Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01346/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 24 June 2013	**On 31 July 2013**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

BRUCE BRANDON MCLEAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Wray, Counsel with Kings Court Chambers
For the Respondent: Mr J McGirr, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a Jamaican citizen, appeals with permission against the decision of the First-tier Tribunal (First-tier Tribunal Judge Carroll and Mrs S E Singer, a non-legal member) dismissing his appeal against the decision of the Secretary of State that he is a foreign criminal subject to automatic deportation pursuant to section 32 of the UK Borders Act 2007. He is now 24 years old. The respondent was not satisfied that any of the exclusions, and in particular Exclusion 1, set out in s.33 of that Act applied to the appellant.

Background

2. The appellant came to the United Kingdom on 10 May 2000 when he was a minor. He was then the dependent child of his father, Dwight Anthony McLean, who sought indefinite leave to remain as the spouse of a British citizen. Indefinite leave to remain was granted to the appellant and his father on 6 January 2001. The appellant's father subsequently changed his name by deed poll to Wayne Richard Martin.

3. On 8 March 2009 the appellant, now 19 years old, was convicted of having an article with a blade in a public place, possession of class B controlled drugs and using a vehicle whilst uninsured. For that offence he received a sentence of 180 hours unpaid work in the community.

4. The offence which triggered the automatic deportation provisions of section 32 was convicted was robbery; he was convicted on 18 July 2011, when he was 22 years old, along with another man, Bruce McLean. It took place at Brockwell Lido. The appellant pleaded guilty and was given credit for that. He was sentenced to 40 months' imprisonment, which was more than sufficient to engage the foreign criminal provisions of s.32.

5. The circumstances which are said to engage Exception 1 under s.33 of the Act relate to the claimed relationship between Ms Hermione Steele, a Grenadian national who now has discretionary leave to remain until April 2015. Ms Steele arrived in the United Kingdom in May 2001 as a visitor and overstayed; she made no application to regularise her position until March 2012. She has two children, Tayashun and Sahar. The elder child, Tayashun, is Ms Steele's child with the appellant when he was settled with indefinite leave to remain and is a British citizen. Sahar is not his child and is a citizen of Granada.

6. Ms Steele did not include the younger child Sahar in her application for leave to remain in the United Kingdom and Sahar has no status now. No explanation for the omission of Sahar from Ms Steele's application was offered.

7. Ms Steele claimed in her application that she and this appellant had been in a relationship for six years. However, Ms Steele's application for leave to remain in the United Kingdom, which was limited to herself and Tayashun, was accompanied by a

number of letters from persons supporting her application, none of whom mentioned a relationship with the present appellant.

8. The appellant in the present application stated that he had been in a relationship with Ms Steele for four years and eight months. The parties did not cohabit until October 2012 when the appellant was granted immigration bail to Ms Steele's address.

9. The respondent did not accept that they were a family unit and considered that as Ms Steele had been responsible for the children's day-to-day welfare and health, it was in their best interests to remain in the United Kingdom with her. It was open to Ms Steele to relocate to either Granada or Jamaica if she considered that to be in the best interests of her children; Tayashun had a right to grow up in the United Kingdom as a British and EU citizen.

10. The appellant claimed to have no relatives in Jamaica, but had returned there several times since his arrival in the United Kingdom. According to his account, his family members were now all in the United States. The appellant was an intelligent, articulate man who had achieved eleven GCSEs and begun studying for a BTech in manufacturing engineering at Kingston College before dropping out of his course to earn money. There was no evidence of employment, nor of any community engagement.

The First-tier Tribunal determination

11. The First-tier Tribunal heard oral evidence from the appellant, Ms Steele and the appellant's father Mr Martin. In their determination, the First-tier Tribunal held that the appellant could not bring himself within the Article 8 provisions of the Immigration Rules.

12. Considering the facts outside the Immigration Rules under Article 8, the First-tier Tribunal was not satisfied that the appellant and Ms Steele were in a committed or durable relationship. His paternity of Tayashun was not disputed. The evidence relating to private life was slight, particularly as the appellant had now been in the United Kingdom for 12 years. They did not believe that he had, as claimed, no meaningful familial, cultural or social ties to Jamaica. The Tribunal applied the decision of the Upper Tribunal in *Masih (deportation - public interest - basic principles) Pakistan* [2012] UKUT 46 (IAC) and considered that the s.33 exceptions were not made out and that removal of the appellant to Jamaica would be lawful and proportionate.

