Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01129/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5 February 2014	**On 18 February 2014**
Prepared 5 February 2014	

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR AJIBOLA ADENIYI

Respondent

Representation:

For the Appellant: Ms A Holmes, Senior Home Office Presenting Officer
For the Respondent: Ms N Manyarara, of Counsel, instructed by Messrs Freemans Solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals, with permission, against a decision of the First-tier Tribunal (First-tier Tribunal Judge C M Phillips and Mr M E Olszewski (lay member)) who in a determination promulgated on 5 November 2013 allowed the

appeal of Mr Ajibola Adeniyi against a decision of the Secretary of State made on 29 May 2013 to issue a deportation order by virtue of Section 32(5) of the UK Borders Act 2007.

2. Although the Secretary of State is the appellant before me, I will, for ease of reference, refer to her as the respondent as she was the respondent before the First-tier Tribunal. Similarly, although Mr Ajibola Adeniyi is the respondent before me, I will refer to him as the appellant as he was the appellant before the First-tier Tribunal.

3. The appellant is a citizen of Nigeria born on 3 October 1993 who entered Britain as a visitor in May or June 2005. He entered Britain with his mother and brother. In December 2009 the appellant, his mother and his siblings were granted indefinite leave to remain as the dependants of his father on the basis of his father's long residency in Britain.

4. The appellant has a number of convictions starting in September 2008 which include four convictions for theft and two for offensive weapons. One of the convictions had resulted in a sentence of six months' detention. The UKBA decided against issuing a decision to deport on that occasion and informed the appellant of that decision in August 2011.

5. In May 2011 he was convicted of having an offensive weapon in public and using threatening, abusive or insulting words or behaviour or disorderly behaviour with intent to cause fear or provocation or violence. On 12 October 2012 he was convicted of having a blade/article which was sharply pointed in a public place. He was sentenced to fourteen months' detention in a Young Offenders Institution. He did not appeal against conviction or sentence. On 28 November 2012 he was served notice of liability to automatic deportation.

6. The Tribunal, having noted the decision to deport, set out the remarks of the sentencing judge. The comments of the judge contained the following:-

> "Although you are only 18, you have got six previous convictions, two for robbery or attempted robbery and two previous convictions for possession of a bladed article. That was on 13 May 2010 and 28 April 2011. On the first occasion you were given a youth rehabilitation order and on the second six months' detention and training. Possession of a knife like this is an extremely serious matter. So far as the nature of the knife is concerned, a lock knife can have no lawful purpose whatsoever. You say your intention was to defend yourself. In my view there was obviously an element of planning involved in this case by virtue of the fact that it was tied to your boxers with a piece of string. This was not just a case of you picking it up on the way out of the house and the likelihood is that you carry the knife around with you all the time.
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> As the Court of Appeal made clear in **Pouthey**, every weapon carried on the streets, even if concealed from sight, represents a threat to public safety. It takes just a moment of irritation, anger, drunkenness, some perceived slight, something totally trivial such as a look for a weapon to be produced and serious injury, potentially fatal to follow

> and I am afraid that an offence like this has to be treated extremely severely. Notwithstanding what you have said your previous convictions are an obviously significant aggravating factor, even though they were committed when you were a juvenile. One was relatively recent. In my view the most important mitigating factor is your age, because although you are nearly 19, that is still quite young and you have obviously not matured enough to appreciate this sort of behaviour is totally unacceptable."

7. The Tribunal heard evidence from the appellant, his mother and his father. The witnesses stated that the appellant goes to church and has changed since his release and would not cause any further trouble. Moreover, he would have no-one to turn to in Nigeria.

8. There was evidence from the appellant's Probation Officer that the appellant complied with his licence conditions and stated that his current risk of re-offending was medium.

9. In paragraphs 50 onwards the Tribunal set out the burden of proof and a précis of the guidance given in the European Court of Human Rights decisions in **Üner [2006] ECHR** and **Maslov [2009] INLR 47**. They noted moreover the guidelines set out in the head note in **Masih [2012] UKUT 00046**.

10. In paragraph 46 of the determination they referred to the new Rules relating to Article 8 claims and in paragraph 61 onwards set out their conclusions. I note that in paragraph 70 they state:-

> "There is a minor child involved since the appellant lives with his 7 year old sister. This gives rise to the need to consider Section 55 of the 2009 Borders Act. The best interests of the child are a paramount consideration and are generally considered to be best served by living with the parents in the country where they reside. The appellant's sister is living with both her parents in a country where they reside. Their appears to have been little in the way of a relationship between the appellant and his sister prior to the index offence because the appellant was incommunicado at home and his parents would not permit his sister to go out only in his company."

