Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01785/2013

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
on 27th February 2014	**on 11th April 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

S X L
(Anonymity direction made)

Respondent

Representation:

For the Appellant: Mr Richards – Senior Home Office Presenting Officer.
For the Respondent: Mr Price instructed by Corbin & Hassan Solicitors.

DETERMINATION AND REASONS

1. This is an appeal against a determination of a panel of the First-tier Tribunal composed of First-tier Tribunal Judge Y J Jones and Mr M E Olszewski (hereinafter referred to as ' the Panel') who in determination promulgated on 4th November 2013 allowed SXL's appeal against the order for his deportation from the United Kingdom.

Background

2. SXL is a citizen of China born in November 1977. He entered the United Kingdom in July 2004 illegally and applied for asylum. He was provided with the necessary forms to complete and released on condition he reported monthly although he failed to complete the necessary paperwork or to report. On 13th

August 2004 his asylum claim was refused on non-compliance grounds against which there was no appeal.

3. On 18th November 2009 Anglo-Chinese Lawyers LLP applied on SXL's behalf for leave to remain under the ECHR and legacy casework programme.

4. Following an exchange of correspondence between the Secretary of State and the lawyers, SXL attended an asylum interview arranged for 28th February 2011. On 9th March 2011 his asylum claim was refused although on 10th March 2011 he was granted discretionary leave to remain in the United Kingdom for three years until 20th March 2014.

5. On 18th November 2010 SXL committed an offence of production of Class B controlled drugs, Cannabis. On 18 April 2011 he pleaded guilty to the offence although on the 12th May 2011 he claimed he was not guilty through his counsel who, for professional reasons, had to withdraw as a result. Further representation was arranged and as there had been no formal application to vacate the earlier plea he was sentenced on the basis of his guilty plea to 21 months imprisonment.

6. On 14th June 2011 SXL was informed of his liability for automatic deportation. Following his response on 26th March 2012 he undertook a screening interview and on 30th March 2012 a further asylum interview after which, on 19th August 2013, a deportation order was made against him.

7. The basis of the appeal against the deportation order is that SXL claims his deportation will breach his right to family life in the United Kingdom because his partner is a refugee from China with refugee status valid until 4th November 2013. They have been in a relationship since 2007 and have two sons born in the United Kingdom in 2008 and 2009, who have leave to remain in line with their mother. The family life will be disrupted and their right to family life breached as his partner and the children will not be able to go with him if he was deported to China.

8. Having considered the evidence the Panel set out their findings from paragraph 28 of the determination. A summary of the relevant findings is as follows:

    i. Mr Price conceded that SXL is subject to automatic deportation. Paragraph 398(b) applies to SXL and his deportation is conducive to the public good. The Panel considered paragraphs 399 and 399A of the Rules which were said not to apply to SXL [29].

    ii. In relation to the asylum claim - a number of different discrepancies were noted in SXL's evidence. The Panel concluded that because of his discrepant evidence in respect of his claimed membership of the

CDP his claim was not credible at any level and that he had no involvement with the CDP in China or in the UK [35].

iii. SXL has established a family life in the UK with his partner and biological children although this has been established in the period he has been in the UK without leave [38].

iv. The Secretary of State accepts that the decision to deport amounted to in an interference with his family life and that it was unreasonable to expect the two children to return with SXL to China [39]. The issue in the case is one of proportionality [40].

v. The offence is serious and in no way should be condoned or minimised [41]. Maslov v Austria considered the approach to be taken by national authorities when considering the deportation of a foreign national on the grounds that his presence constitutes a danger to the community [41].

vi. SXL was convicted of the production of cannabis with a value of approximately £40,000. This was an organised crime involving other perpetrators. He has a few previous convictions for non-related offences [41 (i)].

vii. SXL spent the majority of his life in China and was in the UK unlawfully until granted discretionary leave to remain in 2011, apparently on the basis of his partners refugee status, as did their two children who could not be removed from the UK [41 (ii)].

