Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01271/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 24 October 2013	**On 1 November 2013**
Prepared 25 October 2013	

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

TEKIN HAYRI UCAR

Claimant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Claimant: Ms J Heybrook, Counsel, instructed by Ivy Solicitors
For the Respondent: Mr Walker, Senior Presenting Officer

DETERMINATION AND REASONS

1. The respondent appeals with permission against the determination of the First-tier Tribunal (First-tier Tribunal Judge Hodgkinson and Mr D R Bremmer, JP) promulgated on 22 August 2013 allowing the claimant's appeal against the decision

made by the respondent on 19 June 2013 to refuse to revoke the automatic deportation made against him.

2. The claimant is a citizen of Turkey born on 21 March 1983 and who has lived in the United Kingdom since 21 May 1989 with his mother, brother and sister to join the claimant's father. He and the other members of his family were granted leave to enter and to remain and he was on 25 October 1996 granted indefinite leave to remain. An application made on 4 March 2002 for naturalisation as a British citizen was refused due to his character, that is his criminal activity.

3. The claimant has been convicted of a number of criminal offences details of which are set out in the First-tier Tribunal's determination [4 - 6] the most serious being a conviction on 30 April 2010 for conspiracy to supply a controlled class B drug (cannabis) and possessing ammunition without a certificate for which he was sentenced to a total of 30 months' imprisonment. As a consequence of that conviction the Secretary of State made a deportation order against him pursuant to Section 32(5) of the Borders Act. His appeal against that decision was heard on 9 May 2011 and was dismissed; an application to appeal against the decision was refused. Subsequent to that the claimant made a claim for asylum. That application was refused as was the request that his deportation order be revoked.

4. The respondent's case is set out in the refusal letter of 19 June 2013. In summary, the respondent was not satisfied that the claimant was at risk of harm on return due to his imputed political opinion, that is because his family had been politically involved in the Kurdish community or that he was at risk because he is an Alevi. She considered also that the claimant was excluded from humanitarian protection on account of his convictions [34], was not entitled to a grant of limited leave to remain on a discretionary basis [43], that he was excluded from the protection of the Refugee Convention, a consequence of Section 72(2) of the Nationality, Immigration and Asylum Act 2002 and concluded also, having had regard to paragraphs 398, 399 and 399A of the Immigration Rules as [70] it was not considered that there were insurmountable obstacles to family life with his partner being able to continue outside the United Kingdom and as he had not shown that he had no ties to Turkey [79]. She considered also that there were no exceptional facts raised which warrant departure from the normal position [83].

5. In its determination the First-tier Tribunal held:-

   (i) that the claimant had rebutted the assumption raised by Section 72(2) and therefore did not uphold the respondent's certification of the appeal [75];

   (ii) that the claimant was not at risk on account of his Kurdish ethnicity [81]; on account of his Alevi faith [83]; on account of having to do military service [84 to 89] or on account of his family's political activism [90 to 96] concluding that even had they believed his account, it was clear that the Turkish authorities would have no interest whatsoever in the claimant [104] and went on to consider, following a decision of the Upper Tribunal in **MF (Article 8 – new**

rules) Nigeria [2012] UKUT 00393 to consider Article 8 and, having directed themselves in accordance with **SS (Nigeria) [2013] EWCA Civ 550** [121] and having taken the findings of the previous panel as a starting point [122] the panel concluded that bearing in mind the decision in **Maslov** that while, to render deportation disproportionate, a very strong claim indeed is required for the reasons set out in **SS Nigeria** [132]

(iii) that on the facts of this case given that the claimant was a young child when he moved to the United Kingdom, had spent all his formative years here, including all of his education, is now 30 years old and is no longer wholly fluent in Turkish and his long-term partner is in the United Kingdom as are all his immediate relatives and the fact he has been crime-free since 2010 and has given up his addiction to cannabis, that his removal would be disproportionate.

