IAC-FH-CK-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: DA/01050/2012

**THE IMMIGRATION ACTS**

| **Heard at the Royal Court of Justice** | **Determination Promulgated** |
|---|---|
| **On 21 September 2015** | **On 21 October 2015** |

**Before**

**UPPER TRIBUNAL JUDGE KOPIECZEK**

**Between**

**MR MICHAEL EMATUWO**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Ms M Knorr, Counsel instructed by Wilson Solicitors LLP
For the Respondent: Mr S Walker, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a citizen of Nigeria born on 16 October 1995. He is said to have come to the UK when he was 8 or 9 years of age, in order to visit his grandmother. He has remained since then.

2. These proceedings concern a decision made by the respondent on 9 November 2012 to make a deportation order against the appellant following his conviction for an offence of manslaughter, committed when he was aged 13. His initial sentence of six years' detention was reduced on appeal by the Court of Appeal to four years' detention.

3. His appeal against the respondent's decision was heard by a panel of the First-tier Tribunal on 27 June 2013, that panel consisting of Upper Tribunal Judge Renton and First-tier Tribunal Judge Cheales whereby they dismissed the appeal with reference to the Immigration Rules and on human rights grounds. Permission to appeal against that decision was refused by a Judge of the First-tier Tribunal and likewise by a Judge of the Upper Tribunal.

4. An application was made on behalf of the appellant for permission to apply for judicial review of the Upper Tribunal's decision to refuse permission to appeal. In a decision sent to the parties on 16 January 2014 Baker J. granted permission on limited grounds. There having been no request for a substantive hearing, the Upper Tribunal's decision to refuse to grant permission was quashed. Following that, Mr Ockelton, Vice President of the Upper Tribunal, granted permission to appeal against the decision of the First-tier Tribunal, in a decision dated 4 March 2014. Thus, the appeal came before me.

5. The circumstances of the offence of manslaughter are set out in the sentencing remarks which are quoted at [8] of the determination. Those circumstances are also reflected in the decision of the Court of Appeal dated 30 June 2011 whereby the appellant's sentence was reduced to one of four years' detention. To summarise, the appellant had had a dispute with a boy who was three years older than him, the older boy having taken the appellant's bicycle. There was a meeting arranged between the two of them, the appellant being armed with a flick knife and the older boy being armed with a heavy stick. The appellant was attacked and then took out the flick knife, opened it and started to swing it around to protect himself. The victim stepped in between the appellant and the older boy and was unintentionally struck in the neck by the appellant. Despite the efforts of police officers at the scene, the victim died.

6. The further background to the appeal before the First-tier Tribunal, recorded at [9] of the determination, is that the day after this incident the appellant was attacked on his doorstep and was stabbed in the hand.

7. On or about 28 September 2011 the appellant committed a robbery of a mobile phone and was sentenced to a twelve month detention and training order. After his release, on 27 June 2012, he was the victim of a serious attack in Peckham when he was stabbed five or six times. He had to undergo major surgery to his chest and abdomen, being released from hospital on 11 July 2012. The First-tier Tribunal made reference to a statement from a DC Quirke in which he said that the appellant had refused to cooperate with the police about the attack, DC Quirke suggesting that this was an indication that he wanted to carry out a revenge attack as he had done in another incident in 2009. The statement referred to the appellant having a history of carrying weapons and having a background of gang links both in Hackney and Peckham. At [13] the Tribunal recorded that the appellant denied being a gang member and indulging in gang culture, explaining that he had no information to give to

the police about the attack on him. The Tribunal concluded however, that it was "probable from the Appellant's life on the streets; his unruly behaviour; and his involvement with stabbing incidents that at this time of his life the Appellant was involved in gang membership."

8. At [29] it was concluded that within a relatively short time of his arrival in the UK the appellant was out of control and living on the streets, "fully participating in gang culture".