viii. There is no evidence of any "bad behaviour" since the arrest and detention and no assessment in relation to his risk of reoffending [41 (iii)].

ix. SXL, his partner, and two children reside in a flat above a named restaurant in a town in South Wales leased by his partner. The children attend school in that town and SXL and his partner work in the restaurant [41 (v)].

x. The offence had not been committed when SXL and his partner started their relationship [41 (vi)]. The children are aged four and five [41 (vii)].

xi. In relation to the best interests of the children the Panel found as follows:

"the best interests and well-being of the children is served by remaining in the UK. The children were both born in the UK and

have been brought up in the UK. They both attend school and are learning English in school although their first language is Mandarin. They have never lived in China. The One Child Policy exists in China and the evidence in the Country Information Report is that either both or at least one of the children will not receive education and/or medical assistance in China because the appellant has a son already living in China. The children will remain in the UK with their mother. We have had regard to section 55 of the Borders and Citizenship Act 2009 and consider that the welfare of the children is a paramount consideration. Although the crime committed by the appellant is serious bearing in mind the case law in respect of the children and the appellant's partner in this case it would not be proportionate to deport the appellant and break up his family for the foreseeable future" [41 (xi)].

xii. The Panel find that they are in no doubt that it is in the best interest of the children to have direct physical contact with their father as he is concerned and involved and is building a relationship with them and focusing on their best interests. The children are most likely to be further affected if their father is again removed from their lives such as when he was imprisoned [44].

xiii. Taking all relevant matters into consideration and balancing them is a delicate matter, society is entitled to express its revulsion against the criminal offending, but it is not reasonable to expect the wife and children to return to China, it would not be in the best interests of the children to be separated from their father, his presence has a positive impact on their lives, if he was removed to China communication would have to be by telephone, e-mail and Skype and the children are too young to partake in this type of communication effectively which will be wholly unsatisfactory and not in their best interests [45]. As a result the decision to deport SXL is not proportionate to the legitimate aim achieved. His criminal activities and the adverse effect that his deportation would have on his partner and children make this a particular case, one of those cases, where the public interest in deporting SXL is outweighed by the established family life that exists. The fact he was granted discretionary leave until 2014 after he committed the offences was also considered [46].

Error of law

9. There is no cross-appeal challenging the Panel's findings regarding the dismissal of the asylum claim or any of the protection grounds. The only issue before the Upper Tribunal relates to whether the finding of the Panel that the decision to deport is disproportionate is infected by any material legal error.

10. Permission to appeal was granted as it was considered arguable the Panel erred in failing to consider the provisions of part 13 of the Immigration Rules of which no reference is made in the determination, arguably erred by applying the reasoning in Maslov given SXL entered the United Kingdom in 2004 aged 27 and hence had not spent the majority of his youth in the United Kingdom, and failed to consider the reasoning in SS (Nigeria) [2013] EWCA Civ 550.

11. In relation to the reference to SS (Nigeria) I note in the list of cases the Panel state they specifically referred to, at paragraph 28 of the determination, there is no reference to this authority.

12. In paragraph 2 of the determination the Panel state the following:

> 2. This appeal is under section 82 and 92 of the 2002 Act against the respondent's decision that the appellant does not fall within any of the exceptions to automatic deportation under section 33 UK Borders Act 2007.

13. Whilst the Secretary of State did not consider on the available evidence that SXL is able to rely on any of the exceptions contained within the Borders Act, the decision being appealed against, the relevant immigration decision, is the deportation order made because the Secretary of State has a statutory duty to make such an order. If a person against whom an order is made believes they can satisfy one of the exceptions the burden is upon them to prove that this is so, subject to the normal caveats regarding the burden of proof.

14. A reading of the determination shows the Panel considered all the relevant facts but it is not clear they considered the Article 8 element of this case properly, for example, the grant of permission to appeal refers to Part 13 of the Immigration Rules of which there is little mention in the determination other than at paragraph 29.