6. The respondent sought permission to appeal against this decision on the grounds that:-

Ground 1:

(i) That they had materially misdirected themselves in law in taking a two-stage test of the Article 8 assessment based on an incorrect view that the Immigration Rules did not fully protect the **Maslov**/**Boultif** principles (a misinterpretation of paragraphs 398, 399 and 399A of the Rules and that, given the ability to take into account exceptional factors as set out in paragraphs 397 and 398, it was an error to apply the two-stage test; that the Tribunal should not have regard that there was a starting point before moving on to a second free-standing Article 8 assessment [2] and should have considered whether there were any exceptional circumstances which meant that the consequence of deportation produced an unjustifiably harsh outcome incompatible with Article 8 despite the public interest in deportation; and, that the Tribunal had not attached proper weight to the nature and weight of the public interest [3] and had it assessed the case in line with the Immigration Rules it would have reached a different conclusion [4].

Ground 2:

(i) That the Tribunal had failed to give adequate reasons for finding on material matters in particular a finding at paragraph 124 that the claimant had not re-offended since his last appeal hearing, had not breach bail requirements and had been drug-free given that "the Secretary of State does have evidence that the claimant was recalled to prison for breaching the conditions of his licence." It is averred also that an attempt had been made to arrest him on suspicion of the possession of a firearm and he had been found to be in possession of cannabis. And that, having found that the claimant had raised his claim for asylum in order to avoid deportation and that his evidence was not credible the Tribunal had

failed to provide adequate reasons why they accepted his assertion that he is reformed [3].

(ii) That the claimant does therefore meet the very serious reasons to justify his expulsion in line with **Maslov** and the Tribunal had failed to provide adequate reasons as to their findings why he does not do so now [4].

(iii) That the Tribunal, having found that the claimant has a strong claim to remain here, due to moving to the UK while a child, and having spent his formative years hear, is now aged 30 and is not wholly fluent in Turkish, had failed to provide adequate reasons why it was not proportionate to deport the claimant [5], given he had not shown that he has no ties to Turkey [6], and given that they had not given sufficient reasons for concluding it would not be proportionate to remove him, given the findings in 2011 that, his relationship with his partner, that he could be deported [7];

(iv) That if the matter is to be reconsidered, the respondent would seek to argue that the Tribunal's finding the section 72 presumption had been rebutted was in error.

7. Permission to appeal was granted by First-tier Tribunal Judge Saffer on 11 September 2013, the judge stating that the panel materially erred in its assessment of the claimant's propensity to criminality having potentially erred in its findings regarding evidence of his recall to prison.

8. Since permission was granted, the claimant has been admitted to Chase Farm Hospital, has been diagnosed as psychotic. An application to adjourn the hearing on 24 October 2013 on account of this was refused and was not renewed by Ms Heybrook.

9. Mr Walker accepted that there had been no evidence before the Tribunal that the claimant had been recalled to prison or indeed of his arrests. He accepted that that information had been held on the Home Office file but had not been presented to the Tribunal either at the date of hearing and he was unable, at the commencement of the hearing before me, to produce this evidence.

10. Mr Walker confirmed, as did Ms Heybrook who had been present below, that there had been no application before the First-tier Tribunal for the hearing to be adjourned to permit the evidence to be adduced.

Did the determination of the First-tier Tribunal involve the making of an error of law?

11. It is appropriate in this case to consider first the allegation that material relating to the claimant's alleged recall to prison is considered first. It is accepted that that material had not been produced to the First-tier Tribunal to whom no application had been made for an adjournment to permit the evidence to be adduced.

