



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/01289/2013

THE IMMIGRATION ACTS

Heard at : Field House
On : 18th November 2013

Determination Promulgated
On 29th November 2013

Before

Upper Tribunal Judge McKee

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JULIAN MARADONNA ALLEYNE

Respondent

Representation:

For the Appellant: Miss Helen Horsley of the Specialist Appeals Team
For the Respondent: unrepresented

DETERMINATION AND REASONS

1. A decision to make a deportation order against Mr Alleyne was taken on 17th June 2013, by which date he was in detention under Immigration Act powers at Brook House. Lacking a representative, Mr Alleyne gave notice of appeal himself to the First-tier Tribunal, and on 2nd September 2013 the appeal came before a panel comprising Judge Rosemary Morris and Mrs Wilma Jordan. The appeal was allowed under Article 8 of the ECHR, but permission to appeal to the Upper Tribunal was granted to the Home Secretary on 9th October by Judge Sommerville, and the matter has now come before me.

2. Mr Alleyne could not be brought from Brook House for the hearing today, because the escort contractor, TASCOR, did not have the resources to do so ~ a lamentable state of affairs which is not at all unusual. Rather than adjourn the case, it seemed best to me to press ahead with the 'error of law' stage. Without any knowledge of what might constitute an error of law, Mr Alleyne, who has been unrepresented throughout these proceedings, would not have had any useful submissions to make at this stage, and if an error of law was identified, I proposed to adjourn the case then, so that the decision on the appeal could be re-made at a later date, with Mr Alleyne present.
3. I therefore heard submissions from Miss Horsley, who expanded on the grounds of appeal drafted by one of her colleagues on behalf of the Secretary of State. There were two grounds, the first of which asserted that the First-tier panel were wrong to follow the 'two stage' approach recommended in *MF (Article 8 – new rules) Nigeria* [2012] UKUT 393 (IAC). Permission was not granted on that ground, but Miss Horsley prayed in aid the Court of Appeal's judgment when *MF (Nigeria)* went on appeal to them. It had recently been handed down as [2013] EWCA Civ 1192, and Miss Horsley focused on the Court's characterisation of the new immigration rules in respect of how considerations of private or family life might impinge upon deportation, as forming "a complete code". That meant, as I understand Miss Horsley, that it was no longer permissible for the Tribunal to look outside the provisions of Part 13 of the Immigration Rules, when determining how Article 8 is to be applied in a deportation appeal.
4. It seemed to me, however, that far from disavowing a two-stage test, the Court of Appeal were saying that there is a two-stage test both inside and outside the Rules. Under paragraph 398, when paragraphs 399 and 399A do not apply, a Home Office caseworker, in considering whether there are "exceptional circumstances", in the sense that "*deportation would result in unjustifiably harsh consequences*", must perform a proportionality balancing exercise. Just so, a First-tier judge on appeal, who finds that the appellant cannot succeed under paragraphs 399 or 399A, must determine whether, in the light of the domestic and Strasbourg jurisprudence, deportation would nonetheless be disproportionate. I need say no more on this, because it has now been fully explained at paragraphs 15-18 of *Kabia (MF : para 398 – "exceptional circumstances")* [2013] UKUT 569 (IAC).
5. The second ground, as Miss Horsley very properly pointed out, contains some inaccuracies, particularly in asserting that Mr Alleyne, having committed a serious offence for which he expressed remorse and a determination not to re-offend, had "*gone on to commit a much more serious offence.*" Indeed, his offences had "*escalated in seriousness.*" In fact, after being sentenced to 12 months' detention (reduced on appeal from 18) in a Young Offender Institution for possession of a Class A drug with intent to supply, Mr Alleyne had thereafter received a police caution for assault and a £50 fine for possessing cannabis for his personal use. Clearly, these were much less serious offences, and were penalised accordingly.
6. At paragraph 30 the panel dealt with the fact that, as highlighted in the second ground, "*notwithstanding his stated intentions the Appellant re-offended.*" They carefully considered the context in which this re-offending occurred, and gave

adequate reasons for forming the view that this time Mr Alleyne would not re-offend. This was a view which was rationally open to them on the evidence.