11. Nevertheless the Tribunal concluded that the appellant's removal would impact on his siblings as well as on his parents.

12. The Tribunal then referred to the provisions of paragraph 398 of the Rules, noting that it would only be in exceptional circumstances where the respondent had held that the public interest in deportation was outweighed by other factors. They concluded that there was however nothing exceptional in the appellant's circumstances. In paragraph 80 they said:-

> "In the light of the above we find that there are no exceptional circumstances under the Immigration Rules outweighing the public interest in deportation."

13. In paragraphs 81 onwards they set out what appears to be a separate consideration of the rights of the appellant under Article 8 under the ECHR. They stated that "The test of insurmountable obstacles and exceptionality do not apply as they do under the Immigration Rules". They then went on to say in paragraph 82, that the appellant was living at home with his family and was plainly dependent on his family for his accommodation and emotional support and that that was a "very strong private life factor". Having found that Article 8 would therefore be engaged, they referred to the best interests of the appellant's minor sister, stating:

> "The best interests of his minor sister are a primary consideration. His offending behaviour and the stresses that this has created for his family were not in the best interests of his minor sister. His rehabilitation is. These are a paramount consideration but not the only one."

14. They took into account that the appellant was noted as being of medium risk of harm to members of the public and then in paragraph 87 concluded that, having looked at all relevant factors, they found that:-

> "The respondent has not discharged the onus of proof and shown that the appellant's deportation is Article 8 proportionate. We find that the appellant has put forward a strong enough claim under Article 8 for this to prevail against the public interest in this case in deportation. We find that the appellant having made out his claim under Article 8 of the ECHR does come within the exception. It follows from all the findings set out above that applying all the relevant principles we allow the appeal on human rights grounds – Article 8."

15. The Secretary of State appealed arguing that the Tribunal appeared to have placed weight on the fact that the appellant had not received a warning letter in 2011. That was irrelevant and indeed there was evidence that such a letter had been sent. Moreover, there was no evidence to support the tribunal's acceptance of the appellant's claim that he had indeed taken courses in prison to address his behaviour and that he was motivated to change, particularly taking into account the Tribunal's finding that the probation service still referred to the appellant as being a medium risk of harm. There was nothing, it was argued, on which the Tribunal could have based their conclusion that the risk of harm would lower over time. It was pointed out that the Tribunal had found that the appellant had a supportive background but in the past that had not prevented him committing the offences with which he had been charged.

16. It was pointed out that the appellant had lived in Nigeria for the first eleven years of his life and there was no reason why as an adult he could not readapt to life in Nigeria.

17. Although the application was refused by Upper Tribunal Judge Renton on 29 November 2013, further grounds of appeal were then submitted which referred to the case of **AM v SSHD [2012] EWCA Civ 1634** and **DS (India) [2009] EWCA Civ 544**.

18. Having considered those grounds, I granted permission to appeal on 2 January 2014.

19. Ms Holmes relied on the grounds of appeal. She pointed out that the Tribunal had been wrong to place weight on the assertion of the appellant that he had not received the warning letter where there was evidence that had been served by the respondent and it was in the appellant's interest to state that he had not received it. She emphasised that the Tribunal had ignored the importance of taking into account the public interest in the deportation of those who committed crimes.

20. In reply, Ms Manyarara relied on her detailed skeleton argument in which she emphasised that the Upper Tribunal should not interfere with findings of fact of a Tribunal who had heard the witnesses giving evidence. She argued that the Tribunal had been perfectly entitled to reach the findings it did in respect of Article 8 on the strength of the appellant's private and family life and that they were correct to find that the interference with that right was disproportionate, having considered the public interest. She argued that the conclusions of the panel were adequate and stated that their conclusions were open to them. With regard to the warning letter, she stated that that conclusion was fully reasoned because they found that the witnesses were credible. More importantly, she pointed out that the Tribunal had referred to the determination in **Masih [2012] UKUT 00046 (IAC)** and **RU (Bangladesh) [2011] EWCA Civ 651** as well as the guidance given in **Üner [2006] EHHR 875** and **Maslov [2009] INLR**. She asked me to find that they had properly applied those principles and had conducted the appropriate balancing exercise.