15. A lot of case law relating to Article 8 and deportation has been decided in relation to cases heard prior to 9th July 2002 when the current version of the Immigration Rules was introduced. An important case arising from that time is that of **Masih (deportation – public interest – basic principles) Pakistan [2012] UKUT 00046(IAC)** which is referred to by the panel in paragraph 28 of the determination. In that case the Tribunal said that so long as account is taken of the following basic principles, there is at present no need for further citation of authority on the public interest side of the balancing exercise. 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: (i) 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. (ii) 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. (iii) 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. (iv) The appeal has to be dealt with on the basis of the situation at the date of the hearing. (v) 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.

16. There have also been a number of cases in which the Court of Appeal has considered the weight that should be given to an order to deport an individual made under the automatic deportation provisions, the most important of which is SS(Nigeria) v SSHD [2013] EWCA Civ 550 which has been confirmed in subsequent decisions of the Court. In that case the appellant had been sentenced to 3 years for dealing drugs. He appealed relying on the best interests of his children. The Court of Appeal said that in previous cases in which potential deportees raise claims under Article 8 relying on the children's interests insufficient attention had been paid to the weight attached to the policy of deporting foreign criminals which came from primary legislation. The deportation was upheld.

17. In the determination under consideration there is no mention of the principles arising from SS (Nigeria) or an adequate findings/explanation for why the need to maintain this family unit warrants greater weight being attached to them than the need to deport arising from a policy contained in primary legislation. The Panel seem to have devoted a lot of time to the arguments put forward on behalf of SXL without appearing to have paid the same level of attention to those relied upon by the Secretary of State, notwithstanding reference in the determination to some of the elements they were required to consider.

18. The Grounds criticise the Panel for relying on Maslov. Under Article 8 ECHR jurisprudence - 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 - and the principles derived from Maslov v Austria **[2008] ECHR 546** are still be applied. The criticism that as SXL does not fit into this category the Panel misdirected themselves in law is correct although any such error is not material, for in Boultif v Switzerland [2001] ECHR 54273 as confirmed by Uner v the Netherlands [2007] Imm AR 303 the Court said that in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued, the following criteria had to be considered.

(i) The nature and the seriousness of the offence committed by the Appellant;
(ii) The length of the Appellant's stay in the country from which he or she was to be expelled;

(iii) The time that had elapsed since the offence was committed and the claimant's conduct during that period.
(iv) The nationalities of the various parties concerned;
(v) The Appellant's family situation, such as length of marriage and other factors expressing the effectiveness of the Appellant's family life;
(vi) Whether the spouse knew about the offence at the time he or she entered into the family relationship;
(vii) Whether there are children in the marriage and if so their ages;
(viii) The seriousness and the difficulties which the Spouse is likely to encounter in the country of the Appellant's origin;
(ix) The best interests and well being of any children of the Appellant; and in particular the seriousness of any difficulties that they would be likely to encounter in the country to which the Appellant would be expelled;
(x) The solidity of social, cultural and family ties with the host country and with the country of destination.

19. These are the criteria the Panel considered by reference to the Maslov assessment.

20. The Panel found that the determinative factor was the fact that if SXL was deported the family unit will be broken up but, as recognised by the Court of Appeal in AD Lee v SSHD [2011] EWCA Civ 348, Sedley LJ said "the tragic consequence is that this family… Would be broken up forever, because of the appellant's bad behaviour. That is what deportation does."

21. The fact the best interests of the children are to be brought up in a complete family unit is not challenged but such interests are only one element of the proportionality equation, albeit a very important one. They are not in themselves determinative.

22. There is however a more fundamental structural error in the determination. Although the panel, in paragraph 28, mention the case of MF (Nigeria) [2013] EWCA Civ 1192 they do not appear to have given adequate consideration to the principles arising from the judgement of this and later cases in which the relationship between Article 8 and the Immigration Rules has been discussed such as Nagre [2013] EWHC 720 (Admin) and by the Upper Tribunal in Gulshan [2013] UKUT 640, as confirmed by Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC).

