Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00984/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 July 2013	**On 16 July 2013**

Before

The President, the Hon. Mr Justice Blake
Upper Tribunal Judge Southern

Between

ALFONSO CAPITAO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C. Litchfield, counsel instructed by Alpha Rocks, Solicitors.
For the Respondent: Mr T. Wilding, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant has been granted permission to appeal against a decision of a panel of the First-tier Tribunal (First-tier Tribunal Judge Devittee sitting with Sir Jeffrey James KBE CMG) promulgated on 25 April 2013. The panel dismissed his appeal against a decision of the respondent made on 7 November 2012 that the appellant was subject to automatic deportation as a foreign criminal under section 32 (5) of the UK Borders Act 2007. The respondent rejected the appellant's claim that he

was excluded from such deportation on the basis that as it would infringe his right to respect for his private and family life under Article 8 of the ECHR, he fell within one of the exceptions to automatic deportation as a foreign criminal.

2. At the end of the hearing we informed the parties that the appeal to the Upper Tribunal would be dismissed. These are the reasons for doing so.

3. The appellant, who was born on 17 December 1965, is a citizen of Angola. He first arrived in the United Kingdom, undocumented, at Heathrow Airport in November 1994 and claimed asylum. His appeal against refusal of that application was dismissed in September 1997. The appellant has subsequently stated that he had left the United Kingdom and returned to Angola and re entered the United Kingdom in June 2000, on the basis of a forged passport.

4. A few weeks after June 2000 he was arrested as an illegal entrant and claimed asylum for a second time. His appeal against the removal decision that accompanied refusal of that claim was dismissed in April 2001. He was, however, granted exceptional leave to remain for 1 year, on account of country conditions as they then were in Angola.

5. A year later, in April 2002, the appellant was granted a further 3 years exceptional leave to remain and in May 2003 his son was born to a lady named Vivi Lombo, who had been recognised as a refugee from the Congo in April 2002. This relationship produced a daughter also, who was born in March 2008. Both children are British.

6. In December 2006 while he was maintaining his relationship with Ms Lombo, the appellant fathered a child C by another woman, Ms Bebe Sasa. C was born in September 2007.

7. The appellant was granted indefinite leave to remain on 29 September 2005, despite the fact that on 15 April 2005 he was sentenced to a suspended sentence of imprisonment of 6 months for an offence of using a false instrument. There followed three further occasions upon which the appellant was sentenced to suspended or immediate terms of imprisonment. In September 2006 for two offences of obtaining money by deception and handling stolen goods he was sentenced to 9 months imprisonment suspended for 2 years, that sentence being activated in June 2008 to run consecutively with a sentence of 9 months imprisonment imposed for further offences involving false identification documents.

8. On 16 January 2009 he was detained under the Immigration Acts on completion of his sentence. He was informed of his liability to deportation. On 19 February 2009 he was granted bail while his case was investigated. He failed to report on 16 December 2009 and became an absconder. He next came to light in 2012. He was convicted on I March 2012 of a further offence of possession of a false document and failing to surrender and sentenced to 14 months imprisonment. On 12 April 2012 he was asked for information about his family ties and this led to two letters being sent to Vivi Lombo and Bebe Salsa respectively. Only Bebe Salse replied, in which she stated that the appellant had ‘a high level relation with his daughter C he has access to visit his daughter every weekend.’

9. Following these inquires the Home Office indicated that it accepted that the appellant had a genuine relationship with C but did not accept the same for his other two children.

10. The First-tier Tribunal dismissed the appeal. They found there was a risk of the appellant re offending. The panel found that the nature of the appellant's relationship with Ms Lombo and her children was not such as to be protected by article 8 of the ECHR. He had never cohabited with her and they rejected the appellant's evidence of having maintained regular contact with his children by Ms Lombo. In respect of the appellant's daughter, C, the panel noted the concession made by the respondent about that relationship but, while accepting that there existed between the appellant and C a genuine and subsisting relationship, the panel made clear and reasoned findings of fact to the effect that this was not a strong relationship; he had not played a significant role in her upbringing and that the appellant "does not have a strong commitment to it". As, they concluded, it was "most unlikely" that the appellant would play any part in the future upbringing of any of his three children, he could not resist deportation on that basis.

11. The panel considered also the appellant's private life but explained why he could not succeed on that basis, either under the immigration rules or on their general assessment of his human rights claim outside those rules.

12. The grounds run to 11 closely typed pages in an attempt to identify an error of law in the determination and in doing so they challenge almost everything that Judge Devitte wrote. Permission was granted by the First tier Judge on the basis that:-

    a. The panel's assessment of risk was not supported by the probation report.

    b. The panel's conclusions as to the strength of the appellant's ties with C were arguably inconsistent with the Home office acceptance of the genuine relationship.