21. They were entitled to find that the risk to the public would diminish over time. She and referred to the documentary evidence which indicated that the appellant had undertaken various courses including that entitled "Survive Our Streets", had complied with his licensing conditions and kept away from former friends after his release in May 2013. Moreover, the Tribunal had been entitled to find that the Secretary of State had been unable to support the assertion that the appellant had shown disruptive behaviour in the younger offenders institution.

22. She referred to the refusal of the application by Upper Tribunal Judge Renton who had stated that the Tribunal had been entitled to find that the appellant was credible and moreover that he had a very strong private life here. Moreover, she relied on the determination of the Tribunal in **Ogundimu (Article 8 – new Rules) Nigeria [2011] UKUT 00045 (IAC)** and stated that in any event in **MF (Nigeria)** the Court of Appeal had endorsed a two stage test. She emphasised that the Tribunal were entitled to find that the appellant did not have any ties in Nigeria.

23. She stated that they were entitled to find, applying the criteria in **Maslov**, that the removal of the appellant was disproportionate.

24. In reply, Ms Holmes argued that the Tribunal had placed too much weight on what she referred to as the trivial parts of the appellant's evidence and that they had not

properly considered the evidence of the appellant's father which made it clear that he continued to have ties with Nigeria.

Discussion

25. I consider there are clear errors of law in the determination of the Tribunal. It is clear that they place weight on the interests of the appellant's younger sister despite having found that he had had little to do with her before he was detained. What they write in paragraph 82, which I have quoted above is muddled: it is not clear just what they considered was paramount: if it is the interests of the appellant's younger sister that is clearly wrong particularly when it appears that the Tribunal had themselves found that there had been little contact between the appellant and his sibling in the past and there is simply no evidence to suggest that the appellant's sibling would be unduly harmed by his removal.

26. Moreover, the Tribunal have clearly separated out a consideration of the appellant's rights under Article 8 under the Rules and those under the Convention. That is wrong. It is clear from the judgment of the Court of Appeal in **MF (Nigeria) [2013] EWCA Civ 1192** that there is no difference in substance between the approach under the Rules and that under the Convention. In paragraphs 44 onwards of that judgment it was stated:-

> "44. We would, therefore, hold that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence. We accordingly respectfully do not agree with the UT that the decision-maker is not 'mandated or directed' to take all the relevant Article 8 criteria into account (para 38).
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> 45. Even if we were wrong about that, it would be necessary to apply a proportionality test outside the new Rules as was done by the UT. Either way, the result should be the same. In these circumstances, it is a sterile question whether this is required by the new rules or it is a requirement of the general law. What matters is that it is required to be carried out if paras 399 or 399A do not apply.
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> 46. There has been debate as to whether there is a one stage or two stage test. If the claimant succeeds on an application of the new Rules at the first hurdle i.e. he shows that para 399 or 399A applies, then it can be said that he has succeeded on a one stage test. But if he does not, it is necessary to consider whether there are circumstances which are sufficiently compelling (and therefore exceptional) to outweigh the public interest in deportation. That is an exercise which is separate from a consideration of whether para 399 or 399A applies. It is the second part of a two stage approach which, for the reasons we have given, is required by the new Rules."

27. Although the Tribunal referred to the judgment of the Court of Appeal in **SS (Nigeria) [2013] EWCA Civ 550** they did not follow the guidance in that

determination which is that in assessing the proportionality of removal, weight should be placed on the seriousness of the offence and the interest of the public in the removal of an offender being the need to deter others from serious crime.

28. I would add that the Tribunal do not appear to have taken into consideration the fact that they had themselves found that the appellant had been involved in gang culture in London for some time and had noted the Probation Officer's report which stated that he was at medium risk of harm to the public.

29. In no way do they particularise the "encouraging evidence" that the appellant had matured, changed his outlook and would not again become involved with gang culture. It seems strange that they would place weight on the rehabilitative influences of the appellant's family given that the appellant had come from Nigeria to join them and that he was living with them at the time the offences were committed. Indeed the Tribunal do not appear to have placed any weight on the fact that the appellant has only lived in Britain for the last eight years.

30 Taking all these factors into account, I find the Tribunal did not properly and thoroughly as required assess all relevant factors in their decision and therefore that there were material errors of law in the determination of the Tribunal. I set aside their decision. The appeal will now proceed for a hearing afresh.

Signed Date

Upper Tribunal Judge McGeachy