7. Much of the lengthy second ground consists of disagreement with findings which the panel were entitled to reach. The only point with any merit was picked up by Miss Horsley and was advanced most persuasively, namely that the panel might not have given adequate weight to the public interest side of the proportionality balance. Although the panel's attention had been drawn to *SS (Nigeria)* [2013] EWCA Civ 550, they did not quote any passage from it, in particular the dictum of Lord Justice Laws that "*the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail.*" This is expressed more forcefully by his Lordship in respect of 'automatic' deportation under the UK Borders Act 2007, whereby "*Parliament's express declaration [that] the public interest is injured if the criminal's deportation is not effected*" means that a result favouring the foreign criminal can "*only be justified by a very strong claim indeed.*" Mr Alleyne, it should be remembered, is not a 'foreign criminal' for the purposes of the 2007 Act, which does not apply to him.
8. The last substantial paragraph of the First-tier determination is paragraph 43, in which, when explaining why "*the interests of public safety and the prevention of disorder or crime*" do not outweigh the interests of Mr Alleyne and his British child, the panel directly address those interests with just the following sentence :

"The Appellant has only had one custodial sentence and we are satisfied that he has shown remorse and put in place strategies to try and avoid such offending behaviour in the future."
9. That, says Miss Horsley, is far too brief to take adequate account of the public interest. If that was all the panel had to say about the matter, I would agree. But if one looks back to paragraphs 29-30, one sees that Mr Alleyne was still a minor when he was convicted of the drug offence, was 19 when he received a police caution and was 20 when he was fined for possessing a Class B drug. The only offence for which he received a custodial sentence was committed when he was a minor, and although the panel do not cite *Maslov v Austria*, they seem to have in mind the principle that an offence committed by a juvenile adds less weight to the public interest side of the Article 8 balance. The offence was serious, but the sentence of one year's detention shows that it was considered to be at the lower rather than the higher end of the scale for drug offences.
10. Another *Maslov* consideration (although again with no overt reference to *Maslov*) comes at paragraph 24, in which the panel recollect that Mr Alleyne has been here since the age of 10 and "*has therefore spent nearly half his childhood and all his adult life in this country.*" He is not a 'settled migrant', but the panel accept that he did not realise this until 2009, "*when he wanted to apply for college after he had completed his GCSE examinations.*"
11. I have already mentioned the panel's finding at paragraph 30 that Mr Alleyne is not likely to re-offend. This is backed up by the evidence set out at paragraph 25. There was no OASys Report to assist the panel with a professional appraisal of the risk of re-offending, so the panel had to do the best they could with the evidence before them. Their conclusion on this cannot be characterized as irrational or perverse.

12. Miss Horsley's best point, it seems to me, is that the panel did not expressly weigh on the public interest side of the balance such factors, familiar from cases including *N (Kenya)* and *OH (Serbia)*, as the need to deter others, the expression of public revulsion at serious criminality, and the promotion of public confidence in the criminal justice system. It was certainly an error of law not to mention these factors at all, but I do not agree with Miss Horsley that in this instance it was a material error. Looking at the panel's determination in the round, it is clear that, having seen and heard Mr Alleyne give evidence ~ something the Upper Tribunal has not done ~ they formed a favourable impression of his credibility. They thought it significant that his one serious offence was committed when a juvenile, and they were satisfied that he would not re-offend. Although not settled here, he had been brought to this country as a child, and contrary to what is said in the grounds about Mr Alleyne being "*an adult who has spent his formative years in Barbados*", he would be more accurately described as having spent his formative years in this country.
13. The upshot is that I cannot see how the panel would have come to a different conclusion, had they explicitly taken account of the public interest factors mentioned above. To omit them from the balancing exercise was an error, but it was not a material error, since the weight which could reasonably have been given to them in the present case would not have tipped the balance in favour of deportation. Apart from this omission, the First-tier Tribunal produced a careful and thorough determination, giving sustainable reasons for all their findings, which were fully open to them on the evidence. It would not be right to set their determination aside.

DECISION

The Secretary of State's appeal is dismissed.

A handwritten signature in blue ink that reads "R. McKee". The signature is written in a cursive style with a long, sweeping underline.

Richard McKee
Judge of the Upper Tribunal

19th November 2013