13. We did not have the benefit of a skeleton argument refining the grounds of appeal but we heard at length from Ms Litchfield, who had appeared before the First-tier Tribunal and drafted the grounds. We shall deal with the challenges raised in the order that she addressed them before us.

14. Ms Litchfield began her submissions by arguing that the panel erred in failing to apply the principles in *Maslov v Austria* (no. 1638/03) [2008] ECHR 546. The panel did not refer to *Maslov,* but there was no need for them to do so. This was not the class of case that the *Maslov* guidance was directed at. The appellant spent the first 28 years of his life in Angola and so on arrival was not a child but a mature adult; he had not lived in the United Kingdom most of his life

15. When pressed on this, Ms Litchfield explained that what she meant was that the panel failed to apply the principles in *Boultif v Switzerland* (No. 54273/00) [2001] ECHR 479 and that she had referred to *Maslov* only because those principles were set out in that judgment.

16. When asked what, in terms of the factors identified in *Boultif*, the panel had failed to deal with or address, Ms Litchfield said that no account had been taken of the fact that the appellant had been granted first exceptional leave to remain and then indefinite leave to remain. That is plainly not a sustainable complaint since the immigration history including the grant of such leave to the appellant is referred to specifically in the determination.

17. Next, Ms Litchfield submitted that the panel had erred in failing to have sufficient regard to the appellant's ties, or lack of them, with Angola. The difficulty with that submission is that it is founded, as was the case in the grounds, on the importance of comparative ties in the context of the guidance given in *Maslov* principles, which is not applicable in this case. The panel were plainly aware of the time the appellant had been away from Angola because there are repeated references to that in the determination. This appellant lived in Angola for the first 28 years of his life and so his formative years were spent in that country. Unlike a child who has grown up in this country, he will retain recollections of those formative years as well as a substantial period of time living in that country as an adult.

18. Ms Litchfield then submitted that the panel had failed to carry out an adequate assessment of the best interests of the children involved in this appeal, and in particular the best interests of the appellant's daughter, C.

19. Ms Litchfield further argues that the panel made contradictory findings of fact in respect of the appellant's relationship with C and that they impermissibly went behind a concession made by the respondent as to the genuine nature of that relationship. We disagree and the submission involves a misreading of both the Home Office decision and the panel's determination.

20. The panel did not go behind any concession made by the respondent. At paragraph 32(a) of the respondent's decision letter she said this:

> "It is accepted that you are in a genuine and subsisting relationship with [C]…"

But that was qualified by what was said at paragraph 33 when dealing with a response from C's mother to an enquiry about contact arrangements (with emphasis added):

> "… it is accepted that, in view of the reply letter, a limited amount of contact *may* still exist between you and your daughter [C]…"

Thus there was an issue to be settled by the panel, having heard the evidence offered by the appellant, about the extent to which there was any continuing contact with C. Ms Lombo did not give evidence or provide a statement, and the appellant provided no documentary evidence of visits to the Newcastle area where C was living at the material time.

21. The panel, having heard evidence from the appellant rejected nearly all that he said about his relationship with all three children. In respect of C they noted that she lived with her mother in Newcastle while the appellant, when not in prison, lived in London. They did not accept his evidence to have made visits to Newcastle, noting his apparent lack of resources and failure to produce any evidence at all of having

made any such visits. Thus, accepting the basic fact of family life between the appellant and his biological children, they assessed, as they were entitled to on the evidence, that the nature of that family life was such as to provide no assistance to the appellant in his attempt to resist deportation.

22. Developing those submissions, Ms Litchfield complained that there had been an inadequate assessment of the best interests of the children and the impact upon them, and upon C in particular, of the appellant's deportation. In the light of the panel's findings about the quality of his relationship with the other children, that were not and could not have been challenged in this appeal, we are in fact concerned only with the assessment of C's best interests.

23. Again we find both the grounds of appeal and the submissions developed before us lacking in substance. First, contrary to what is asserted, the panel plainly did not limit consideration of C's best interests to the approach taken in Appendix FM to the Immigration Rules, but looked at the matter more widely in the context of the Article 8 jurisprudence.

24. It is obvious that C's best interest required her to remain with her mother and primary carer. The question is whether deportation of her father would be a source of serious detriment to C's welfare and if so whether such detriment was justified by other considerations of public policy including his offending and the risk to the public of future offending. Having found that the appellant did not have significant contact with C and had not played an important role in her upbringing, there was no evidential basis on which his deportation was likely to cause serious detriment. The submission that once it is accepted (on the basis of limited evidence) that there was a genuine relationship, it follows that there is always serious detriment to the child is obviously a false one. We note the complete absence of any evidence about C and her welfare that might have advanced the appellant's case in this respect.

