IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02024/2013

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Determination Promulgated**
On 6 October 2014	**On 18 November 2014**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR ARNOLD MOHAMED DIABATE

Claimant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Claimant: No representation
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"). The claimant is a citizen of France and although born in the United Kingdom on 21 December 1993, is not a British Citizen. Apart from a few visits to France and a visit of some eight to nine months' duration to the Côte d'Ivoire, he has lived in the United Kingdom since birth. His mother, a naturalised French citizen, has also lived in the United Kingdom for in excess of twenty –two years, as have his siblings.

2. The claimant has a poor history of offending, first receiving a caution on 12 April 2008. Between 14 November 2008 and 22 February 2011 he was convicted on seven occasions for eleven offences. One of these convictions, for wounding with intent to do grievous bodily harm, resulted in a sentence of one year's imprisonment.

3. On 15 May 2012 he was convicted at Blackfriars Crown Court of having an offensive weapon and affray to which he was sentenced to two years and six months' imprisonment and given a three year Anti-Social Behaviour Order.

4. On 13 August 2013, having obtained details from the claimant of his life in the United Kingdom, the respondent concluded that it was in the public interest to deport the claimant. It was accepted that he is a French national and that, given the length of his residence here and integration into the United Kingdom, she was required by European Law to establish that his deportation was warranted on imperative grounds of public security.

5. The respondent considered that, given the claimant was subject to the highest level of Multi Agency Public Protection Arrangements (MAPPA level 3) and poses an immediate danger to the public, that in the absence of clear evidence that he had become rehabilitated, that the "imperative reasons" test was met and that having had regard to the factors set out in Regulation 21(5) and (6), that his removal would be proportionate. She considered also it would not be a breach of Article 8 to remove him from the United Kingdom. The claimant appealed against that decision to the First-tier Tribunal

6. In a determination promulgated on 14 February 2014 First-tier Tribunal (a panel comprising First-tier Tribunal Judge Collier and Mrs R M Bray, GP) allowed the appeal. The Tribunal found that:-

   (i) the claimant was integrated into British life even though his lifestyle was antisocial [62];

   (ii) apart from his nationality the claimant has no significant links to France, the only reason for him having French nationality being due to his mother who had been born in Ivory Coast and later obtained French nationality [64] and that she had settled in the United Kingdom before he was born;

   (iii) the claimant has never lived in France, has no relatives there, does not speak French and if deported, would not have anywhere to go, would be without a support network and would most likely resort to crime to survive [65, 66] and that the respondent had not fully considered the claimed circumstances before taking the decision to remove him to France [69];

   (iv) the claimant's criminal offending had not reached the levels of seriousness implied by the crimes mentioned in Article 83(1) TFEU, as referred to in **PI v Oberbürgermeisterin Remschied [2012] EUECJ C-349/09;** and,

(v) the respondent had not fully or appropriately considered the claimant's personal circumstances or the impact of deportation being pursued and had therefore not established the decision to deport the claimant as proportionate;

(vi) having had regard to Article 8, the claimant's deportation would be disproportionate when considering all the matters in the round finding [98] that as a result of his arrest, sentencing and his imprisonment he is now aware of the consequences of crime, would be aware of the prospect of deportation and could not be expected to engage in further criminal activities and thus the ultimate aim of justification of interference had not been made out and thus was disproportionate [100];

7. The respondent appealed out of time on the grounds that:

(i) the Tribunal had misdirected itself, failing to note that neither **PI** nor Article 83 set out an exhaustive list of crimes, had failed to engage with the evidence of the danger caused by the claimant who is a MAPPA 3 offender;

(ii) there is no evidential basis beyond the claimant's own claims to conclude he is aware of the consequences of his crime and thus insufficient evidence to conclude that he was not an individual at high risk and would amend his offending behaviour;

(iii) the Tribunal had materially misdirected themselves with respect to Article 8 reaching inadequate conclusions in failing to consider that the claimant's mother could accompany him to France to assist with reintegration, that the claimant had failed to establish that it was unreasonable to expect him to live independently of his family in France; that the conclusion that he would resort to criminality was speculative and based on the claimant's oral evidence which is said to be self-serving and that the evidence of his family was also not objective.

