Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01252/2013

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Determination Promulgated**
On 17 February 2014	**On 28 February 2014**
Prepared 18 February 2014	

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

AZIZ JARAD AKA ABDULLAH ALI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Adewoye, legal representative of Prime Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of Morocco born on 20 October 1984 appeals, with permission against a decision of the First-tier Tribunal (First-tier Tribunal Judge J Simpson and Mr B D Yates (legal member)) who in a determination promulgated on

9 December 2013 dismissed the appellant's appeal against a decision of the Secretary of State made on 30 May 2013 to deport the appellant pursuant to the provisions of Section 32(5) of the UK Borders Act 2007.

2. The appellant arrived in Britain illegally in 2001 claiming asylum on 28 June that year. His application was refused but the appellant was granted exceptional leave to remain until his 18th birthday on 20 October 2002.

3. On 26 May 2006 the appellant was convicted of two counts of burglary and theft and sentenced to 29 months' imprisonment which was extended to 40 months to include eleven months for an unexpired licence in respect of past convictions for burglary and theft.

4. In May 2008 he was served with a decision to make a deportation order but his appeal against that decision was allowed on 10 February on the basis that the appellant had not complied with directions. A further deportation letter was served in December 2010 and a letter giving reasons for the refusal of asylum was served in April the following year. On 27 May 2011 the appellant's appeal against the decision to deport was allowed under Article 8 of the ECHR and on 6 September 2011 he was granted three years' discretionary leave to remain.

5. On 29 September 2011 the appellant was convicted of burglary of a dwelling house and theft from a supermarket and sentenced to three years' imprisonment. A further decision to deport him was therefore made and it was in those circumstances that this appeal came before the First-tier Tribunal in December 2013.

6. The Tribunal noted the determination of the First-tier Tribunal and the fact that that Tribunal had considered that a critical aspect of the appeal before them was the appellant's abuse of heroin but that as a result of a prison sentence he had stopped using heroin and had had a period of stability and the First Tribunal therefore stated that there was no suggestion the appellant posed any risk to society. They reached that conclusion on the presumption that had the appellant been a risk to society there would have been OASys or NOMS reports but that these had not been forthcoming. They had stated that the appellant was off drugs and that "if he is supported in the community the pressures that he was under at the time he committed the offences would not be present".

7. The Tribunal, in December 2013 noted the appellant's assertions at the time of the hearing in May 2011 he had not used heroin for a number of years and had stopped taking methadone. He said that in June 2011 he had been arrested and detained for an offence he had not committed and then released without charge and had then reverted to abusing heroin which he said had been supplied to him free of charge. He had entered a community based drugs programme to support him and he had claimed that he had then stopped using heroin and since that time his only drug abuse had been when he had smoked cannabis on two occasions when in prison.

8. The Tribunal noted that the appellant's prison records showed that he had failed drugs tests in June 2012, September 2012 and December 2012 and extra time had therefore been added to his sentence.

9. In November he had refused to provide a sample for testing and in August had been found intoxicated in the prison yard.

10. They quoted from the NOMS1 report dated January 2013 which described the appellant to be at:-

> "Risk of further offending...until such time as Mr Ali (the appellant's alias) engages in sincere efforts to address his substance abuse".

The NOMS report had referred to his bad behaviour in prison and said that it was concerned that he had chosen to behave in this way

> "Whilst in the controlled environment of the custody setting. Despite maintaining that the index offence did not relate to funds for drug abuse, we can see from his list of adjudications that he has clearly relapsed back on drug abuse."

11. The Tribunal therefore rejected that the appellant was no longer a drug user. They noted his two latest offences had been of a dwelling house on 4 September 2011 and theft from Tesco's on 15 September. They noted that a laptop computer, two cameras, a mobile phone and £785 had been taken in cash from the house and that the two offences had been committed within eleven days of each other. They stated they were satisfied that these offences had been committed to feed the appellant's drug habit.

12. It appeared to the Tribunal that the previous Tribunal's assumption that the appellant was drug free and posed no threat to society was unfounded and noted that the NOMS report indicated that there had been little improvement.