25. The next complaint pursued before us by Ms Litchfield was that the panel erred in their conclusion that there was a risk of the appellant re-offending because they had misinterpreted the Probation Service Offender Management Information Report. But that complaint is based upon a misunderstanding of the report. Ms Litchfield is correct to say that, at page 7 of that report, a reconviction risk is said to be "low", but that is in respect of the risk of violent offending and nobody has suggested that the appellant represents other than a low risk of committing violent crime. No assessment was carried out in respect of the likelihood of general re-offending. Therefore, all that was before the panel was that this was an appellant who had committed repeated offences of dishonesty and unlawful use of identity documents, sufficiently serious to cross the custody threshold; that he had offended during the currency of a suspended sentence for a similar offence; that he had failed to surrender to bail and had absconded in an attempt to avoid the consequences of having committed those offences and that he had no plans as to how he would support himself financially following his release from prison. On the basis of that evidence the panel was clearly entitled to conclude that the appellant had behaved in a manner that revealed 'a pattern of dishonest conduct' and that 'we are satisfied that the appellant carries at the very least, a medium to high risk of reoffending.' Indeed that was the only sensible conclusion on the evidence taken as a whole.

26. The final point taken by Ms Litchfield was that the panel erred in failing to deal with evidence relating to the appellant's medical condition. The appellant's representatives submitted 138 pages of evidence, mainly attendance notes made by medical staff at the place of the appellant's detention. It is notable that multiple copies have been included in the paginated bundle of some of these documents, sometimes four or five. The grounds assert that this material:

> … demonstrates that the Appellant currently suffers with a prostrate disorder, depression, hernia and takes prescription drugs for this…. The Appellant has been diagnosed with PTSD and has suffered from self harm in the past for which he received mental health treatment in the community from a psychiatric nurse."

Ms Lichfield said in the grounds that there was evidence before the First-tier Tribunal that:

> "… medical treatment for the Appellant's mental health conditions are not treatable (sic) in Angola due to mental health not being part of the primary health care system… he receives treatment in the UK for his medical conditions. This treatment will stop if he is deported, and thus is a relevant consideration under the *Maslov* criteria."

27. Although Ms Litchfield is correct to say that the panel did not deal with the medical evidence in considering the balance of factors in the proportionality analysis, and it might have been preferable for the sake of completeness if they had done so, no arguable point of law results.

28. No suggestion is made that the appellant could resist deportation on grounds alone of ill health or an inability to access medical treatment in Angola, so that the argument is that these issues should inform the proportionality assessment of his article 8 claim. Nor does the evidence support a suggestion that medical treatment for conditions other than mental health difficulties will not be available.

29. The evidence of his mental health difficulties is not without difficulty. The appellant claimed to have given a history of self harm but the notes report that there are no current issues of self harm or suicide (64 of appellant's bundle) and in giving the account the appellant has been described as a "vague historian" (*ibid)*. In late November 2012 he told a medical officer that he was more concerned with his physical welfare than his mental state (page 91 appellant's bundle). On 9 January 2013 a therapist who had offered to treat the appellant while in prison recorded (at page 96 of the appellant's bundle):

> "The Client failed to attend his appointment. I made enquiries with officers who confirmed he had received the relevant notice. After the appointed time an officer informed me that the client was reading in the library at the time of the appointment. Given this and the client previous failure to engage I do not intend to pursue this man as he seems to be displaying a complete lack of motivation or desire to engage."

30. Although there has been mention in the extensive medical notes of PTSD there is no formal diagnosis of such a condition by a consultant or other appropriately qualified medical practitioner.

31. The position with the appellant's physical heath may have been overstated. On 21 January 2013 the outcome of investigations by the Prostrate Cancer Risk

Management Programme into the appellant's "prostrate problem" was recorded (page 97 of the appellant's bundle). The Prostrate-specific antigen level was found to be significantly below that at which guidance indicated action was needed, leading to a conclusion:

> "Prostrate-Specific antigen level report Normal. No Further Action."

This investigation followed an examination at Kings College Hospital in August 2012 when the urology Registrar found:

> "… his prostrate moderately enlarged and with an overall benign impression."

32. These medical notes record also that the appellant underwent a hernia repair, but that was as long ago as 2005.

33. There is nothing in the medical evidence capable of affecting the balance of factors in this appeal. It follows that nothing at all turns upon the complaint that the panel failed to set out all of this in the determination because it added nothing of any consequence to the claim being assessed.

34. Drawing all this together we find no merit in any of the challenges advanced. The panel of the First-tier Tribunal gave cogent reasons for reaching conclusions that were open to them on the evidence and the determination discloses no error of law.

35. The appeal to the Upper Tribunal is dismissed.

Signed

Upper Tribunal Judge Southern

Date 12 July 2013