(iv) the panel should also have considered that as the claimant has travelled to France on several occasions it would have been reasonable to conclude that the claimant would have been capable of communicating in France and secondly that he must have spoken French in Ivory Coast where he spent some six to nine months and that as he had grown up in a French family, it was not credible that he did not have a working knowledge of French.

8. Permission to appeal was granted by First-tier Tribunal Judge Grant-Hutchison, accepting the respondent's explanation for being out of time.

9. It was on that basis that the appeal came before Upper Tribunal (a panel comprising Upper Tribunal Judge Rintoul and Deputy Upper Tribunal Judge Chana) on 29 May 2014. For the reasons set out in their decision promulgated on 7 July 2014, they found that the First-tier's decision did involve the making of an error of law, and set it aside. The Upper Tribunal held:

7. It was incumbent on the First-tier Tribunal to consider first whether the respondent had demonstrated that the imperative needs of public security had been met; and, if so, whether, having had regard to the factors set out in regulations 21(5) and (6), that decision was proportionate.

8. We consider that in approaching the first step, the Tribunal at [82] and [83] the panel misdirected themselves as to the nature of the test, which is prospective, whereas they considered past offending. Further, while "imperative needs" of public security implies a significant degree of threat, it is not a test determined by whether, as the Tribunal considered, the crime committed is of a specific level of criminality; still less can it be said that the list of crimes alluded to in **PI** and Article 83(1) TFEU is by any means exhaustive. The statement at paragraph 84 "we find that this appellant's criminal offending has not reached the level of seriousness implied by the aforementioned crimes" is therefore not a relevant finding in assessing whether the imperative needs of public security is met.

9. Further, it is not possible to discern from the determination or otherwise the process of reasoning by which the panel moved from assessing the type of crimes which may be covered by Article 83 to finding that the respondent had not made out a case.

10. We consider further that in assessing the issue of the threat posed by the claimant, the Tribunal erred in failing adequately to address the evidence that, as a MAPPA category 3 offender, the claimant was seen as a serious risk. While this issue is referred to [55]-[58] and [98], and while long extracts from a pre-sentence report are cited, there is no attempt to engage with the NOMS 1 report of 22 March 2013. Still less is there any proper attempt to engage with the fact that the claimant has been the subject of adjudications within prison when concluding [58] that the threat of deportation may have made him less likely to re-offend.

11. In addition, the Tribunal erred when assessing proportionality under the EEA Regulations, a task not in fact necessary had they found that the imperative needs test had not been met. The Tribunal held:

> "we find that the respondent has not fully or appropriately considered the appellant's personal circumstances or impact of deportation being pursued. We find the respondent has not established the decision to deport the appellant is proportionate in accordance with the principles of Regulation 21(5)".

12. This is simply inadequate, and fails to explain in any meaningful way the Tribunal's decision, and while the panel has considered proportionality with respect to article 8, [86] – [100], that decision is infected by the errors identified above in respect of finding that the deportation was not in accordance with the regulations (a significant, if not determinative factor) and the conclusion that he was unlikely to reoffend.

13. For these reasons, we are satisfied that the determination did involve the making of an error of law capable of affecting the outcome of the decision and in the circumstances, the decision will have to be remade.

14. With regard to the challenges to the findings of fact made with respect to article 8 as set out in grounds d) we consider that it was open to the Tribunal to conclude that the claimant lacked ties to France. The grounds fail to establish that the conclusions impugned were perverse, and the matters raised at d (i) to (iii) are simply disagreements and attempts to reargue the case.

15. Nonetheless, we consider that the finding that it would be disproportionate within article 8 terms to deport the claimant cannot stand given that that conclusion was infected by the errors identified above in respect of finding that the deportation was not in accordance with

> the regulations (a significant, if not determinative factor) and the conclusion that he was unlikely to reoffend.
>
> 16. Accordingly, for the reasons set out above we consider that the determination of the First-tier Tribunal did involve the making of an error of law and we set it aside.

10. The Upper Tribunal then gave directions for the matter to be listed for the decision to be remade, and for the issue of the claimant's nationality to be addressed as a preliminary issue.

Preliminary Issue – Claimant's Nationality

11. Section 1 (1) of the British Nationality Act 1981 provides that an individual born in the United Kingdom acquires British Citizenship automatically if, at the time of his birth, either parent was a British Citizen or was settled in the United Kingdom.