23. In MF (Nigeria) the Master of the Rolls indicated that where the "new rules" (in force from 9 July 2012) apply (in a deportation case), the "first step that has to be undertaken is to decide whether deportation would be contrary to an individual's article 8 rights on the grounds that (i) the case falls within para 398 (b) or (c) and (ii) one or more of the conditions set out in para 399 (a) or (b) or para 399A (a) or (b) applies. If the case falls within para 398 (b) or (c) and one or more of those conditions applies, then the new rules implicitly provide that

deportation would be contrary to article 8" (paragraph 35, underlining added). Paragraphs 399 and 399A can be thought of as setting out the exceptions to deportation (see paragraph 14).

24. In this case SXL has been sentenced to a period of imprisonment of less than four years but at least 12 months. Paragraph 398 states:

> 398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> (a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
> (b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
> (c) the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,
>
> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

25. Paragraph 399 states:

> 399. This paragraph applies where paragraph 398 (b) or (c) applies if –
>
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British Citizen; or
> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
>
> (a) it would not be reasonable to expect the child to leave the UK; and

(b) there is no other family member who is able to care for the child in the UK; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave or humanitarian protection, and

(i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment); and

(ii) there are insurmountable obstacles to family life with that partner continuing outside the UK.

26. And 399A:

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or

(b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.

27. In paragraph 29 of the determination the Panel state that they have considered paragraphs 399 and 399A but that they do not apply to SXL. It is not clear what the Panel mean by such a comment as clearly because the sentence SXL received is one specifically referred to in 398 (b) the above two paragraphs of the Rules do apply. It can only be construed that what the Panel are saying in paragraph 29 is that although the Rules do apply to SXL he is unable to satisfy either of them. This is not a matter of semantics for if he is unable to satisfy the requirements of 399 or 399A paragraph 398 makes it clear that it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

28. I find that the Panel erred in law in failing to follow the guidance provided in MF (Nigeria) and related case law and in failing to properly consider the provisions of the Immigration Rules so far as they relate to deportation

provisions which they were legally obliged to do. It is a structural failing to dismiss the Rules in the way the Panel did in paragraph 29 and proceeded to undertake a freestanding Article 8 assessment in the manner they were undertaken prior to the introduction of the current version of the Immigration Rules without reference to those provisions.

29. The question this Tribunal considered with the advocates at the hearing is whether that error is material in light of the findings made by the Panel.

30. As stated, the Panel should have considered whether there were circumstances that meant the public interest in deportation is outweighed by other factors particular to SXL and/or his family which is, in effect, a proportionality assessment. In MF (Nigeria) the main issue concerned the position when the appellant could not succeed substantively under paragraphs 398 or 399 of the rules on a deportation and the determinative question is whether there are "exceptional circumstances" such that the public interest in deportation is outweighed by other factors (paragraph 398 of the new rules). Here the Court accepted a submission for the SSHD 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" (paragraphs 39 and 40). The Court went on to say: "In our view, [this] 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" (paragraph 42). Although the Court disagreed with the Upper Tribunal in MF's case on the question of form, it did not disagree in substance (paragraphs 44 and 50). It differed from the UT in considering that the rules did mandate or direct a decision maker to take all relevant criteria into account (paragraph 44). Accordingly, the new rules applicable to deportation cases should be seen as "a complete code ... the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence" (ibid). "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". What the Court said about the test of "insurmountable obstacles" can be seen as obiter but it did say that if that means "literally obstacles which it is impossible to surmount, their scope is very limited indeed. We shall confine ourselves to saying that we incline to the view that, for the reasons stated in detail by the UT in Izuazu [[2013] UKUT 00045] at paras 53 to 59, such a stringent approach would be contrary to article 8".

