IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01307/2014

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination & Reasons Promulgated**
On 24 March 2015	**On 1 May 2015**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MARKLAND KAREEM NEWELL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms H Masih, Counsel instructed by Rodman Pearce
For the Respondent: Mr D Mills, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Jamaica born on 7 July 1995. The brief details of his immigration history are that he is said to have arrived in the UK on 8 December 2001 with the person who claimed to be his mother, but who was not. Ultimately, discretionary leave was granted to the appellant on 29 February 2012 until 28 February 2015.

2. What brought the appellant before the First-tier Tribunal was an appeal against the respondent's decision to make a deportation order against him under the automatic deportation provisions of the UK Borders Act 2007.

That decision was in response to his having been convicted on 16 September 2013 of an offence of possession of a firearm with intent to endanger life. That description of the offence comes from the 'Trial Record Sheet' at K3 of the respondent's bundle. The decision letter describes the offence as possession of a firearm with intent to cause fear of violence. For present purposes the precise description of the offence is not material. Suffice it to say that the appellant received a sentence of four and a half years' imprisonment.

3. His appeal against that decision came before First-tier Tribunal Judge T R P Hollingworth and Mrs S E Singer, a non-legal member on 20 November 2014. They dismissed the appeal.

The grounds of appeal and submissions

4. As originally formulated, there were three grounds of appeal to the Upper Tribunal, although two of them are described as ground 2. The first of the grounds was abandoned at the hearing before me and nothing more need be said about it. The second ground relates to the Panel's refusal to adjourn the hearing and the third ground is expressed as "Wrong assessment of proportionality".

5. Although not raised in the grounds, the judge granting permission identified an additional arguable error of law in terms of the Panel's failure to take into consideration Sections 117A-C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). That was a matter that was part of the amended grounds.

6. A further amendment to the grounds was sought before me in relation to certain factual matters which featured in the determination of the First-tier Tribunal. I granted permission for the grounds to be amended.

7. At the hearing Ms Masih adopted the original and amended grounds, and relied on her skeleton argument. The submissions of the parties can be summarised as follows. Ms Masih submitted that the Panel had not applied the correct test when refusing to adjourn the hearing, the application for an adjournment having been made to allow a witness to attend and give evidence. The Panel was wrong to state at [12] of the determination that there was no likelihood that the position in relation to the witness would be any different next time given her indication that she was willing to attend and give evidence. Although the Panel did state at [42] that her evidence was accepted, that was not a matter that is reflected in their findings. Her evidence was potentially relevant to the risk of re-offending.

8. So far as the failure to take into account Sections 117A-C of the 2002 Act is concerned, one of the matters which was in the appellant's favour was that he could speak English, a matter that is not reflected in the determination. Similarly, there are a number of matters which were relevant to the question of whether there were "very compelling

circumstances" over and above the Exceptions within Section 117C. These include the matters set out in the original grounds, and which include factors such as what is said to be the appellant's vulnerability, that he did not live with or was not cared for by his sister in Jamaica prior to his arrival in the UK in 2001, that he has no family ties to Jamaica, his mother's health and the length of time he has been in the UK. The OASys Report and the Pre-Sentence Report ("PSR") refer to his lacking assertiveness and having low self esteem. There is evidence that he had engaged with the youth offending team, for example, and those matters are not reflected in the Panel's determination. Reference was also made to the decision in Maslov [2008] ECHR 546.

9. Similarly, the Panel placed undue emphasis on the appellant's immigration history.

10. There had been a factual error in the determination in terms of the conclusion that the appellant had still been using cannabis in 2014, whereas it is clear from the OASys Report at paragraph 8.9 that his drug use related to a period prior to his being remanded in custody. In addition, it was not open to the Panel to conclude that because of the adjudications during the appellant's detention, the assessment of a medium risk of re-offending may be susceptible to variation.