13. They considered arguments put forward on behalf of the appellant that the appellant would face inhuman or degrading treatment because of his mental illness if returned to Morocco and that he would not be assisted by the Moroccan government who did not help homeless persons. It was claimed that the appellant suffered from PTSD and schizophrenia and that if he were removed his support would stop as would the care he received in the United Kingdom.

14. They noted that there were two reports from a Dr Turner dated 26 October 2010 and Dr Hajioff dated 13 September 2010, the latter of which stating that the appellant was taking olanzepine which was a major tranquiliser usually prescribed for psychotic conditions such as schizophrenia and drug induced psychosis. It could also be used as a calming agent for those who are anxious or restless.

15. The report had referred to the appellant persistently hearing "voices" which had decreased with medication but had not completely disappeared.

16. Dr Turner had stated that there was no evidence of symptoms that could be associated with schizophrenia or other psychotic disorders, although it appeared that the appellant had active symptoms of a depressive disorder compounded to some degree by the fact that he was still on methadone as a maintenance treatment for his "opiate dependence".

17. The appellant's medical records dated April 2013 had shown that he was taking nefopam, olanzepine and paracetamol. The Tribunal commented that there was no evidence these were anything other than the standard medications for depression.

18. Having taken into account a World Health Organisation report for 2013 which showed that there were basic health facilities in Morocco but that access might remain difficult for populations with low resources they noted that the report had said that mental health care was part of the primary care system and that therapeutic drugs were generally available at the primary health care level of the country.

19. Having considered the medical reports the Tribunal stated:-

> "We adopt the findings of the medical practitioners that the appellant is not schizophrenic and his condition is well controlled by his current medication. We also accept that health care facilities in Morocco may not be as good or as available as in the UK but that basic medication required to treat the appellant's conditions are available in Morocco according to the WHO report. The appellant adduced no evidence to contradict this conclusion. He asserted he has no family support in Morocco but accepted the same applies in the UK".

20. In paragraph 18 they stated:-

> "We conclude there is nothing exceptional about the appellant's circumstances which would make the respondent's decision disproportionate and further that the threshold applicable to an Article 3 claim is far from reached in this case."

21. They went on to dismiss the appeal.

22. The grounds of appeal on which Mr Adewoye relied at the hearing asserted that the Tribunal had adopted "a wrong legal test of exceptionality" where paragraphs 399 or 399A or 399B does not apply. They stated that that approach was contrary to the judgment of the Court of Appeal in **MF (Nigeria) [2013] EWCA Civ 1192** "where it was expressly stated that the new Rules do not create a new legal test of exceptionality".

23. The grounds of appeal then appeared to set out the factors which it was considered should be taken into consideration in this appeal. These included the fact that the first Tribunal, in 2011, had found that the appellant had no ties in Morocco as he had

been away from there since the age of 11, that he suffered from depression which had led him to self-harm on a number of occasions and the fact that he would not have counselling in Morocco which was important for his rehabilitation. It was stated that the WHO report relied upon did not make mention of availability of counselling.

24. It was also argued that the Tribunal had not mentioned the issue of self-harm which should have been evident before them and that that was crucial in assessing Article 3 and Article 8 elements of the case. It was argued they should have assessed how the appellant would manage on return without family ties or shelter and suffering from depression and being low in resources.

25. It was argued that the relevant test was that of reasonableness as to whether or not it would be disproportionate to remove the appellant in "Article 8 mental cases" short of the Article 3 test.

26. It was emphasised that the Tribunal had not considered the lack of support the appellant would face in Morocco and that they had not properly considered the support available there.

27. The second ground of appeal similarly argued that the decision of the panel was against the evidence adduced about the facilities in Morocco.

28. It was claimed that insufficient consideration had been given to the fact the appellant was attending a drug counselling group in prison and had not failed a drugs test for almost a year in prison given that the last adjudication was in 2012. It was argued that there had not been any consideration of whether or not the appellant was a danger to the community, whether his deportation was conducive to the public interest or whether he would reoffend in future and whether or not his Article 8 rights outweighed the public interest in his deportation. The final sentence of the grounds stated "it is accepted that he committed an offence and falls under the automatic deportation criteria but that is not enough to justify deportation".