12. It is not disputed that the claimant was born in the United Kingdom or that his mother is a French citizen and thus a citizen of the European Economic Area.

13. Prior to 2000, it was established law that in order to meet the definition of "settled" within the meaning of section 1(1) of the British Nationality Act 1981, an EEA national need only have been exercising Treaty rights in the United Kingdom. This position is reflect in the Nationality Directorate Instructions at chapter 3, section 3.5.1.4 which relates to the evidence needed to establish that an individual had in fact acquired British Citizenship at birth:

> (if the child was born in the United Kingdom before 2 October 2000) evidence that one of the parents was an EEA national who, at the time of birth, was exercising EC treaty rights in the United Kingdom.

14. Thus, it would appear that in this case there is no requirement here that the claimant's mother had acquired permanent residence or indefinite leave to remain at the time of his birth, only that she had been exercising Treaty rights, in which case there would appear to be now power in law to deport the claimant

15. This matter was adjourned at the previous hearing to allow the claimant to obtain evidence to show that his mother had been exercising treaty rights at the time of his birth.

16. I heard evidence from Mrs Diabate on this issue. She adopted her witness statement of 30 July 2014 adding that although she had started working shortly after her arrival in the United Kingdom, she had stopped around the time she gave birth to her daughter and subsequent to that she had started to learn English and had gone to college. She said that she had also worked part-time on a temporary basis for various agencies although, as this was now over twenty years ago she could not recall when or where that was. She did confirm that she had written to HM Revenue and Customs asking for details of the information they held regarding her national insurance contributions and payments of income tax. The reply had not yet arrived although it appears that the letter was to be sent to

her employer's address. I adjourned the hearing to allow her time to retrieve the letter from her place of work and then the hearing recommenced.

17. It is evident from the letter from HM Revenue and Customs that Mrs Diabate did enter into the national insurance system before 1990. She is recorded as having worked for two employers in the tax year 1990 to 1991 but for the tax years from 1991 until 5 April 1995 there is no record of an employer or benefits received.

18. In the circumstances, where there is no evidence of National Insurance being paid or benefits having been paid and whilst I do not doubt Mrs Diabate's credibility, the fact remains that there is simply no reliable evidence of her having exercised treaty rights around the time of the claimant's birth. Accordingly, I am not satisfied that it has been shown on the balance of probabilities that he is a British citizen through virtue of his mother having exercised treaty rights from the time of his birth.

Remaking the Decision

19. I heard evidence from the claimant. He said that he is currently detained under immigration powers. He said he had not been able to complete any courses designed to rehabilitate him as without the approval of his probation officer, this could not be done. This in turn required a sentencing plan which had not been put in place for him until February by which time it was too late for anything to be done as his sentence was to end in June. It was not possible to obtain these programmes whilst in immigration detention. He accepted that he had received two adjudications in prison and that he had now changed. He said that he was older and at 21 he wanted to change. He said that on release he was supposed to have gone to a hostel but that was no longer available. He said that there is still an ASBO in place preventing him to go to large areas of Camden but that did not cover the area where his mother lived.

20. The claimant said that he had lived in the United Kingdom all of his life, that all his family and friends are all here. He said he had only twice been to France, once to Disneyland and the second time to obtain a visa to go to the Cote d'Ivoire but that he has no family in France.

21. In cross-examination the claimant said that the statement in his witness statement that he had only been to Cote d'Ivoire for two months was wrong. He confirmed that he had left home in 2008 although he had not been forced to do so; this was mis-recorded in the probation report. He said that he had wanted to go out to live in a hostel as a lot of the friends he had at the time had done so and that he had not wanted to remain at home with his mother and siblings. He said that his mother had not been to see him when he had been in prison as it was a long distance from London as it was expensive and difficult for her to do so but he had kept in contact by telephone.

22. The claimant said that he had spent approximately six months in Cote d'Ivoire although he had no family there, there were family friends. He said that the

language he had spoken there is Diolla as did his friends. He accepted that French had been spoken but not so widely in the area where he was. He said that where it has been written in the pre-sentencing report that he had gone there to study that this was incorrect and in any event it made no sense. He added that he had also once been to Nigeria again to visit family friends.

23. The claimant said he had not finished the school here but had done maths and English level 2 in prison as well as level 1 business studies.