31. In **Kabia (MF: para 298 - "exceptional circumstances") 2013 UKUT 00569 (IAC)** it was held (i) The new rules relating to article 8 claims advanced by foreign criminals seeking to resist deportation are a complete code and the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence: **MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192 at para 43**; (ii) The question being addressed by a decision maker applying the new rules set out at paragraph 398 of HC 395 in considering a claim founded upon article 8 of the ECHR and that being addressed by the judge who carries out what was referred to in **MF (Article 8 - New Rules) Nigeria [2012] UKUT 393 (IAC)** as the second step in a two-stage process is the same one that, properly executed, will return the same answer; (iii) The new rules speak of "exceptional circumstances" but, as has been made clear by the Court of Appeal in **MF (Nigeria),** exceptionality is a likely characteristic of a claim that properly succeeds rather than a legal test to be met. In this context, "exceptional" means circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that a deportation would not be proportionate".

32. The use of the word exceptional circumstances in some respects mirrors the weight to be given to the public interest as recognised in SS (Nigeria). The key question for this Tribunal to consider is whether there are circumstances in this case in which the deportation would result in unjustifiably harsh consequences for SXL and his family such that the deportation would not be proportionate.

33. In this respect Mr Price admitted that SXL and his partner work in the same business which enables them to resolve childcare issues. SXL plays a role in the day-to-day care of the children and the family are supported by the business. It was submitted that if he was not available there will be nobody to care for the children and that the business could suffer; although he accepted that if the business did fail the children and their mother will be able to rely upon state support and she will be available to care for them.

34. The difficulty with the findings of the Panel is that they seem to have found that it was the separation of this family unit and the fact that SXL would not be able to play the role that he does in his children's lives that justified the finding that they made. There was insufficient evidence before the Panel that if SXL was deported this family would "fall apart" as it has no doubt had to manage in the past during periods of imprisonment or other separation. Insufficient evidence was provided to show that the children's mother is not capable of meeting the emotional and physical needs of the children and a finding that the best interests of the children will be to remain with their mother in the United Kingdom is correct. If SXL was removed it has not been proved that alternative childcare or other arrangements could not be made. It has not been established on the evidence that the effect of his removal would mean that the business had

to close down or, if it did, that the children would suffer consequences of economic hardship or deprivation.

35. In relation to relationship issues and the emotional consequences of SXL's removal, there is insufficient evidence to show that this would have a profound effect upon the children such as to establish unjustifiably harsh consequences.

36. SXL was granted a period of leave in line with that of his partner but the making of the deportation order arises from a statutory obligation and such a grant does not create a legitimate expectation that SXL cannot be removed from the United Kingdom. The offence for which he was convicted was not a low level offence but part of a commercial production of cannabis for which SXL was assessed by the sentencing judge on the evidence as having the role of a "farmer" as a result of which he was sentenced to a period of imprisonment and for which the Judge referred to the likelihood of his deportation from the United Kingdom.

37. Although the consequences of removal will be the breaking up of this family and the fact that the children will have to be brought up by their mother, in assessing whether the decision is proportionate it is necessary to consider the provisions of the Immigration Rules as they are now drafted which reflect ECHR case law and the UK's Convention obligations.

38. I find the Panel materially erred in law. Had they considered all relevant matters it may be arguable that their decision was not susceptible to challenge however generous it may be seen to be by the Secretary of State, but they did not. I find the Panel did not provide adequate reasons to support their findings that it is not proportionate all the circumstances for SXL to be deported in light of the nature of the offence and the deterrent element which is an important part of the public interest argument in relation to this automatic deportation case.

39. I set the determination aside although the immigration history and findings relating to the existence of family and private life shall be preserved findings.

40. Having considered the evidence and submissions made by Mr Price, I find that it has not been established that should SXL be removed from the United Kingdom it would result in unjustifiably harsh consequences for him or his family such that his deportation is not proportionate. I accept there may be resultant hardship and some adverse consequences but it has not been established that they are sufficient to justify this appeal being allowed.

Decision

41. **The First-tier Tribunal Panel materially erred in law. I set aside their decision. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

42. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I continue that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed…….
Upper Tribunal Judge Hanson

Dated the 10th April 2014