9. In the same paragraph the Tribunal concluded that there can be no more serious offence than an unlawful killing, and made further reference to the appellant's committing what was described as "a typical street robbery" shortly after his release from detention from the sentence for the offence of manslaughter.

10. Various grounds in support of the application for permission to appeal against the decision of the First-tier Tribunal were advanced. I need not set them all out in detail. They can be summarised in the following way. The first ground alleges a failure to take into account relevant matters and an error in the assessment of evidence on whether or not the appellant had been involved in gangs. This included the contention that the First-tier Tribunal had failed to apply the correct standard of proof in this respect. Ground 2 alleges errors in the assessment of the seriousness of the offence of manslaughter and in the assessment of the mitigating features of the case. Ground 3 alleges error in assessment of viability of return to Nigeria and the ability of the appellant's parents to 'parent' him. Ground 4 contends that the First-tier Tribunal failed to make findings or to give reasons for rejecting relevant evidence on the appellant's prospects for rehabilitation and ground 5 asserts error in the assessment of the public interest in the deportation of a minor. Finally, ground 6 suggests an error of law in terms of the First-tier Tribunal's assessment of the public interest in the deportation of minors as expressed through the automatic deportation provisions of the UK Borders Act 2007 and the fact that Parliament has expressly excluded minors from the automatic deportation regime.

11. In his decision Baker J. granted permission to apply for judicial review on two grounds only, refusing permission on the other grounds. Those grounds, as reformulated before the Administrative Court, although in essence the same grounds as before the Upper Tribunal, were the asserted error of the First-tier Tribunal in placing significant weight on DC Quirke's hearsay evidence and the ground in relation to the Tribunal's assessment of the circumstances of the offence of manslaughter, also apparently reflected in the evidence of DC Quirke in his witness statement.

12. Following that grant of permission, there having been no substantive hearing before the Administrative Court, the decision of the Upper Tribunal refusing permission to appeal was quashed.

13. At the hearing before me I expressed my provisional view that the grant of permission to appeal by the Vice President of the Upper Tribunal was a grant only on the grounds on which permission was granted by Baker J. The Vice President's decision states as follows:

> "Permission is granted in the light of the decision of the High Court in this case. The parties are reminded that the Upper Tribunal's task is that set out in s. 12 of the 2007 Act."

14. However, having heard Ms Knorr's submissions I am now more inclined to the view that the grant of permission by the Vice President did not restrict the grounds that may be argued, notwithstanding that Baker J. only granted permission to apply for judicial review on limited grounds. It is not necessary either to explain in detail the arguments advanced on behalf of the appellant on this issue or indeed to resolve the arguments, for reasons which are apparent from the succeeding paragraphs. Suffice to say, Ms Knorr's argument was to the effect that the Administrative Court was written to on behalf of the appellant on the basis that he would be seeking to have the refused grounds reconsidered at a hearing before the High Court, but the matter did not proceed to a substantive hearing because the decision of the Upper Tribunal refusing permission to appeal was quashed. It is clear furthermore, that the Upper Tribunal was then in a position of having to make a fresh decision on the grant of permission, and in advance of that decision having been taken by the Vice President, on behalf of the appellant all the previous grounds were relied on, with arguments being advanced about the undesirability of the Upper Tribunal granting permission on limited grounds.

15. At the hearing before me I was referred by the parties to an email dated 6 March 2015 from a representative of the Home Office. It is addressed to the appellant's representatives. I summarise it as follows. It states that it is clear that a substantial time has passed since the decision to make the deportation order was made. Given the minority of the appellant at the time of the decision it is considered that it would be appropriate to reconsider the decision that was made, although it was to be noted that that is not a concession that the matter will be resolved in the appellant's favour. The email goes on to state that the respondent notes in particular the appellant's comments in relation to the evidence of DC Quirke, although it is not conceded that the First-tier Tribunal was wrong to take this evidence into account, nor is it accepted that the Tribunal gave it undue weight in their assessment. It is accepted in the email that the appellant correctly identified that the statement does not follow what is now considered to be best practice following the Tribunal decision in *Farquharson (removal – proof of conduct)* [2013] UKUT 00146 (IAC). The email continues that that is not a concession of an error on the part of the First-tier Tribunal. Nevertheless, it is stated that the Secretary of State undertakes not to take into account the statement of DC Quirke in any fresh decision should permission to withdraw the case be given by the Upper Tribunal.