29. At the beginning of the hearing Mr Adewoye stated there were no further reports regarding the appellant's mental or physical health although he did refer to the medical notes from the prison which had been in the bundle before the First-tier Tribunal.

30. He relied on the application for permission emphasising the Tribunal had applied an "exceptionality" test and that this was against the decision in **MF**. Although, in the Rule 24 statement which had been served by the respondent it was argued that for the appellant not to be deported there would have to be some exceptional factor he referred to paragraph 14 of the judgment in **MF** and stated that the decision to deport the appellant was so unjustifiably harsh that it was disproportionate.

31. He referred back to the determination of the First Tribunal who had set out factors which they considered to be important and which had led to their decision to allow the appeal. These included the reports of Dr Hajioff and the evidence given to him by the appellant regarding the appellant's attempt to self-harm since childhood and the overdoses that he had taken in prison and the claim that he had once tried to hang himself. Dr Hajioff had diagnosed the appellant as depressed and had prescribed antipsychotic medication.

32. He had also noted the appellant's history of abuse in Morocco and his attempts to leave Morocco with his brother. Moreover that Tribunal had stated that only 30% of the population had access to medical insurance and the system was unequal and that figures for those employed in the mental health field were unsatisfactory.

33. Mr Adewoye went on to refer to the World Health Organisation report and stated it was evidence that this had not been properly considered by the Tribunal.

34. He argued that there were clear exceptional factors in any event in this case given the fact that the appellant had been out of Morocco since the age of 11 and the difficulties he would have in attempting to live a normal life there.

35. He stated that the appellant would not have available to him the olanzepine which he is receiving here.

36. He argued that the Tribunal had not properly considered the issues of self-harm nor had they properly considered the risk of reoffending or the lack of support which the appellant would receive in Morocco.

37. He emphasised that there was a lack of facilities for the appellant in Morocco.

38. While he accepted that there was a high threshold for a Tribunal to conclude that there were exceptional circumstances which would mean that an appellant should not be deported he referred to the Immigration Directorate Instructions Chapter 13 which gave "criminality guidance in Article 8 ECHR cases". They stated that "exceptional" did not mean "unusual" or "unique". Moreover a case was not exceptional just because exceptions to deportation in Rules 399 and 399A had been missed by a small margin. The Immigration Directorate Instructions said "'exceptional' mean circumstances in which deportation would result in unjustifiably harsh consequences of an individual or their family such that it would not be proportionate."

39. The Immigration Directorate Instructions set out a number of factors to be considered which included the circumstances around a person's entry to Britain, exceptional cultural or legal factors which would prevent or severely limit a person from enjoying private life in their country of origin and difficulties in communication. Moreover factors could be taken into account on a cumulative basis.

40. Mr Adewoye stated that he gave room for consideration of the health of the appellant and facilities in Morocco.

41. He again emphasised that the findings of the Tribunal were contrary to those of the First Tribunal and asserted that they had disregarded the WHO report. They had, in effect, applied too stringent a test.

42. In reply Mr Walker relied on the Section 24 response which stated that the Tribunal had considered all relevant facts before them and made cogent findings and that their decision was well reasoned, sound and sustainable. They had taken account all factors weighing in the appellant's favour including the medical evidence and correctly had found that it was out of date. Moreover, the response referred to the judgment in **MF (Nigeria)** which stated that the Rules expressly contemplated a weighing of the public interest to deportation against "other factors" and that those must be a reference to the issue of proportionality. It was not a case that the test of exceptionality is being applied rather it was a question of whether or not removal was a proportionate response and that the scales were heavily weighed in favour of deportation and therefore something very compelling, which would be "exceptional" is required to outweigh the public interest in removal. The term "exceptional" should be used to denote a departure from the Rule and the general Rule was that set out in paragraphs 399 and 399A and therefore very compelling reasons would be required to outweigh the public interest in deportation. Those compelling reasons were "exceptional circumstances". It was argued therefore that the new Rules were a complete code and that the exceptional circumstances to be considered in the balancing exercise involved the application for a proportionality test as required by the Strasbourg jurisprudence.

43. It was therefore argued that the Tribunal had not used an "exceptionality test" but had properly considered all relevant factors in this case.