11. Mr Mills submitted that in relation to the complaint in the grounds about the refusal to adjourn, the chronology of events was highly relevant. There had been a previous adjournment which was in part in relation to that witness. Although the chronology was not decisive, it was significant. Despite the upcoming hearing the witness booked a trip to the USA. In any event, there is nothing to indicate that the evidence from the witness could have affected the outcome of the hearing. Even if she does have qualifications as an expert, there were expert assessments before the First-tier Tribunal in the form of the PSR and the OASys Report. Her evidence could not have made a difference to the assessment of the risk of re-offending.

12. In any event, even if there was no evidence as to the risk of re-offending, the seriousness of the offence was such that the Panel would have come to the same view.

13. It is true that the Panel did not refer to the factors set out in ss.117A-D but at [74] of the determination there is reference to the appropriate test or an expression so close to the relevant test as not to be significantly different. The Panel there said that to override the public interest element requiring removal, "very compelling domestic and family circumstances indeed would be required." Any error of law therefore, in relation to ss.117A-C is not material.

14. So far as the decision in Maslov is concerned the relevant considerations are in any event contained within ss.117A-C, as argued in the 'rule 24' response. It is to be remembered that s117B(4) states that little weight

should be given to a private life that is established by a person at a time when the person is in the United Kingdom unlawfully.

15. In addition, the offence which resulted in the decision to make a deportation order took place when the appellant was an adult so Maslov has no application.

16. In relation to the ground alleging a factual error in terms of the appellant's cannabis use, that error could not possibly have made a difference to the outcome even if it could be said that in late 2013 he was still using cannabis but not in 2014.

17. In reply Ms Masih pointed out that the index offence was committed not long after the appellant had just turned 18.

My assessment

18. In terms of the grounds that were pursued, I deal first with the question of the adjournment. In advance of the hearing that took place on 20 November 2014 an application had been made by the appellant's solicitors for an adjournment in part on the basis that it was proposed to call a witness, Gwen Madden. The application was renewed before the First-tier Tribunal. Ms Madden had written a letter which is at page 9 of the appellant's bundle. Although it has a typed name at the bottom, it was not signed and was undated, matters referred to by the First-tier Tribunal. The letter, so far as material, stated that the author was a youth worker and community development worker, a Youth Pastor at the Mansfield Christian Fellowship. She refers to having had contact with the appellant over recent months since his detention and she states that during the course of visits she has developed a professionally based relationship with him. She describes him as young and ambitious and displaying characteristics of a reformed person. In essence, she refers to his having expressed regret for his offences. The letter states that he has a job with his mother when he is released. She concludes that experience within the criminal justice system has proven to be beneficial to him and that:

> "Deporting him away from family and support after he has been punished and reformed would not fulfil the purpose of the justice system. We have the opportunity to see were (sic) the penal system can be truly successful by restoring a reformed character back into the community he once held no respect for. I believe that [the appellant's] influence would be far more beneficial in the UK and with training and support [the appellant] has the opening of being a model citizen."

19. In dealing with the application for an adjournment at [10] the Panel stated that it had indicated to Counsel that they did not find the letter "impressive". It was pointed out that it did not bear an official letterhead, was not signed and was not dated. Nevertheless, the Panel adjourned for a short time to allow the appellant's representative to make further enquires. As recorded at [11] the Panel was then told that Ms Madden was not in fact involved in a professional capacity with the appellant but that

she attended the same Church. The Panel was informed that she was a qualified "development worker". The Panel also noted however, that there was no indication of the number of visits that had taken place by Ms Madden to the appellant. There was no explanation as to why no witness statement had been taken from her. The Panel was told that it was Counsel's belief that the solicitors only became aware of her non-availability within the previous two days and that she had gone to America for a reason no one knew. A further short adjournment was allowed for instructions to be taken from the appellant.

20. At [12] the Panel stated that it had considered the decision in Nwaigwe (adjournment–fairness) [2014] UKUT 00418 (IAC) and had considered the representations made by both parties. It was stated that the only basis of the application for an adjournment was that there "may or may not be a witness statement from the witness Ms Madden". There the Panel stated that it was prepared to proceed on the basis that whatever evidence came from her would be supportive. However, in view of the "unsatisfactory circumstances" regarding the witness, the ambiguity with regard to any qualifications and her absence without warning, that led to the application being refused. The Panel added that there was no likelihood of the position being any different next time.