12. In **MA (Fresh evidence) Sri Lanka *** [2004] UKIAT 00161 the IAT stated, after considering **E v SSHD** [2004] EWCA Civ 49:-

> 23(ii) New evidence will normally be admitted only in accordance with '*Ladd v Marshall* principles' (see *Ladd v Marshall* [1954] 1 WLR 1489), applied with some additional flexibility under the CPR (see *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318, 2325; White Book para 52.11.2). The *Ladd v Marshall* principles are, in summary: first, that the fresh evidence could not have been obtained with reasonable diligence for use at the trial; secondly, that if given, it probably would have had an important influence on the result; and, thirdly, that it is apparently credible although not necessarily incontrovertible. As a general rule, the fact that the failure to adduce the evidence was that of the party's legal advisers provides no excuse: see *Al-Mehdawi v Home Secretary* [1990] 1AC 876."

> 15. The Court of Appeal pointed out that it was not dealing with the current jurisdiction of the Tribunal which is limited to hearing an appeal on a point of law. However, we see no reason why the general principles governing the reception of evidence which was not before the Adjudicator should be different. There is no reason why the first and third principles should be changed. The application of the second principle will be different. When applied in the context of an appeal on the ground of error of fact or law, the fresh evidence has to be such that it would probably have had an important influence on the result of the factual or legal conclusions of the Adjudicator. When applied in the context of error of law alone, the test for the relevance of fresh evidence which could and should have been before the Adjudicator cannot now be that it assists a challenge to factual conclusions such as credibility findings or other personal circumstances which are very much matters for the Adjudicator. The application of the second principle now requires that the evidence be relevant to showing that the Adjudicator made an error of law, which probably had an important influence on the result.

13. Applying the principles in **Ladd v Marshall**, I consider that the respondent has failed to show me that the evidence in question could not have been obtained with reasonable diligence for use at the hearing not least because, as is noted in the determination, the information was supplied to the respondent well before the hearing. Second, as Ms Heybrook pointed out, it is not suggested that the claimant was guilty of any criminal offence.

14. The relevant material had still not been supplied by the respondent in time for the hearing before me, one month after they had been notified of the date of the hearing and nearly six weeks after permission had been granted I was not satisfied that it was appropriate to permit any additional material and I explained that to Mr Walker.

15. Mr Walker accepted that, in the circumstances, there was little he could say in favour of ground 2.

16. Turning first to ground 1, since the grounds were drafted, the Court of Appeal has handed down its decision in **MF Nigeria [2013] EWCA Civ** . In light of that decision, as both representatives accepted, the appeal before the First-tier Tribunal should have proceeded on the basis that if the requirements of paragraph 399 and 399A of

the Rules were not me, the consideration of exceptional factors should have taken place within paragraph 398 of the Rules. This brings into play the application of article 8 jurisprudence as considered at [39]-[40] of **MF**:

> 39. Ms Giovannetti has made it clear on behalf of the Secretary of State that the new rules do not herald a restoration of the exceptionality test. We agree. It is true that, as the UT pointed out at para 38 of their determination, the new rules are not a perfect mirror of the Strasbourg jurisprudence. But Ms Giovannetti concedes that they should be interpreted consistently with it. Mr Husain correctly points out that the rules do not expressly provide for consideration of all questions relevant to article 8 claims, such as what is in the best interests of the child; the age of the offender at the date of entry into the UK and at the date of the offending; the length of time since the offence; the offender's subsequent conduct and so on. But the rules expressly contemplate a weighing of the public interest in deportation against "other factors". In our view, this must be a reference to all other factors which are relevant to proportionality and entails an implicit requirement that they are to be taken into account.
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> 40. Does it follow that the new rules have effected no change other than to spell out the circumstances in which a foreign criminal's claim that deportation would breach his article 8 rights will *succeed*? At this point, it is necessary to focus on the statement that it will only be "in exceptional circumstances that the public interest in deportation will be outweighed by other factors". Ms Giovannetti submits that the reference to exceptional circumstances serves the purpose of emphasising that, in the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who do not satisfy paras 398 and 399 or 399A. It is only exceptionally that such foreign criminals will succeed in showing that their rights under article 8(1) trump the public interest in their deportation.