24. I then heard submissions. Mr Whitwell relied on the refusal letter submitting that, even though it was accepted that the claimant was integrated into the United Kingdom, had been born here and that the highest level of protection was under the EEA Regulations engaged, still nonetheless this claimant did present a significant risk as shown by the NOMS Report. It was to be noted that he was in the highest category of risk with an 80% chance of reconviction and that he was at MAPPA level 3.

25. Mr Whitwell asked me to note also the offences of violence which had resulted in adjudications in prison and that there was no evidence of rehabilitation. He submitted that in these circumstances given the substantial risk of further serious crimes against the person being committed the claimant's deportation was justified. He submitted that it was also proportionate given the claimant's conduct and lack of any evidence of true integration into the United Kingdom, the absence of any employment record or family life or connections other than with his mother and siblings. He submitted that the claimant's dependency on his mother was purely financial rather than emotional.

26. In reply Mr Diabate said that he had lived in the United Kingdom all his life, that this country was all he knew and that he had become integrated here. He said his friends and family are all here and that he had explained why he had not been able to get the risk of his reoffending reassessed.

Discussion

27. As the appellant is an EEA national, it is for the respondent to justify deporting the appellant. The relevant provisions are set out in the EEA Regulations which provide:

> 21. (1) In this regulation a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
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> (2) A relevant decision may not be taken to serve economic ends.
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> (3) A relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security.
>
> (4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or…

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles—

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin.

28. The purpose of these regulations is to give effect to Directive 2004/38/EC. It is not submitted that the provisions of the Directive with respect to expulsion or deportation are not properly transposed by the EEA Regulations, but it is, in the context of this case important to note recital 245 which provides:-

> (24): Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child, of 20 November 1989

29. It is accepted that by the Secretary of State that it is for her to show that there are, in this case, imperative grounds of public security justifying the claimant's deportation. Having had regard to **MG** [2014] EUECJ C-400/12, in particular at [36]-[37] the Secretary of State's concession in this case that the applicant meets the integration test, despite the fact that he is still in detention, was one open to her and cannot be put aside. This is not a case in which the Secretary of State has

conceded a matter of law rather it is a concession of a matter of fact which is open to her.

30. It is notable that in this case, unlike the situation where the five year threshold is met, it is only on grounds of public security that apply, not grounds of public policy. The CJEU considered both "imperative reasons" and "public security" in **Tsakouridis** [2010] EUECJ C-145/09 noting[40] - [41]

> 40. It follows from the wording and scheme of Article 28 of Directive 2004/38, as explained in paragraphs 24 to 28 above, that by subjecting all expulsion measures in the cases referred to in Article 28(3) of that directive to the existence of 'imperative grounds' of public security, a concept which is considerably stricter than that of 'serious grounds' within the meaning of Article 28(2), the European Union legislature clearly intended to limit measures based on Article 28(3) to 'exceptional circumstances', as set out in recital 24 in the preamble to that directive.
>
> 41. The concept of 'imperative grounds of public security' presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness, as is reflected by the use of the words 'imperative reasons'.

31. The Court also noted [53]:

> 53. To assess whether the interference contemplated is proportionate to the legitimate aim pursued, in this case the protection of public security, account must be taken in particular of the nature and seriousness of the offence committed, the duration of residence of the person concerned in the host Member State, the period which has passed since the offence was committed and the conduct of the person concerned during that period, and the solidity of the social, cultural and family ties with the host Member State. In the case of a Union citizen who has lawfully spent most or even all of his childhood and youth in the host Member State, very good reasons would have to be put forward to justify the expulsion measure (see, to that effect, in particular, *Maslov v. Austria*, §§ 71 to 75).

32. It must also, in this context be noted that the CJEU held in **PI** at [33];

> 33. In the light of the foregoing considerations, the answer to the question referred is that Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that it is open to the Member States to regard criminal offences such as those referred to in the second subparagraph of Article 83(1) TFEU as constituting a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population and thus be covered by the concept of 'imperative grounds of public security', capable of justifying an expulsion measure under Article 28(3), as long as the manner in which such offences were committed discloses particularly serious characteristics, which is a matter for the referring court to determine on the basis of an individual examination of the specific case before it.