16. Ms Knorr pointed out that in fact the respondent's decision had not yet been withdrawn. She was concerned that any fresh decision would take into account the existing decision of the First-tier Tribunal on *Devaseelan* principles.

17. Mr Walker conceded that the author of the email was unhappy with the evidence of DC Quirke in terms of the decision in *Farquharson*, best practice not having been followed. Ultimately, it was conceded by Mr Walker on behalf of the respondent that the First-tier Tribunal did materially err in law on the grounds on which permission was granted by Baker J. Ms Knorr indicated that in those circumstances, if I concluded that they were sufficient for the decision to be set aside, the other grounds did not need to be resolved.

18. In more detail, the ground concerning the evidence of DC Quirke directly, asserts that his evidence in terms of the appellant's involvement in gang violence is either unreliable or does not support the conclusion of involvement in gang violence. In the first place, DC Quirke was not called to give evidence and did not produce any of the intelligence reports relied on in his statement. The absence of any such supporting material is contrary to the decision in *Farquharson*. It is argued that the appellant had no opportunity to test the evidence of DC Quirke.

19. Furthermore, contrary to what is implied in the statement of DC Quirke, it had never been suggested that the offence of manslaughter was a gang-related offence. Reference is made to the decision of the Court of Appeal in re-sentencing the appellant. The victim was in fact a close friend of the appellant (although I note that the First-tier Tribunal at [29] recognised that fact). The Court of Appeal accepted that there was no intention to injure the victim, or indeed anyone else, save for the purpose of protecting himself from the attack on him. Furthermore, no details are given in the statement of DC Quirke in relation to the appellant's alleged non-cooperation with the police in relation to the attack on him.

20. The suggestion that the offence of manslaughter was gang-related was inconsistent with information from police from Operation Trident, and there was other evidence inconsistent with that suggestion, as set out in the grounds. The conclusion by the First-tier Tribunal that the appellant was effectively "living on the streets" is not supported by the evidence it is argued.

21. I am satisfied that the First-tier Tribunal did err in law in its assessment of the evidence of DC Quirke and the conclusion that the appellant was involved in gang violence or gang activity on the basis of DC Quirke's statement, and bearing in mind the guidance in the decision of *Farquharson*.

22. I am also satisfied that in its assessment of the seriousness of the offence, the First-tier Tribunal failed to have regard to the basis upon which the appellant was sentenced and the accepted factual circumstances of the

offence of manslaughter. That assessment to some degree has some overlap with the First-tier Tribunal's reliance on the evidence of DC Quirke.

23. Additionally, in the light of the concession made on behalf of the respondent at the hearing before me in relation to the decision of the First-tier Tribunal, I am satisfied that the First-tier Tribunal erred in law such as to require its decision to be set aside.

24. In the light of the practice statement at 7.2, and having heard the submissions of the parties, I have concluded that it is appropriate for the matter to be remitted to the First-tier Tribunal to be heard *de novo*, not to be listed before 16 January 2016.

*Decision*

The decision of the First-tier Tribunal involved the making of an error on a point of law. The First-tier Tribunal's decision is set aside and the appeal is remitted to the First-tier Tribunal for a hearing *de novo*.

DIRECTIONS

1. The appeal is remitted for a hearing *de novo* to be heard before a judge or judges other than Upper Tribunal Judge Renton and First-tier Tribunal Judge Cheales.
2. The appeal is not to be listed before 16 January 2016.
3. No findings of fact are preserved.

Upper Tribunal Judge Kopieczek 16/10/15