Permission to appeal

13. First-tier Tribunal Judge Cruthers granted permission to appeal on the basis that it was 'just arguable' that the First-tier Tribunal may have erred in law in their proportionality assessment as to the best interests of the child Tayashun and/or the low risk which the appellant posed to the community in the United Kingdom.

Rule 24 Reply

14. The respondent filed a reply pursuant to rule 24 of the Upper Tribunal Procedure Rules, of which the material paragraphs are as follows:

> "3. The panel carried out a detailed and factual analysis of the appellant's circumstances. The conclusion reached as to the nature of the appellant's relationship with Ms Steele are sustainable. Neither the appellant nor Ms Steele were considered to be credible witnesses as to the nature and length of their relationship.
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> 4. There were good reasons to indicate that the relationship was not of significance and from this situation it can be clearly be inferred that the contact between the appellant and his son with whom he has a family life by virtue of parentage was limited and resulted from the need for a bail address and little else. The appellant's current residence with Ms Steele was found to be opportunistic.
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> 5. The child Tayashun is of an age where he is largely dependent on his mother, has spent the majority of his life with her alone and there was no independent evidence of his or his sister's best interests.
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> 6. Given the limited involvement of the appellant with Ms Steele and her family and the assessment of the appellant's character and the lack of credibility in the accounts of the parties it was open to the panel to conclude on the evidence before them that the deportation of the appellant was not a disproportionate interference."

15. That was the basis on which the appeal came before me.

Upper Tribunal hearing

16. In submissions, Mr Wray argued that although the appellant's offences were serious, he had received some credit for mitigating circumstances.

17. The appellant in this case had an Offender Assessment System (OASys) report which assessed his overall risk of re-conviction as low, but that he posed a medium risk of harm to the community. That was relevant to the assessment of s.33 and Exception 1.

18. The interests of the children outweighed the public interest in this appeal. The appellant's son was a British citizen and his step-daughter had no applied to register as a British citizen when she reached 10 years old. The appellant continued to rely on the decision of the Upper Tribunal in *Masih (deportation - public interest - basic principles) Pakistan* [2012] UKUT 46 (IAC).

19. Mr Wray was aware of the decision of the Court of Appeal in *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550. He asked me to allow the appeal.

20. I indicated to Mr McGirr that it would not be necessary to hear from him.

The law

21. The automatic deportation provisions are set out in s.32 of the UK Borders Act 2007:

"32. Automatic deportation

(1)In this section "foreign criminal" means a person—

(a) who is not a British citizen,

(b) who is convicted in the United Kingdom of an offence, and

(c) to whom Condition 1 or 2 applies.

(2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months. …

(4)For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good."

22. There is no dispute that the appellant is a 'foreign criminal' as there defined. The presumption that his deportation is conducive to the public good is triggered, and under section 32(5) the Secretary of State must make a deportation order against him. Such a deportation order may be revoked only where the appellant can bring himself within one of the exceptions set out in s.33, or he has left the United Kingdom, or for the purpose of taking certain actions under the Immigration Acts or making a fresh deportation order.

23. The exception provisions relevant to this appellant are set out as Exception 1 in section 33(2) of the 2007 Act:

"33(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach—

(a) a person's Convention rights, or

(b) the United Kingdom's obligations under the Refugee Convention."

24. The Upper Tribunal considered that exception in *Masih,* and gave the following guidance:

"The following basic principles can be derived from the present case law concerning the issue of the public interest in relation to the deportation of foreign criminals:

(a) In a case of automatic deportation, full account must be taken of the strong public interest in removing foreign citizens convicted of serious offences, which lies not only in the prevention of further offences on the part of the individual concerned, but in deterring others from committing them in the first place.

(b) Deportation of foreign criminals expresses society's condemnation of serious criminal activity and promotes public confidence in the treatment of foreign citizens who have committed them.

(c) The starting-point for assessing the facts of the offence of which an individual has been committed, and their effect on others, and on the public as a whole, must be the view taken by the sentencing judge.

(d) The appeal has to be dealt with on the basis of the situation at the date of the hearing.

(e) Full account should also be taken of any developments since sentence was passed, for example the result of any disciplinary adjudications in prison or detention, or any OASys or licence report.