33. What is meant by "public security" is dealt with in detail in **SSHD v FV (Italy) [2012] EWCA Civ 1199** at [87] to [94] (per Lord Justice Pill with whom Lord Justice

Aikens and Lady Justice Rafferty agreed on that point). I note that the court held [136]:

> 136. In my view, there is nothing in the statement of Carnwath LJ in ***LG*** (in the first Court of Appeal decision) that is inconsistent with what the CJEU has subsequently stated in ***Tsakouridis and PI*** on the scope of "imperative grounds of public security". The 2008 Tribunal was conscious of the fact that it was dealing with the top "level" in the hierarchy. It considered the nature of the offence committed by FV, which was a single incident of homicide committed against a flatmate in the context of their drunken relationship and where the jury had found that FV had been provoked. The 2008 Tribunal considered in detail the OASys Reports and the question of possible re-offending. Their interpretation of those reports, even if it could be criticised, cannot, in my view, be regarded as so unreasonable as to constitute a material error of law. The 2008 Tribunal also drew a distinction, rightly on my view of the CJEU cases, between a person who is so homicidal that he presents a significant risk of killing members of the public at random and a person who might be violent towards a specific person (in this case FV's wife) which brought with it a danger of death to that specific person. The 2008 Tribunal was correct to conclude that FV fell only into the latter category. It also had in mind the fact, which was common ground before them, that FV was to be treated as being "integrated" in the UK, because he had obtained a PRR and he had been "resident" for 10 years immediately prior to the deportation decision.

34. It follows that it is open to the United Kingdom to conclude that offences of violence, and in particular here, the continuing threat of serious violence to a wide section of the public, is one which can amount to imperative grounds of public security and thus what is in issue is the risk that the claimant currently presents.

35. Whilst I accept his evidence that he has not been able to undergo any relevant training courses owing to the late service of the sentencing plan only a matter of months before he was released, the fact remains that he has not undergone any such course. I thus have only his evidence and that of his mother that he has changed.

The Assessment of Risk by the Probation Service

36. The starting point is the pre-sentencing report dated 13 November 2012. The offence analysis provides:-

> In summary on 21 March 2012 at Torriano Estate, NW5 Mr Diabate along with his co-defendant as part of a larger group (numbering approximately eighteen people) chased a small group of young men. Mr Diabate was seen by a member of the public to be in possession of a knife with a "seven to eight inch blade". Police officers were called and Mr Diabate was found to be hiding under bushes. An independent witness approached the police and indicated that the person they had detained was the one carrying a knife.
>
> Case papers indicate that this offence was committed in a public place, during the day and was witnessed by several members of the public. I can only suggest that

such behaviour will have caused fear, intimidation and anxiety in those who will have witnessed such actions.

It would appear that a group of young men chased an individual who ran towards a larger group for support. This larger group then chased the smaller group. It is difficult to establish the underlying reasons as Mr Diabate claims to have been the individual chased, however he is unable or unwilling to identify his chasers. His explanation would suggest that this was a random act and not based on a history. I do not find this explanation to be credible.

As stated above, Mr Diabate could not or would not explain who was being chased and why. When asked, he denied being part of any "gang" or being involved in the serious group violence, however, information obtained from the police and the Youth Offending Service would suggest that Mr Diabate leads a pro-criminal and anti-social lifestyle and is engaged in serious group violence, as a perpetrator and as a victim.

In light of Mr Diabate's stance, it is difficult to explore the underlying motivations, reasons and attitudes behind his behaviour. It is my assessment that Mr Diabate's associations, lifestyle and distorted thinking all contribute to the risk of harm he poses to others. Mr Diabate's suggests the matter is not serious or that the significances would not have been significant.

Generally speaking offences of this nature are often linked to rivalries with other young people ... Although it can appear that such offences occur suddenly, without warning and are over very quickly, indicating no prior planning or pre-meditation, I would argue that group offending of this nature is deliberate and the perpetrators are conscious of the reasoning behind their actions. Such offending is reckless with no regard for the victim and the possibility of collateral damage to innocent members of the public is documented.

37. The report also details the claimant's previous offending as follows:-

Mr Diabate is a young man of 18 who has appeared before the court on seven previous occasions since 2008 for eleven offences. These consist of two offences of violence, three for theft, three burglary offences and three relating to police, court and prisons.

The court will note that in May 2010 Mr Diabate received a twelve month detention and training order for a conviction for grievous bodily harm, Section 18, committed on 25.2.2012. Mr Diabate acknowledged that he stabbed the victim. In explanation Mr Diabate informed me that the victim owed him some money and an argument developed. He tells me that he was aware of a knife which had been "stashed" in the locality and as the victim was with his friends, he felt the need to protect himself. Of concern is Mr Diabate's description of the offence as "just a stabbing" and when challenged, he stated that what he meant was that he stabbed him in the stomach rather than injuring any vital organs. This explanation is at odds with the account that was relayed to the Youth Offending Service officer during the pre-sentence report interview. On that occasion, he described that his friend came running towards him, being chased and that he went to his friend's aid. The court will note the symmetry between this explanation and the current offence. The case summary that I have received from the police regarding the GBH offence presents a different

> account of this matter, indicating that Mr Diabate robbed an individual and used the knife in a reckless matter to frighten, intimidate and secure compliance from the victim. Of note is that Mr Diabate was with another individual and that they targeted three individuals and managed to direct them into an alleyway. He is described as slashing at one, poking another with his knife before coming at the victim. ...
>
> In addition to Mr Diabate's record of previous convictions, I have been provided with information from the police which suggests that he is capable of inflicting serious injury with no regard for the victim and he is known to carry and use knives. It is my understanding that the police were in the process of petitioning or had petitioned the court for a violent offender order in 2011 although I am not aware as to what the final outcome was.

38. The report also goes on to note that the appellant was asked to leave the family home at age 17 and that since leaving that house in May 2011 he has been of no fixed abode that his mother did not want to allow him back in the family home nor did he wish to return there. The report goes on to say:

> Mr Diabate did categorically deny that he was part of a gang however the information available would contradict this. I am satisfied that Mr Diabate is capable and has engaged in serious violence without any hesitation on his part. It is difficult to explore his reasons for behaving in this way given his refusal to acknowledge this reality. It is also of note, the number of times that he has himself been the victim of serious violence. Mr Diabate received a bullet wound to his head in 2010. Although it is not suggested that Mr Diabate was the intended target, his close approximation to an incident involving a shooting causes concern. I am also aware that he received multiple stab wounds to his legs in November 2010 and he would not assist the police with enquiries.

39. The probation officer then goes on to assess Mr Diabate's risk of harm to members of the public and known adults as very high. That is that there is an imminent risk of serious harm to others that event more likely than not to happen imminently and to have a serious impact. It is noted that he had previously been assessed at a very high risk of harm by the Youth Offending Service, there is no reduction in risk or protected factors that would allow an assessment otherwise. It states also

> Statistical analysis of Mr Diabate's offending record indicates a high (80%) risk of re-sanction within the next two years. These risks will continue to stay high as long as he maintains his pro-criminal attitude and lifestyle; remain associated with his offending peer group and does not make constructive use of his time. This will require a change in attitude and an acknowledgement that his lifestyle is damaging to himself and others.

40. Turning next to the sentencing remarks I note that although Mr Recorder Katz was not satisfied that the incident for which the appellant was most recently sentenced was gang related, he found it was a group activity which aggravated it and that the claimant was at the front of the group, a further aggravation. Whilst noting that there was a possibility of some form of rehabilitation and a change and

that in mitigation his Counsel had said that he had made efforts to try to start to change his life around his sentence was reduced in light of the mitigation to 30 months from what otherwise would have been a three year sentence. The judge also imposed an ASBO.

41. The NOMS Report produced for the Home Office was produced by the same probation officer who produced the pre-sentencing report and contains much which is the same. In addition it is noted at page 6 that the claimant and another young person had whilst in custody beaten somebody up who was a known gang member and that on 6 July 2012 he attacked a prisoner in class on behalf of another person whilst on remand. He comments:-

> The claimant is able to engage in violence without reason or warning. His violence can be expressive and linked to revenge or anger, however, I feel that it is in the main instrumental. He behaves in this manner for personal gain, establishing his status, warning of rivals (revenge) on a location gratuitous. There is further evidence of difficulties with adult relationships and authority figures. Prison report suggested although he can follow instructions, he can also choose to ignore, be argumentative and difficult.

It is noted that he is at MAPPA category 3 and that his licence would have required him to live at an approved address, to be subject to a curfew overnight and report to staff on a daily basis. He would also have been required not to associate with the person with whom he was convicted most recently, to contact directly or indirectly any serving or remanded prisoner without permission.

42. It is noted also that the claimant had previously breached prison release licences on at least one occasion by committing a further offence in entering an area from which he had been excluded.

43. It follows from the jurisprudence that what is in issue in considering whether the threshold is met is not the nature of the crimes committed but the nature of the risk presented by the applicant in the future. In this case there is an imminent risk to members of the public. This goes considerably beyond the scenarios considered in **FV** and the other cases referred to above. It is evident that this risk extends to a section of the public, not just specific individuals, and the fact that he was willing to attack a man at the instigation of another illustrates just how dangerous he is, mirrored by his categorisation as a MAPPA level 3 offender.

44. There is no indication of any of the protective factors such as the stability of accommodation, family (in terms of a partner or children), employment nor any realistic prospect of this. Whilst there is evidently some degree of control to be exercised over the claimant through MAPPA mechanisms, that is essentially reactive.

45. Whilst I note that the First-tier Tribunal indicated that there was some degree of change on the part of the claimant, this does not equate to a finding that the risk he poses has diminished. Further, there is insufficient evidence that the imminent

threat of removal if he were to commit another crime is, given his past behaviour, likely to diminish the risk.

46. I find that the claimant has not shown any real indication that he has changed while in jail, nor that there is any good reason not to accept the risk assessment produced in the NOMS report. I find further that he has not shown any real insight into his offending behaviour, nor that there is at this stage any real prospect of him being rehabilitated in the foreseeable future. I am not persuaded that there is, on the facts of this case, any material difference in the claimant's chance of being rehabilitated in the UK or in France. I am not persuaded either that he has in reality addressed any of the concerns raised by the probation officer as set out above.

47. Accordingly, I am satisfied that given the very high risk of the claimant committing further offences as shown by the way he has conducted himself in the past, and that this is likely to result in serious harm to one or more members of the public, that on the particular facts of this case the imperative needs of the public security are met.

48. That, however, is not the end of the matter. It is still necessary to consider whether given his level of integration, his removal is proportionate. I accept that, in line with the Directive and the decision in **PI** that there must be very strong reasons why an individual born and brought up in the United Kingdom should be deported.

49. I accept that the claimant has never lived in France, and his little knowledge of French, but he has not shown that he has no knowledge of it, or that he cannot learn it within a reasonable period. There is insufficient evidence before me to show that he would be destitute if deported to France, or that he could not remain in contact with family. As noted above, he has little to show for his years spent in the United Kingdom, over and above his now limited ties with family and an extensive criminal record. There is little or no evidence before me of the content of his private life.

50. As against this, there is the fact that it has been established that he presents a significant threat to the community. For the reasons given above, I am satisfied that the imperative needs of public security are met. That is a significant factor.

51. I assessing the issue of proportionality, I have considered also the principles set out in **Maslov**, as well as the decision of the Court of Appeal in **Akpinar v SSHD** [2014] EWCA Civ 937. I note that the claimant has lived here all his life, but his offences continued over a period and while he is an adult. He has no family here, and his ties to the United Kingdom are if anything by default rather than anything positive. There is little or no evidence of substance to show that he would face difficulties in integrating into France, the country of his nationality, or that there are real and substantial differences in the culture of what is, after all, another West European country.

52. Taking all of these factors into account, I am satisfied that the respondent has justified the decision to deport the claimant to France, and that accordingly, I dismiss the appeal under the EEA Regulations.

53. I now turn to a consideration of Article 8 of the Human Rights Act. I am satisfied that the claimant is a foreign criminal within the meaning of paragraph 117D of the Nationality, Immigration and Asylum Act 2002 and that thus, he is a person to whom section 117C applies. I am satisfied also, for the reasons set out above, that he does not fall within either of the exceptions set out in that section, and that thus the public interest requires his deportation. Further, given the risk he poses to the public, the absence of any family life here, and the limited extent of his private life and ties to the United Kingdom, that his deportation is a proportionate interference with his right to respect for his private and family life. Accordingly, I dismiss his appeal on Human Rights grounds also.

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal involved the making of an error of law and it is set aside.

2. I remake the decision by dismissing the appeal on all grounds.

Signed Date **17 November 2014**

Upper Tribunal Judge Rintoul