44. Mr Walker went on to state the panel had correctly considered the appellant had continued to abuse drugs and had carried on stealing. He referred to the terms of the NOMS report.

45. He stated that the medical evidence produced was out of date and in any event the Tribunal had found that the appellant was not schizophrenic. They had considered the medical support available in Morocco and indeed there was nothing to say that drugs similar to those which the appellant was or had taken would not be available in Morocco. It was clear, he argued, that the Tribunal had used the appropriate proportionality test.

46. In reply Mr Adewoye emphasised that reoffending was not the only consideration that should be taken into account and set out the mitigating factors which had led to the appellant to commit theft after the last hearing before the First Tribunal.

Discussion

47. In determining this appeal I have considered in particular the judgment of the Court of Appeal in **MF** and the correct approach to the issue of Article 8 rights set out in that judgment. Having emphasised that the first step was to decide whether deportation be contrary to an individual's Article 8 rights on the grounds that fell within paragraphs 398 and 399A, in paragraph 36 the reference to exceptional circumstances, which would mean that the public interest in deportation should be outweighed by other factors, was considered. Having noted the recognition by the European Court of Human Rights that States were entitled to decide that there is generally compelling public interest in deporting foreign criminals reference was made to the proportionality test which is demanded by Article 8.

48. It was emphasised that the new Rules do not herald a restoration of the exceptionality test and it was stated that that it was relevant that all factors relating to proportionality should be taken into account. In paragraph 44 of the judgment the Master of the Rolls states:-

> "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."

49. he went on to say:-

> "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 paragraphs 399 or 399A do not apply."

50. I have considered the determination of the Tribunal. The reality is that the Tribunal, having noted the appellant's immigration history and his criminal activities stated that it was relevant that despite the faith placed on the appellant by the First Tribunal the appellant had gone on to reoffend.

51. They noted that the only issue was whether or not the decision to deport was in breach of the appellant's rights under Article 3 or Article 8 of the ECHR.

52. They considered at very considerable length the appellant's medical history and noted indeed that the medical reports were not recent.

53. They took into account however the reports of Dr Turner and Dr Hajioff and noted that the appellant's latest medication records showed that in April 2013 he was taking nefopam, olanzepine and paracetamol. They correctly stated there was no evidence that these were anything other than standard medication for depression.

54. They then went on to consider the World Health Organisation report for 2013 and the medical facilities in Morocco. They set out at length the drugs which were available.

55. There was nothing before them to lead them to the conclusion, as Mr Adewoye would have us believe that the drugs which the appellant is now taking or their equivalents would not be available to the appellant in Morocco. They stated that they adopted the findings of the medical practitioners that the appellant was not schizophrenic and that his condition was well controlled on his current medication. They considered the fact that the appellant would not have family support in Morocco but noted that, of course, he had no family support here.

56. What they stated in paragraph 18 was that they concluded that "there is nothing exceptional about the appellant's circumstances which would make the respondent's decision disproportionate and further that the threshold applicable to an Article 3 claim is far from reached in this case". That sentence does not imply that they were importing into their consideration of the appellant's circumstances an "exceptionality" test. They had weighed up all relevant factors. The relevant factors in this case are those to which they had referred in the determination. The appellant is an overstayer. He has committed a series of thefts and has certainly in the past shown an addiction to drugs. There is a link between the two. They found that the appellant was not schizophrenic but there are drugs available for him in Morocco. While he has no family to whom he can turn there he similarly has no family here. Weighing up all these factors the Tribunal, clearly mindful of the provisions in paragraphs 398 and 399 of the Rules and, although they did not specifically refer to it, although they referred to the NMS report, they were clearly aware of the public interest in the deportation of criminals reached a conclusion that there was nothing in this case which would mean that the removal of the appellant would be disproportionate and therefore that his removal would be in breach of his rights under Article 8 of the ECHR. As is pointed out in the judgment in **MF** if there were such disproportionate factors these would lead to it being found that this was an exceptional case.

57. I therefore find that the Tribunal made no material error of law in their determination and that therefore their decision dismissing this deportation appeal on immigration and human rights grounds shall stand.

Signed Date

Upper Tribunal Judge McGeachy