21. I am not satisfied that there is any error of law in the Panel's refusal of the adjournment. Although it is true that there was no reference to the applicable Procedure Rules, incidentally a matter not specifically raised on behalf of the appellant in the grounds, it is clear that the Panel did consider the question of fairness to the appellant and whether refusing the adjournment would have any impact on the fairness of the proceedings. As Mr Mills pointed out, the chronology is relevant. It is apparent that there had previously been an application for an adjournment of a hearing on 25 September 2014, in part because of the stated intention of calling Ms Madden as a witness. That application had been granted and the hearing was then fixed for 20 November 2014. The application for an adjournment was originally made on paper two days before the hearing and renewed at the hearing itself. Even though the potential for the witness to give evidence was identified at the time of the earlier application for an adjournment in September 2014, there was no witness statement from her beyond the unsigned and undated letter to which I have referred.

22. Furthermore, there was no explanation as to why Ms Madden had arranged to visit the USA when there was a hearing in the case in which she was expected potentially to give evidence. Although there was evidence in the form of the itinerary and purchase of air tickets, those documents indicate that tickets were booked on 21 October 2014. Notice of the hearing was sent on 30 September 2014. Therefore, at the time of the trip being arranged, it was known that the appellant's hearing had been fixed.

23. In any event, as I pointed out to Ms Masih at the hearing, at [42] of the determination the Panel stated that it had considered with particular care the observations of Ms Madden which is in her letter in the bundle. The Panel went on to state that although they regarded whatever she said as "supportive" it could not render the decision to remove the appellant disproportionate.

24. Thus, in my judgement the Panel was entitled to take into account the absence of a witness statement, the fact that the letter from Ms Madden did not set out any particular expertise beyond identifying herself as a youth worker and community development worker, the fact that there was no witness statement from her and no explanation as to why it was apparently at such short notice that she was unavailable. The overriding objective in Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 includes a requirement to deal with cases expeditiously.

25. Furthermore, I do not accept that what is contained in Ms madden's letter could realistically have made any difference to the assessment of the risk of re-offending as set out in the OASys Report and Pre-Sentence Report, that risk of re-offending being expressed as medium and the risk of serious harm being expressed as high. In addition, as was submitted by Mr Mills, the risk of re-offending is but one factor to be taken into account, to which I would add that in the case of serious offending it is by no means the most important factor.

26. I am however, satisfied that the Panel erred in law in failing to make express reference to and identify the matters set out in ss.117A-D of the 2002 Act. Those provisions of the 2002 Act came into force on 28 July 2014 and were directly applicable to the appeal before the First-tier Tribunal. They are expressly relevant to public interest considerations so far as Article 8 cases are concerned. Although not advanced in argument, the parallel provisions of the Immigration Rules introduced at the same time were also applicable.

27. However, I am not satisfied that the Panel's error of law in this regard is material. It seems to me that the only matters of a general nature that could be said potentially to apply in the appellant's favour are the general public interest considerations expressed in s.117B, namely the appellant's ability to speak English and, or so it was advanced before me, the fact that he would be financially independent. That is predicated on the basis that he would be able to obtain employment with his mother.

28. It cannot be overlooked that the appellant would have to establish that there were "very compelling circumstances, over and above those described in Exceptions 1 and 2" for it to be said that the public interest in deportation does not apply in his case.

29. Whilst I note the matters relied on on behalf of the appellant, as set out in the skeleton argument at paragraph 10, such as his compliance and

engagement with the youth offending team, his apparent motivation to address his offending behaviour, attendance at college and obtaining of qualifications and what is said to be his vulnerability, the Panel did in fact make an assessment of the appellant's circumstances. Included within that is his mother's health which was expressly referred to. Significantly, although the Panel did not set out the provisions of ss.117A-C of the 2002 Act it did state at [74] as follows:

> "To override the public interest element requiring removal, very compelling domestic and family circumstances indeed would be required. Having carefully evaluated the Appellant's position we do not accept these exist."

