IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02058/2014

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 24 August 2015	**On 12 October 2015**

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

SIBUSISO SYDWELL SOMAWONGA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G O'Ceallaigh
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with leave against the decision of First-tier Tribunal Judge Robinson dismissing his appeal against the decision of the respondent dated 25 November 2014 to make a deportation order against him pursuant to Section 3(5)(a) of the Immigration Act 1971 and to refuse his human rights claim. The reasons for the deportation order were that on 14 October 2014 at Portsmouth Crown Court, the appellant was convicted of "Affray" and "Breach of Conditional Discharge" for which he was sentenced to 45 weeks" imprisonment. As a his criminality, his deportation was considered to be conducive to the public good and as

such was liable to deportation by virtue of section 3(5)(a) of the Immigration Act 1971. The appellant appealed the respondent's decision on the basis that his deportation would lead to a breach of his rights under Article 8 of the ECHR.

2. The appellant is a citizen of South Africa, born on 15 August 1991. He entered the UK on June/July 2003. On 9 December 2003 he applied for leave to remain as a dependent child and this was granted until 31 July 2005. A further application was granted until 25 January 2007. On 24 November 2005 he applied for indefinite leave to remain and this was granted on the same day.

3. The appellant has numerous convictions starting from 22 August 2006, when he was 15 years old until 14 October 2014 when he was convicted of affray and breach of conditional discharge. The judge at paragraph 2 listed all of the appellant's criminal offences. Some of the offences led to custodial sentences, but the majority did not. The majority of the offences were committed by the appellant when he was a minor.

4. UTJ Canavan granted permission as follows:

> "The First-tier Tribunal Judge correctly referred to *Maslov v Austria* [2008] ECHR 546 but did not as a matter of fact make findings as to what weight should be placed on offences that took place while the appellant was still a minor. In assessing whether there was a 'strong argument for deportation' it is at least arguable that the First-tier Tribunal Judge should have taken into account the nature of the offences and the age when many of them were committed as part of the overall balancing exercise, especially in light of the requirement for a judge to consider section 117C(2) of the Nationality, Immigration and Asylum Act 2002.
>
> It is also arguable that the First-tier Tribunal Judge erred in apparently requiring the appellant to be in a cohabiting relationship with his partner. Whether Article 8 is engaged is a matter of fact relating to the strength of family ties and does not necessarily require co-habitation.
>
> Given that the appellant's status on arrival in the UK appears to be unclear the argument that the First-tier Tribunal Judge erred in finding that the appellant was not lawfully in the UK for 'most of his life' may be weaker but permission is granted on all grounds in order for the matter to be argued in more detail."

5. I accept the argument in the grounds that it is evident that the respondent took into account the entire course of the appellant's offending behaviour, from August 2006 until October 2014 in deciding at paragraph 12 of the Decision to Deport Notice that the appellant was a persistent offender in accordance with paragraph 398 of the Immigration Rules such that deportation action should be taken.

6. The argument posed by the appellant's Counsel in reliance on the grounds is whether in the light of *Maslov,* the appellant being an 'integrated alien' who has been lawfully resident in the UK during his childhood, should have

the offences committed whilst as a minor taken against him as to lead to him being described as a 'persistent offender'. Counsel was disputing that the appellant is a persistent offender. He argued that there was no definition of persistent offender.

7. Paragraph 398(c) which is the applicable immigration rule, describes two types of offenders; (a) the offender whose offending has caused serious harm or (b) they are a persistent offender who shows a particular disregard for the law. The respondent relied on the latter to support her decision that the deportation of the appellant is conducive to the public good **[12].**

8. I find that the word "persistent" has to be given its ordinary meaning. According to the definition in the Oxford Dictionary, "persistent" means "*continue firmly or obstinately (in opinion, course of action, doing thing) especially in the face of difficulty or objection".* I find that this definition aptly describes the appellant who, for a period of 8 years from 2006 to 2014, embarked on a course of criminal behaviour thereby showing a particularly disregard for the law. Consequently, I find that by his behaviour, the appellant is a persistent offender in accordance with paragraph 398(c). I do not support Counsel's argument that the appellant's offending behaviour as a minor should have been taken out of the equation when deciding whether or not he is a persistent offender because deportation action could not have been pursued at that time. There is no logical reason why it should not have been taken into account. His offending behaviour continued into adulthood, which was the appropriate time for the respondent to pursue deportation action. Furthermore, by definition, the appellant is a foreign criminal who is subject to deportation by virtue of the Immigration Rules and Section 117C of the amendment to the 2002 Act.

9. I find that although the judge made errors in his decision, the errors do not materially undermine his decision for the following reasons.

10. I accept that in considering the exceptions to deportation, the judge erred in finding that the requirements of the "exception" in paragraph 399 could not be met because there was no evidence of past-cohabitation by the appellant and his partner or evidence that they have supported each other financially. I note that even though the judge described Natasha McMullan as the appellant's partner, the appellant in his statement, which he relied on in evidence, described her as his girlfriend. However, on the evidence that was before the judge, I do not find that he erred in law in finding that the appellant was not in a genuine and subsisting relationship with his "partner" such that it infected his treatment of whether the claim could succeed because the facts were "exceptional" or very compelling.

11. In respect of paragraph 399A (a) I find that the judge's finding that the appellant has not been lawfully resident in the UK for most of his life was an error because the respondent had accepted that he has been lawfully resident in the UK for most of his life. I note that the judge decided

paragraph 399A(b) in the appellant's favour, that is, he is socially and culturally integrated in the UK by virtue of his education and social contacts. The judge found against him in respect of 399A(c), the judge was not satisfied that there are very significant obstacles to his integration in South Africa where he would be removed to. I find that the judge's findings at paragraph 44 on this issue are sustainable on the evidence. This means that the appellant could not satisfy all the three limbs of the exception in order for the public interest in deportation to be outweighed.

12. I find that the judge properly relied on the judgement of the ECHR in Maslov v Austria, and the decision of the Upper Tribunal in Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 60 (IAC) in his assessment of the proportionality of the appellant's removal. His assessment of proportionality is set out at paragraphs 51 to 60. Contrary to what is stated in the grant of permission, at paragraph 51 the judge considered nature, number and seriousness of the crimes committed by the appellant He found that the appellant has a long list of offending for a young man of 23 years of age. There were serious offences of violence and, according to the most recent assessment, he presents a medium risk to the public. He has breach community penalties in the past. The judge considered the appellant's personal circumstances and the public interest in the deportation of foreign criminals. On the evidence that was before him, I find that the judge's proportionality assessment does not disclose an error of law.

13. For all the above reasons I find that the judge's decision dismissing the appellant's appeal is sustainable and should stand.

Notice of Decision

14. The appellant's appeal is dismissed.

Signed Date

Upper Tribunal Judge Eshun