Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/01057/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 13 April 2015	**On 23 April 2015**

Before

UPPER TRIBUNAL JUDGE ESHUN
UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MICHAEL OSEI BERCHIE
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Ian Jarvis, a Senior Home Office Presenting Officer
For the Respondent: Ms Jacqueline Victor-Mazeli, Counsel instructed by Victory At Law solicitors

DECISION AND REASONS

1. The Secretary of State appeals against the decision of the First-tier Tribunal allowing the appeal of the claimant against her decision on 2 June 2014 to make an automatic deportation order against the claimant, a citizen of Ghana, pursuant to sections 32 and 33 of the Borders, Citizenship and Immigration Act 2009 (as amended). The claimant is

currently serving an indefinite term of imprisonment, with a minimum term of 11 years.

Claimant's immigration history

2. The claimant came to the United Kingdom in 1997, age 10 years, to join his parents who were here. At the age of 14, on 15 November 2001, Stratford Juvenile Court convicted the claimant of theft and gave him a non-custodial sentence of three months, plus costs. On 23 April 2003, at the same court, he was again convicted of theft, this time receiving a conditional discharge, plus a costs award. On 15 May 2003, he was convicted at Stratford Juvenile Court of possessing an offensive weapon in a public place and sentenced to 12 months' supervision order in a Young Offenders' Institution, plus costs.

3. The claimant has been detained since 2003, when he was 16 years old. He is now 28 years old. On 2 June 2004, the claimant was convicted of murder at the Central Criminal Court. He was sentenced to indefinite imprisonment, with a minimum term of 11 years. The claimant did not appeal either the conviction or the sentence.

4. In his sentencing remarks, Judge Stephens QC described a vicious attack by the claimant and his cousin on a young man of 19 who had done them no harm: it seems to have been in revenge for the actions of the victim's friend, who had earlier beaten the claimant with a weapon. The claimant went home, fetched a knife, and stabbed the victim twice in the back and neck. The judge considered that he intended, at the very least, serious bodily harm and probably the victim's death. The claimant was described as having previous convictions for possession of an offensive weapon, a cosh, and a knife, on different occasions. The judge considered him a 'dangerous young man who will need many years of discipline and training before you can safely be let out onto the streets again'.

5. During the period 2003-2009, the claimant while in prison was the subject of 10 adjudications in respect of his continued poor behaviour, the final one being an assault on a prison officer in 2009, which he claimed was unintentional.

6. On 14 November 2006 the claimant was granted indefinite leave to remain as his father's dependant. He was then 19 years old. The claimant's father and grandmother died in 2010 while he was in prison. His mother and two sisters are settled in the United Kingdom, but he still has an aunt in Ghana.

7. On 20 May 2009, the claimant was given an opportunity to provide reasons why he should not be deported as a foreign criminal. On 2 June 2014, the Secretary of State decided that the public interest required his deportation and that there were no circumstances under Article 8 ECHR which would outweigh that public interest.

First-tier Tribunal appeal

8. On 15 December 2014, First-tier Tribunal Judge Herbert held that the claimant could not meet the Immigration Rules, in particular paragraph 398 thereof, but went on to consider and allow the appeal under Article 8 ECHR outside the Rules.

Grounds of appeal

9. The Secretary of State appealed to the Upper Tribunal. Her grounds of appeal are somewhat diffuse. However, the principal point which they make is that the Immigration Rules are a complete code in relation to deportation, such that there is no room for a deportation appeal to be allowed under Article 8 ECHR outside those Rules (see *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192) and that, applying *DS (India) v SSHD* [2009] EWCA Civ 544, even if it could properly be said that there was no risk of re-offending, in appropriate circumstances the removal from the United Kingdom of a serious offender was in the public interest, which extended beyond the risk of re-offending to the need for deterrence and prevention of serious crime and public abhorrence of such offences.

10. On 13 January 2015, First-tier Tribunal Judge McDade granted permission to appeal on the basis of all the grounds of appeal advanced by the Secretary of State.

The hearing

11. On 10 April 2015, the claimant purported to serve a Rule 24 notice. The notice was out of time and did not comply with the requirements of Rule 24(3), nor did it contain any application for an extension of time. We agreed to treat it as the claimant's skeleton argument. We also have the benefit of a skeleton argument from the Secretary of State. We have had regard to both of those documents, and to the oral arguments by the parties at the hearing today. Both Mr Jarvis and Ms Victor-Mazeli made submissions on Article 8 outside the Rules, as well as within the codified scheme in the Immigration Rules themselves.

12. The arguments advanced on behalf of the claimant by Ms Victor-Mazeli were directed at Article 8 ECHR outside the Rules: Counsel was unaware of the effect of the Court of Appeal decision in *MF (Nigeria)* and her arguments relied on the Upper Tribunal decision which that judgment overturned.

Discussion

13. We remind ourselves of the conclusion reached by the Master of the Rolls in *MF*'s case, giving the judgment of the court. After examining the

guidance entitled "Criminality Guidance for Article 8 ECHR Cases" issued to Home Office caseworkers as to the meaning of the phrase 'exceptional circumstances' at paragraph 398 of the Immigration Rules, he said this:

> "14. …The latest version of this document was issued in March 2013 to assist caseworkers in applying the new rules. At this stage, it is sufficient to refer to what is said about the phrase "exceptional circumstances" where it appears in rule 398:
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> > "In determining whether a case is exceptional, decision-makers must consider all relevant factors that weigh in favour and against deportation.
>
> "Exceptional" does not mean "unusual" or "unique". Decision makers should be mindful that whilst all cases are to an extent unique, those unique factors do not generally render them exceptional. For these purposes, exceptional cases should be numerically rare. Furthermore, a case is not exceptional just because the exceptions to deportation in Rule 399 or Rule 399A have been missed by a small margin. Instead, "exceptional" means circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that deportation would not be proportionate. That is likely to be the case only very rarely."
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> 15. On the other hand, the document issued in March 2013 defines exceptional circumstances and states that, in determining whether a case is exceptional, all relevant factors in favour of and against deportation are to be considered under the new rules. On this approach, it is difficult to see what scope there is for any consideration outside the new rules: i.e. they provide a complete code."

14. At paragraph 104 of his decision, the First-tier Tribunal Judge in the present appeal acknowledged that the claimant had not made out his case under the Rules. He considered that 'although there are exceptional circumstances as outlined above, that notwithstanding that, the public interest under the Immigration Rules would weigh in favour of deportation'. At paragraph 131, he refused the application under paragraph 398 of the Immigration Rules.

15. At paragraphs 105-130, the judge purported to continue to consider the question of Article 8 outside the Rules, before allowing the appeal outside the Rules. He erred in law in so doing and we therefore set aside his determination and restore the decision within the Rules which appears at paragraph 104 and 131. The Secretary of State's appeal succeeds and we substitute a decision dismissing the claimant's appeal against her decision to deport him to Ghana as a foreign criminal, pursuant to paragraphs 32-33 of the Borders, Citizenship and Immigration Act 2009 (as amended).

Conclusions

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. We set aside the decision. We re-make the decision in the appeal by dismissing it.

Signed

Upper Tribunal Judge Gleeson