30. In my judgement, in that paragraph the Panel did refer to the appropriate test that needed to be applied albeit not in identical words to those of the statute or the Immigration Rules, but as near as makes no significant difference. Insofar as it could be said that the Panel did not expressly refer to each and every one of the matters set out in the grounds or skeleton argument or advanced on behalf of the appellant at the hearing before them, it was not required to do so. It is evident from the determination that there was a full and careful evaluation of all the relevant factors advanced on behalf of the appellant.

31. In any event, that is all aside from the fact that the appellant was not evidently able to establish that he comes within either of the Exceptions within s.117C. He had not been lawfully resident in the UK for most of his life. Although the Panel found that he was socially and culturally integrated in the United Kingdom, it could not be said on the evidence that there would be very significant obstacles to his integrating in Jamaica. At [59] the Panel stated that it had contemplated the appellant's potential return to Jamaica and accepted that there would be practical difficulties for him on return. However, it was pointed out that he was young, in good health and adaptable and that the skills that he had obtained in the UK would help. In addition, at [56] it was pointed out that the appellant has a sister in Jamaica, albeit that the evidence from the appellant and his mother was that they were pessimistic about any co-operation or support that could be obtained from her. Again however, at [57] it was noted that the appellant had obtained various qualifications and it was concluded that he had transferable skills that would help him on return.

32. The Panel did take into account the appellant's age at the time of the offence, at [28]. It was also noted that he had convictions for violence prior to that offence. At [35] it was expressly stated that consideration was given to the length of time he had been in the UK, again referred to at [41]. I do not accept that the decision in Maslov has any application to the circumstances of this appeal given that the offence which triggered the decision to make a deportation order was committed when the appellant was an adult, albeit not long after his 18th birthday. The offence was committed in August 2013, about a month after his 18th birthday. In any event, even if it could be said that Maslov was relevant, the "very serious reasons" were apparent in the decision to deport him, given the seriousness of the offence.

33. Although it is said in the original grounds that "undue weight" was given to the appellant's immigration history, I am not satisfied that there is any error of law in the Panel's assessment of this issue. It is not apparent from the determination that his immigration history was a matter that the Panel concluded was the responsibility of the appellant. At [51] it was noted that the decision letter acknowledged that responsibility for regularising the appellant's stay lay with his mother. It was in any event surely relevant for the Panel to take into account the fact that for a number of years in the UK his stay has been unlawful. That is a matter that is expressly referred to in Section 117B in terms of an individual's private life. It was not a matter that was overemphasised by the Panel and was not a matter that the Panel considered reflected adversely on the appellant himself in terms of any personal responsibility.

34. Although it does appear that the Panel made a mistake of fact in concluding that it seemed that the appellant was still using cannabis in 2014, as set out at [49] of the determination, even without that error of fact, the outcome could not have been any different. The fact is that the OASys Report did indicate that the appellant was misusing cannabis at a serious level up to the date of his detention in 2013. It was only after he was detained that he said that he ceased using cannabis. The error by the Panel in this respect is not such as could be characterised as an error of law, although it is a mistake of fact. Still less could it be said that if it is an error of law, it is one that is material to the outcome.

35. As regards the complaint made about [69] of the determination in terms of the adjudications referred to by the appellant which accrued during his detention, I am not satisfied that there is any error of law by the Panel in this respect either. The Panel stated that there is no indication that the adjudications spoken of by the appellant are recorded in the OASys Report. It then concluded that the evaluation of re-offending currently at a medium level "may be susceptible to variation" as a result. In other words, the Panel stated that the medium risk of re-offending, implicitly, could arguably be re-assessed as perhaps being higher than medium. However, the Panel did not express its view that the risk of re-offending had in fact risen to higher than a medium risk. It was at the level of medium risk of re-offending that the Panel made its assessment of the proportionality of deportation.

36. In summary, I am not satisfied that there is any material error of law in the decision of the First-tier Tribunal. The decision to dismiss the appeal therefore stands.

Decision

37. There is no material error of law in the decision of the First-tier Tribunal and its decision to dismiss the appeal therefore stands.

Upper Tribunal Judge Kopieczek 29/04/15