(f) *In considering the relevant facts on 'private and family life' under article 8 of the Human Rights Convention, "for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in [this] country, very serious reasons are required to justify expulsion".*

(g) *Such serious reasons are needed "all the more so where the person concerned committed the relevant offences as a juvenile" ; but "very serious violent offences can justify expulsion even if they were committed by a minor". Other very serious offending may also have this consequence."*

25. The question has also been considered by the Court of Appeal in *SS (Nigeria),* the relevant passages being at paragraphs 52-56 in the judgment of Lord Justice Laws:

> "52. In my opinion, however, [the legislative source of the policy] is a central element in the adjudication of Article 8 cases where it is proposed to deport a foreign criminal pursuant to s.32 of the 2007 Act. The width of the primary legislator's discretionary area of judgment is in general vouchsafed by high authority: *Brown*, *Lambert*, *Poplar*, *Marcic*, *Lichniak* and *Eastside Cheese*, cited above. But it is lent added force where, as here, the subject-matter of the legislature's policy lies in the field of moral and political judgment, as to which the first and natural arbiter of the extent to which it represents a "pressing social need" is what I have called the elected arm of government: and especially the primary legislature, whose Acts are the primary democratic voice. What, then, should we make of the weight which the democratic voice has accorded to the policy of deporting foreign criminals?
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> *(2) THE NATURE OF THE POLICY: MORAL AND POLITICAL*
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> 53. The importance of the moral and political character of the policy shows that the two drivers of the decision-maker's margin of discretion – the policy's nature and its source – operate in tandem. An Act of Parliament is anyway to be specially respected; but all the more so when it declares policy of this kind. In this case, the policy is general and overarching. It is circumscribed only by five carefully drawn exceptions, of which the first is violation of a person's Convention/Refugee Convention rights. (The others concern minors, EU cases, extradition cases and cases involving persons subject to orders under mental health legislation.) Clearly, Parliament in the 2007 Act has attached very great weight to the policy as a well justified imperative for the protection of the public and to reflect the public's proper condemnation of serious wrongdoers. Sedley LJ was with respect right to state that "[in the case of a 'foreign criminal' the Act places in the proportionality scales a markedly greater weight than in other cases".
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> 54. I would draw particular attention to the provision contained in s.33(7): "section 32(4) applies despite the application of Exception 1...", that is to say, a foreign criminal's deportation remains conducive to the public good notwithstanding his successful reliance on Article 8. I said at paragraph 46 that while the authorities demonstrate that there is no rule of exceptionality for Article 8, they also clearly show that the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail. The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgment only be justified by a very strong claim indeed.
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> *(3) SUMMARY*

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

and paragraph 62, in that of Mr Justice Mann:

> “62. In this appeal counsel for the appellant placed considerable emphasis on the need for the Tribunal to satisfy itself as to the interests of the child in such a way as suggested an inquisitorial procedure. I agree with Laws LJ that the circumstances in which the Tribunal will require further inquiries to be made, or evidence to be obtained, are likely to be extremely rare. In the vast majority of cases the Tribunal will expect the relevant interests of the child to be drawn to the attention of the decision-maker by the individual concerned. The decision-maker would then make such additional inquiries as might appear to him or her to be appropriate. The scope for the Tribunal to require, much less indulge in, further inquiries of its own seems to me to be extremely limited, almost to the extent that I find it hard to imagine when, or how, it could do so.”

Discussion

26. The question for me is whether it was open to the First-tier Tribunal on the facts found to conclude that the appellant had not made out a sufficient case to bring himself within Exception 1 as set out in section 32(2)(a) in relation to Article 8 ECHR. The evidence in relation to the best interests of Ms Steele’s children was not strong and the Tribunal had no inquisitorial duty, as set out by Mann J in *SS’s* case.

27. The appellant had committed a serious offence for which he received a sentence of 40 months. His relationship with Ms Steele was, at best, intermittent and the Tribunal was entitled to find that it did not add much weight to the proportionality balance. The Tribunal’s determination was a proper representation of the weight to be given to the public interest as set out in a statutory provision. The conclusions reached were not, properly understood, legally erroneous in the weight attached to the best interests of the appellant’s son and step-daughter, or to such private and/or family life as has been enjoyed between Ms Steele, the appellant, and her children.

28. There was no material error of law in the Tribunal’s determination and I uphold it.

DECISION

The making of the previous decision involved the making of no error on a point of law I do not set aside the decision but order that it shall stand.

Date: Signed

Judith Gleeson

Judge of the Upper Tribunal