised in OH (Serbia) and requires a Tribunal to evaluate for itself the "content and extent" of the public interest.

63. In this appeal, that is precisely what the Tribunal did. I am in no doubt that the Tribunal carried out the balancing exercise properly. The Tribunal applied the five-stage approach in Razgar [2004] UKHL 27. At para 32 the Tribunal concluded that Art 8.1 was engaged on the basis that the appellant's deportation interfered with his "private life" and concluded that that interference was in accordance with the law and for a legitimate aim. None of that is challenged.

64. The Tribunal set out [15] of Wilson LJ's judgment in OH (Serbia) at para 31 of its determination. The Tribunal also set out, at some length, extracts from the relevant Strasbourg decisions in Üner (para 28), Maslov (para 30) and Balogun v UK [2013] 56 EHRR 3 (at para 29), the latter repeating the so-called Boultif criteria and additions thereto made by the Strasbourg Court in Üner.

65. In para 33, the Tribunal dealt with the serious nature of the appellant's offending and noted, as they were entitled to do, that the appellant had committed further serious offences whilst on bail for the index offence. The Tribunal made a number of

findings, none of which can successfully be challenged, concerning the appellant's lack of remorse and his continued denial of the offending. The Tribunal also considered the appellant's circumstances in the UK, in particular his relationship with his stepsister and stepmother. The Tribunal found, and again this finding is unassailable, that the appellant had maintained contact with his brother in Venezuela and that it was his wish to renew contact with his mother who lived there. The Tribunal noted that the appellant's index offence of robbery for which he was sentenced to six years' detention, was a "very serious offence" which had been followed by a "further serious offence of unlawful wounding" and there was a background of offences of violence and dishonesty. The Tribunal was well aware that the appellant had come to the UK at the age of 10, that he had spent some of his formative years here but had maintained cultural links, having lived with "Venezuelan family members" in the UK. The Tribunal had well in mind that the appellant's offending had occurred as a youth but noted that the offending continued "as he approached adulthood". The Tribunal was well aware that the appellant had indefinite leave to remain which he had been granted in May 2008. At para 30, the Tribunal cites the relevant passage in the Strasbourg Court judgment in Maslov (namely [75]) 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." (my emphasis)

66. In this appeal, the appellant could only establish that he had a private life in the UK. It is not suggested that his relationships gave rise to "family life". The proper approach is set out in Maslov at [71]-[74] which was cited by the Tribunal at para 30 of its determination. At [71], the Strasbourg Court said this:

> "In a case like the present, where the person to be expelled s a young adult who has not yet founded a family of his own, the relevant criteria are:
>
> - the nature and seriousness of the offence committed by the applicant;
>
> - the length of the applicant's stay in the country from which he or she is to be expelled;
>
> - the time elapsed since the offence was committed and the applicant's conduct during that period;
>
> - the solidarity of social, cultural and family ties with the host country and with the country of destination."

67. In setting out its findings at para 15 and in assessing proportionality in para 33 of its determination, the Tribunal fully considered these factors and the Strasbourg Court's view that "very serious reasons" were required to justify expulsion. Mr Joseph did not, in his oral submissions, argue that the Tribunal failed to apply the approach in Maslov or that its conclusion in assessing proportionality was not properly open to the Tribunal on the basis of irrationality. Given, however, that that is suggested in general terms in para 7 of the grounds, and given that this appeal concerns the

deportation of a young adult who has lived in the UK for ten years, I have thought it appropriate to look beyond Mr Joseph's submissions in this regard.

68. For the reasons I have given above, I am satisfied that the Tribunal fully took into account the appellant's circumstances, both in the UK and if deported and, having regard to the nature and seriousness of his offending even though committed as a juvenile, the Tribunal did not err in law in reaching its finding that the appellant's deportation was a proportionate interference with his private life in the UK.

Decision

69. The First-tier Tribunal's decision to dismiss the appeal stands. Any error of law by the Tribunal was not material to its decision to dismiss the appellant's appeal in reliance upon Art 8 of the ECHR.

70. The appellant's appeal to the Upper Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal