Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00243/2013

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision and Reasons Promulgated**
on 23 July 2015	**On 3 September 2015**

Before

UPPER TRIBUNAL JUDGE PITT
DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

AK
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Karnik, instructed by Citywide Solicitors
For the Respondent: Mr Smart, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, AK, appeals against a decision dated 22 January 2013 to make him subject to a deportation order under Section 3(5)(a) of the Immigration Act 1971 because the respondent deemed his deportation to be conducive to the public good.

2. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we make an anonymity order. Unless the Upper Tribunal or a Court

directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellants. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Background

3. The appellant is a citizen of the Democratic Republic of Congo. He was born in October 1993.

4. The appellant came to the UK in June 2005 with his sister. His mother had already come to the UK and made an unsuccessful asylum claim. The appellant made an asylum claim on arrival in terms similar to that made by his mother. His claim was refused and the appeal was dismissed in a determination promulgated on 2 October 2007 of Immigration Judge Cheales.

5. The appellant, his mother and his sister were all granted indefinite leave to remain in February 2008. According to the decision of 22 January 2013 the grant of indefinite leave was made under the "legacy" policy.

6. On 14 March 2011 the appellant committed an aggravated burglary and the offence of possessing an imitation firearm. The facts of the offence were that he and two others entered a home, each taking it in turn to threaten the residents with a knife whilst the others went round the house finding items to steal. The appellant was 17 years' old at the time of the offence and was sentenced on 15 July 2011 to 3 ½ years' imprisonment in a Young Offender Institution.

7. The appellant was informed on 16 December 2011 that deportation action would be taken against him. With the assistance of legal representatives he made a number of written submissions which were accepted as an asylum and human rights claim and he was interviewed. On 22 January 2013 the respondent issued the decision which is under appeal before us.

8. The decision found that the seriousness of the appellant's crime meant that he fell to be excluded from the Refugee Convention by operation of s.72 of the Nationality, Immigration and Asylum Act 2002 and from Humanitarian protection by operation of paragraph 339D of the Immigration Rules. In addition, the substance of the appellant's protection claim was not found credible. The respondent did not accept that deportation amounted to a breach of his rights under Articles 3 and 8 of the ECHR.

9. The appellant appealed to the First-tier Tribunal and in a determination promulgated on 22 March 2013, his appeal was refused by First-tier Tribunal Judge McDade and Mr G H Getlevog.

10. The First-tier Tribunal approached the appeal on the incorrect basis that the respondent's decision had been made under Section 32 of the UK Borders Act 2007. The decision also failed to address the issue of exclusion from the Refugee

Convention and Humanitarian Protection. The First-tier Tribunal found, however, that the substance of the appellant's protection claim failed in so far as it was the same as his earlier claim rejected by Judge Cheales. A further protection claim of risk arising from the appellant's profile as a criminal deportee was not found to have merit.

11. The First-tier Tribunal also found that the appellant's Article 8 claim failed where his offence was so serious and because, at [9], in his oral evidence the appellant had continued to be untruthful about the circumstances around his offence, something he had also tried to do when arrested, essentially seeking to minimise his involvement. The First-tier Tribunal also found at [9] that the appellant had been untruthful about contact after conviction with his co-accused. Their comments on these points were as follows:

> "9. There can be no question that the offence committed by the Appellant in 2011 was one of utmost seriousness. He was sent to custody for a period of three and a half years for offences of aggravated burglary and possession of a firearm. It is apposite to quote the learned judge in his sentencing remarks when he said a follows:-
>
> > "This was a well organised offence with professional hallmarks. The three of you obviously planned the offence together before it was committed. You targeted the house where you expected there to be valuable items for taking. You expected the house to be occupied otherwise you would not have taken the knife, the imitation firearm and worn the balaclavas. You had obviously obtained the knife and the imitation firearm with the purpose of committing this offence. You wore masks and/or balaclavas. You wore gloves plainly to avoid leaving fingerprints. … You, [AK] had the imitation firearm … Whilst you took turns to guard the victims for about twenty minutes the house was comprehensively ransacked by those who were not keeping guard."
>
> We note that despite all three of the defendants being caught red-handed inside the property it was the Appellant, who according to the judge "tried to blag your way out of it with some lies". We find it of some concern now that at the appeal hearing before us the Appellant when invited by his representative to give an account of the offence was content to continue to tell lies by claiming before us that he knew not why he as going to the house with his two associates but simply went along without having any intention to do wrong. Not only is this a fabrication we hold it to be a worrying sign that even after all of this time the Appellant has not taken anything like full responsibility for the serious crime that he has committed. Still we noted that he attempted to give the impression at the hearing that following his conviction he has disassociated himself from his co-accused [AN] when in fact we noted from the OASys report that not only were the two of them in the same prison together but also that the Appellant and AN continued to have regular contact such that they both remained friends and were happy to continue their friendships."

12. The appellant appealed the decision of the First-tier Tribunal. Permission was granted on all grounds in a decision dated 11 April 2013 of First-tier Tribunal Judge Nightingale. On 2 July 2013 the appeal came before Upper Tribunal Judges Perkins and McKee. The respondent conceded material error on ground 1 as the First-tier Tribunal had treated the appeal as if it was against automatic deportation. The Upper

Tribunal also found ground 2 made out where the First-tier Tribunal had not applied the principles set out in Maslov v Austria [2008] ECHR 546.

13. Having found those errors of law, the First-tier Tribunal did not deal with grounds 3 or 4. Ground 3 is at paragraph 14 of the written grounds dated 3 April 2013, thus:

> "The Appellant respectfully submits that the Tribunal unfairly and irrationally concluded that the Appellant continued to tell lies. His evidence about the circumstances leading up to the offences was cut short by the Tribunal, as will be made clear by an examination of the record of proceedings, the Appellant was not seeking to go behind the conviction but rather explain the circumstances of the conviction in order to provide an explanation for what was on the face of it conduct that was out of character. For the Tribunal to fairly reach conclusions that the Appellant told lies and fabrications then not only does it have a duty to hear all the evidence, it also has a duty to provide a reasoned explanation as to why it reaches such conclusions."

14. Ground 4 maintained that the First-tier Tribunal had erred as the country evidence showed that criminal deportees faced a risk of mistreatment on return to DRC.

15. However, as above, the Upper Tribunal did find grounds 1 and 2 made out and proceeded to set aside and re-make the appeal, allowing it under Article 8 ECHR in a determination promulgated on 15 July 2013. Part of the reasoning for allowing the appeal was that Maslov required "very serious reasons" for deportation where the appellant was a settled migrant who had spent a major part of his childhood in the UK and committed the offence whilst a minor.

16. The respondent appealed the decision of the Upper Tribunal to the Court of Appeal on the ground that Maslov had been applied incorrectly. Permission was granted by Elias LJ in an order dated 4 November 2013 and the case linked with another for the question of how to apply Maslov to be addressed by the Court.

17. In a decision reported on 8 July 2014 as Akpinar v SSHD [2014] EWCA Civ 937 in which this appellant was referred to as AV, the Court of Appeal found that the Upper Tribunal had erred in its application of Maslov. The Court found that although the issue of long residence as a child and offending whilst a juvenile were relevant factors there was no "very serious reasons" test.

18. In an order of the same date, this appeal was remitted to the Upper Tribunal in these terms:

> "The SSHD's appeal against the decision of the Upper Tribunal in AV v SSHD is allowed and the matter is remitted to a differently constituted Upper Tribunal:
>
> a. to determine whether there was any material procedural error or unfairness in the proceedings before the First Tier Tribunal; and
>
> b. to determine for itself, or remit to a differently constituted First Tier Tribunal, the questions of whether AV's deportation would breach his rights under Articles 3 and/or 8 of the ECHR and/or under the Refugee Convention."

19. We also found [57] to [59] of Akpinar of assistance in establishing the scope of the remittal:

> "**AV**
>
> 57. AV had committed a serious offence involving violence. That fact does not, however, necessarily lead to the conclusion that he should be deported. My difficulty with the determination of the Upper Tribunal is that the only error of law that it found on the part of the First-tier Tribunal, namely the mistaken assumption that his was a case of an automatic deportation order, did not bear on the First-tier Tribunal's findings of primary facts. The Upper Tribunal made no finding that justified its making different primary factual findings from those made by the First-tier Tribunal. Moreover, since the Upper Tribunal did not hear any oral evidence, it was in no position to make findings as to AV's credibility or his remorse (or lack of it) differing from those made by the First-tier Tribunal which had heard his oral evidence.
>
> 58. Counsel for AV contended before the Upper Tribunal that the First-tier Tribunal had cut short his evidence to it, and should not have done so. However, the Upper Tribunal made no finding as to whether this contention was justified, and if so whether there was a material irregularity. A tribunal may be entitled to cut short a witness's evidence if, for example, it has become repetitious or irrelevant.
>
> 59. In these circumstances, it seems to me that this Court should allow the Secretary of State's appeal and remit AV's appeal to be heard afresh by a differently-constituted Upper Tribunal which can determine whether or not there was any unfairness in the proceedings before the First-tier Tribunal, and if so the consequences, and in particular whether the First-tier Tribunal made any material procedural error. The Upper Tribunal will then determine AV's claim on the facts established by the First-tier Tribunal or by the Upper Tribunal itself."

20. We can deal with the procedural error challenge relatively quickly. Mr Karnik, counsel for the appellant before the First-tier Tribunal, did not have a record of proceedings from the First-tier Tribunal. He indicated that there was no prospect of obtaining one even after an adjournment. The hand-written record of proceedings on the Tribunal file did not assist in identifying if or how the appellant was "cut off" or otherwise prevented from giving evidence on his conviction or any other matters. Ground 3 of the written grounds dated 3 April 2014 is clearly predicated on there being such a record of proceedings to support the challenge. We did not find that this ground could be made out without one.

21. Mr Karnik sought to argue that the conclusions of the First-tier Tribunal at [9] of the decision were not permissible given the appellant's evidence in his witness statement and elsewhere about his offence and that the First-tier Tribunal had not given sufficient reasons for their findings at [9] as to the appellant seeking to minimise his offence. He suggested that was also the case as regards the finding at [9] that the appellant had not been truthful about contact after conviction with his co-accused.

22. That, however, to our minds, attempts to re-formulate what is said in ground 3 as an adequacy of reasons challenge or rationality challenge. This ground was manifestly based on the allegation that the First-tier Tribunal prevented the appellant from giving evidence on a material matter. The wording clearly indicates that the

challenge would be made out relying on a record of proceedings. There is no such record of proceedings. Further, nothing is said at all in ground 3 about a challenge to the finding on the appellant's contact with his co-accused. Further, the terms of the remittal from the Court of Appeal, made very clear at [58] of Akpinar, concern only "procedural error or unfairness" not inadequacy of reasons or rationality.

23. This submission appeared to us to be additionally without merit where the sentencing remarks recorded at [9] of the First-tier Tribunal determination show a level of premeditation on the part of the appellant that left it entirely open to the Tribunal to conclude that that the appellant's statement of not knowing why he went to the house was a "fabrication" and "a worrying sign that even after all of this time the Appellant has not taken anything like full responsibility for the serious crime he has committed."

24. We can also deal economically with the appellant's protection claim. The appellant does not appear ever to have challenged the First-tier Tribunal's failure to deal with the respondent's decision on s.72 certification of his asylum claim and exclusion from Humanitarian Protection. The Upper Tribunal and the Court of Appeal say nothing on the matter in their decisions. Where the Court of Appeal refers in terms in the order of 8 July 2013 to the requirement for us to address the appellant's refugee claim, however, possibly out of too much caution, we address the point now.

25. The exclusion from Humanitarian Protection must stand as the appellant's 3 ½ year sentence brings him within paragraph 399D(i) of the Immigration Rules. As well as a serious offence attracting a sentence of 2 years' or more being required, exclusion from the Refugee Convention under s.72 also requires a finding that the applicant constitutes a danger to the community of the UK. It appears to us on the basis of the findings of the First-tier Tribunal at [9] on the appellant's "worrying" failure to take responsibility for his crime that the presumption of his being a danger was not rebutted, notwithstanding the lack of offending since 2011 and low risk of reoffending identified by the Probation Service.

26. If we are wrong on the certification of the asylum claim, the extant protection claim still cannot succeed. There was no challenge to the finding of the First-tier Tribunal that the appellant's protection claim based on ethnicity and events prior to his leaving DRC failed. The claim before us concerns only the appellant's profile as a criminal deportee. That matter has been settled against the appellant by BM and Others (returnees – criminal and non-criminal) DRC CG [2015] UKUT 00293 (IAC). Quite sensibly, the legal representatives did not seek the take the protection aspects of the appeal any further before us.

27. It therefore remains for us to re-make the Article 8 ECHR appeal against deportation on the basis of the findings of fact of the First-tier Tribunal. After an adjournment for Mr Karnik to take instructions, we heard up-dating evidence from the appellant and his mother. The appellant's mother was able to give her evidence in English, no suggestion being made at any point that she had not understood or been unable to give her answers accurately.

Re-making the Appeal

28. Since this appeal was last considered, Section 19 of the Immigration Act 2014 has inserted Part 5A of the Nationality, Immigration and Asylum Act 2002 with effect from 28th July 2014. All deportation appeals heard after that date, whether the decision to deport or the deportation order was made prior to that date or not, are subject to this new statutory scheme; Singh v SSHD [2015] EWCA Civ 74 applied.

29. The relevant parts of section 117A-C are as follows:

> 117A Application of this Part
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> (a) in all cases, to the considerations listed in section 117B, and
>
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
>
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
>
> 117B Article 8: public interest considerations applicable in all cases
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to—
>
> (a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

30. The Immigration Rules have also been amended and for our purposes are as follows:

Deportation and Article 8

A398. These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

(b) a foreign criminal applies for a deportation order made against him to be revoked.

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 and in the public interest 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 and in the public interest 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;

(c) the deportation of the person from the UK is conducive to the public good and in the public interest 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, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

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 be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

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

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

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

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

31. The appellant does not claim to have a relationship with a child or partner for the purposes of paragraph 399. He has not been lawfully resident in the UK for most of his life, having obtained indefinite leave to remain only in 2008, so cannot come within the provisions of paragraph 399A. For the same reasons he also falls outwith the substantive provisions of section 117C.

32. Following paragraph 398, therefore, we must assess whether there are very compelling circumstances over and above those described in paragraphs 399 and 399A which can outweigh the public interest in deportation.

33. The head note of Chege (section 117D – Article 8 – approach) [2015] UKUT 00165 (IAC) states:

> "The correct approach, where an appeal on human rights grounds has been brought in seeking to resist deportation, is to consider:
>
> (i) is the appellant a foreign criminal as defined by s117D (2) (a), (b) or (c);
>
> (ii) if so, does he fall within paragraph 399 or 399A of the Immigration Rules;
>
> (iii) if not are there very compelling circumstances over and beyond those falling within 399 and 399A relied upon, such identification to be informed by the seriousness of the criminality and taking into account the factors set out in s117B.
>
> Compelling as an adjective has the meaning of having a powerful and irresistible effect; convincing.
>
> The purpose of paragraph 398 is to recognize circumstances that are sufficiently compelling to outweigh the public interest in deportation but do not fall within paragraphs 399 and 399A.
>
> The task of the judge is to assess the competing interests and to determine whether an interference with a person's right to respect for private and family life is justified under Article 8(2) or whether the public interest arguments should prevail notwithstanding the engagement of Article 8.
>
> It follows from this that if an appeal does not succeed on human rights grounds, paragraph 397 provides the respondent with a residual discretion to grant leave to remain in exceptional circumstances where an appellant cannot succeed by invoking rights protected by Article 8 of the ECHR."

34. In addition to the clarification in Chege on the assessment to be made, when doing so we must also apply the provisions of paragraph 117B of the Immigration Rules.

35. It did not appear to us that the provisions of paragraph 117B assisted the appellant in making out sufficiently compelling circumstances outweighing the public interest in his deportation. Where he is a foreign national criminal, the public interest weighs very strongly in his deportation where he committed this very serious offence. He

speaks English but the operation of s.117B does not mean that this weighs positively in his favour; see AM (S 117B) Malawi [2015] UKUT 0260 (IAC) and Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) applied. We accept that the appellant is working, is financially independent and is helping to support his mother and younger siblings. Again, he does not gain positive weight from that.

36. Section 117B(5) mandates that little weight should be given to a private life that is established by a person at a time when the person's immigration status is precarious. AM (S 117B) Malawi [2015] UKUT 0260 (IAC) states at paragraph 5 of the head note that:

> "5. In some circumstances it may also be that even a person with indefinite leave to remain, or a person who has obtained citizenship, enjoys a status that is "precarious" either because that status is revocable by the Secretary of State as a result of their deception, or because of their criminal conduct. In such circumstances the person will be well aware that he has imperilled his status and cannot viably claim thereafter that his status is other than precarious."

37. It was our view that the appellant has known since March 2011 when he committed his offence that his presence in the UK was precarious and that little weight attracts to the private life developed thereafter. Certainly, he was informed by the respondent of the intention to deport him as long ago as 16 December 2011. Good behaviour since then, in the light of that knowledge, to our minds, carried less weight, really only being what should be expected and not capable here of amounting to very compelling circumstances beyond what is already provided for in paragraphs 399 and 399A.

38. The appellant does not qualify for consideration under section 117B(6) where he is subject to deportation.

39. Part of the appellant's case against deportation is that he came to the UK from DRC when he was 11 years' old, some 10 years' ago, has not returned since and has little knowledge of the country. We noted his mother's evidence that he went to school there, however. The evidence is also that the family retained some links to DRC where the appellant's younger brother was there being cared for by a third party until quite recently. We accept that the appellant does not speak fluent French but he has grown up in a household where this was the main language used between his mother and the children and he accepts that he has some knowledge of the language.

40. We also took into account that the appellant's offence occurred when he was a minor and the low risk of reoffending that has been identified by the probation service. We accept that he has acted entirely appropriately and cooperatively with the criminal justice system since conviction and has been successful in education and work since leaving prison. There is also a public interest in deportation acting as a deterrent and expression of public revulsion at serious offending such as this, however, matters that still fall to be weighed against the appellant even if the risk of reoffending is low.

41. We accept that he has good relationships with his mother and younger siblings and that all will be badly affected by his deportation.

42. It remains the case that, in our view, even considering the evidence in his favour at its highest, the appellant has not shown "very compelling circumstances" that can outweigh the public interest in his deportation. We must therefore dismiss the appeal.

Decision

43. The appeal is re-made as dismissed.

Signed  Date: 28 August 2015

Upper Tribunal Judge Pitt