17. In considering "exceptional circumstances", it is important to note the observation made by the Master of the Rolls. He cited with approve the decision of Sales J in Nagre v SSHD [2013] EWHC 720 (Admin) in the context of his observations of the repeated use by the ECtHR of the phrase "exceptional circumstances" , stating [42] and [43]:

> 42. At para 40, Sales J referred to a statement in the case law that, in "precarious" cases, "it is likely to be only in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of art 8". This has been repeated and adopted by the ECtHR in near identical terms in many cases. At paras 41 and 42, he said that in a "precarious" family life case, it is only in "exceptional" or "the most exceptional circumstances" that removal of the non-national family member will constitute a violation of article 8. In our view, that is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be "exceptional") is required to outweigh the public interest in removal. In our view, it is no coincidence that the phrase "exceptional circumstances" is used in the new rules in the context of weighing the competing factors for and against deportation of foreign criminals.

> 43. The word "exceptional" is often used to denote a departure from a general rule. The general rule in the present context is that, in the case of a foreign prisoner to whom paras 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the "exceptional circumstances".

18. It is evident from the determination that that the First-tier Tribunal carried out a proper and adequate consideration of the article 8 jurisprudence which, although carried out (wrongly) after a finding that the appeal did not fall to be allowed within the rules, was nonetheless the same analysis that would have been undertaken within paragraph 398. Thus, their error in proceeding as they did was not material.

19. As Mr Walker accepted, the panel had addressed **SS (Nigeria)**. It is clear from their determination that they did so. It is clear also from the paragraphs cited above from **MF Nigeria** that in assessing exceptional factors there has to be a proportionality exercise in which serious and significant weight has to be attached to the public interest in deporting foreign criminals. Whilst it is clear that the panel erred in doing so outside the Immigration Rules, the test that they applied is that which is set out in the Rules, as understood in light of the decision in **MF (Nigeria)**. Mr Walker again accepted that but submitted that in this case the panel had not attached sufficient weight to the public interest in deportation.

20. I consider that, however, that argument is not sustainable. The panel stressed at several stages the significant and high weight to be attached to the public interest in this case and set out in adequate detail why they considered, given the length of time the claimant has spent in this country, the age he arrived here and the fact that all his parents are here and that he has been in a twelve year long relationship with Natasha Fisher, a British citizen, that it would on the facts of this case not be proportionate to remove the claimant.

21. Turning to ground 2, while it is clear that the panel did not accept the claimant's credibility in terms of his claim for asylum it considered that his raising of a claim for asylum was an attempt to avoid deportation, they have set out in adequate detail why they considered that the claimant has reformed given the lack of evidence of further criminal conviction, activity or taking cannabis. They did so in setting out why they considered that the Section 72 certificate was not upheld, a finding which I consider was in all the circumstances sustainable.

22. It is evident that the First-tier Tribunal did direct themselves properly with respect to Maslov and I consider also that the Tribunal did set out in adequate detail why the considered deportation is not proportionate. The challenges set out in the grounds of appeal within ground 2 at [4] –[8] are in effect an attempt to restrict the factors that could be taken into account to those set out in paragraphs 399 and 399A, contrary to what was held in **MF.**

23. Whilst the decision reached by the panel is not one to which I might necessarily have come, it was nonetheless one which was open to them and for which they gave permissible reasons.

24. In conclusion, I consider that although the panel erred by considering exceptional circumstances outwith the immigration rules, rather than within them, this made no material difference to the outcome given that the exercise they conducted was in substance, if not in form, the same.

25. In the circumstances, however, I uphold the determination although substituting the basis on which it was allowed.

Summary of Decisions

The determination of the First-tier Tribunal did not involve the making of an error of law. I uphold it subject to the clarification that the appeal is allowed under the Immigration Rules.

Signed Date

Upper Tribunal Judge Rintoul