



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/02434/2013

THE IMMIGRATION ACTS

**Heard at Newport
On 2 June 2015**

**Decision & Reasons Promulgated
On 10 July 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TUMM

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer

For the Respondent: Mr C Simmonds of Duncan Lewis & Co, Solicitors

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order by the First-tier Tribunal pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).
2. Although this is an appeal by the Secretary of State against the First-tier Tribunal's decision to allow the appellant's appeal under Art 8, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

Introduction

3. The appellant is a citizen of Zimbabwe who was born on 13 October 1990. The appellant came to the United Kingdom in December 2001 when he was 11 years of age. His mother had previously come to the UK in 2000. He has remained in the UK since his arrival and completed his secondary education here. At the date of the hearing before the First-tier Tribunal, the appellant was 23 years of age.
4. Following his arrival in the UK, the appellant's mother unsuccessfully applied for further leave to remain as a student and also on medical grounds with the appellant as her dependant. Following that, on 6 January 2006 the appellant's mother applied for asylum with the appellant as her dependant. That application was refused on 7 March 2006 and her subsequent appeal was dismissed followed by a refusal to grant her permission to appeal on 30 January 2009.
5. On 3 July 2007, the appellant was convicted at the Cardiff Crown Court for the offence of robbery and on 3 August 2007 was sentenced to a detention and training order (DTO) of eighteen months. The Secretary of State sought to deport the appellant but his appeal was allowed on 4 January 2008.
6. On 15 February 2010, the appellant was again convicted at the Cardiff Crown Court on this occasion of four offences of supplying class A controlled drugs. On 21 April 2010, he was sentenced to 36 months' detention in a young offenders' institution on each count to run concurrently.
7. On 5 July 2011, the appellant was notified of his liability to automatic deportation. The appellant raised asylum issues claiming to be dependent upon his mother's asylum claim.
8. On 18 November 2013, the Secretary of State refused the appellant's asylum claim and for humanitarian protection certifying those claims under s.72(2) of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002") and para 339D of the Immigration Rules (Statement of Changes in Immigration Rules, HC 395 as amended). The Secretary of State also concluded that the appellant could not succeed under the applicable Immigration Rules for deportation cases, namely paras 398, 399 and 399A. The Secretary of State concluded that, despite the appellant's lengthy residence in the UK, his deportation would not breach Art 8.

The Appeal

9. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 25 March 2014, the First-tier Tribunal (Judge N J Osborne and Ms V S Street JP) allowed the appellant's appeal under Art 8 of the ECHR. The claim succeeded essentially on the basis of the impact the

appellant's deportation would have on the relationship with his girlfriend "SH".

10. The Secretary of State sought permission to appeal to the Upper Tribunal. Permission to appeal was initially refused by the First-tier Tribunal on 24 June 2014 but on 1 August 2014 the Upper Tribunal (UTJ Kebede) granted the Secretary of State permission to appeal.
11. Thus, the appeal came before me.

The Submissions

12. Mr Richards, who represented the Secretary of State, relied upon the grounds of appeal. Those grounds are somewhat diffuse. They challenge the First-tier Tribunal's favourable finding that the appellant's deportation had not been shown to be proportionate. In essence they argue that the First-tier Tribunal failed to give adequate reasons why the impact upon the appellant and his relationship with his girlfriend (SH) if he were deported amounted to "exceptional circumstances" under para 398 of the Rules so as to outweigh the public interest. Further, it is said that the First-tier Tribunal failed to give adequate consideration to the public interest given the severity of the appellant's offending. The First-tier Tribunal did not properly carry out the proportionality assessment and identify why there would be a "unjustifiably harsh" consequences if the appellant were deported.
13. In his oral submissions, Mr Richards refined the Secretary of State's position. First, he pointed out that it had been accepted before the First-tier Tribunal that the appellant could not succeed under para 399 or para 399A of the Rules. Secondly, the First-tier Tribunal had then recognised that it was necessary to establish whether there were any "exceptional circumstances" to outweigh the public interest. However, despite setting out and dealing with the relevant criteria under Maslov v Austria [2009] INLR 47, Mr Richards submitted that the First-tier Tribunal failed to identify any "exceptional circumstances" in its determination. As a consequence, the First-tier Tribunal had fallen short of what was required of it given that the appellant was relying upon "exceptional circumstances". That was a material error of law.
14. Mr Simmonds, who represented the appellant, submitted that the First-tier Tribunal had correctly directed itself at para 35 in accordance with the Court of Appeal's decision in MF (Nigeria) v SSHD [2013] EWCA Civ 1192 acknowledging that there must be "very compelling reasons" to outweigh the public interest. Secondly, Mr Simmonds submitted that the "exceptional circumstances" test was that contemplated by the Strasbourg jurisprudence which the First-tier Tribunal had applied at para 52 on the basis of the Maslov criteria. Thirdly, Mr Simmonds submitted that the First-tier Tribunal had fully taken into account the public interest, for example at para 50 it had noted the importance of the expression of society's revulsion at particularly serious crimes and deterring foreign

criminals from committing future offences. Fourthly, Mr Simmonds submitted that the First-tier Tribunal had considered in great detail the appellant's circumstances including that he had come to the UK when he was 11; he had been here for twelve years which was more than half his life; he had a genuine and subsisting relationship since December 2011 with his girlfriend and that they intended to marry. There was also positive evidence about the appellant's voluntary work. Mr Simmonds submitted that taken together, the First-tier Tribunal had considered these were "very compelling circumstances" to outweigh the public interest.

Discussion

15. The First-tier Tribunal heard the appellant's appeal on 14 March 2014. The appeal was, therefore, governed by the Immigration Rules in force prior to 28 July 2014. Further, Part 5A of the NIA Act 2002 did not apply as that also did not come into effect until 28 July 2014.
16. The relevant Immigration Rule is para 398 which, at that time, provided as follows:

"Where a person claims that their deportation would be contrary to the UK's obligation under Art 8 of the Human Rights Convention, and ...

 - (b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than four years but at least twelve months; ...

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors".
17. It was accepted before the First-tier Tribunal that the appellant could not succeed under either para 399 or para 399A. The basis for that concession is not recorded in the First-tier Tribunal's determination. Paragraph 399(a) deals with the situation where the individual has a child in the UK. That is not the case for this appellant. Paragraph 399(b) deals with the situation where the individual has a "genuine and subsisting relationship with a partner" who is a British citizen. It applies where the individual has been in the UK with valid leave continuously for at least fifteen years and there are "insuperable obstacles" to family life with the partner continuing outside the UK. Even if the basis of the concession is not recorded, the appellant obviously could not satisfy the "fifteen years" residency in the UK. He had only been resident for twelve years.
18. Likewise, para 399A (the 'private life' provision) applies where an individual has lived in the UK for twenty continuous years or is under 25 years of age and has spent at least half of his life living continuously in the UK and has "no ties (including social, cultural or family)" with his own country. Clearly, the appellant could not satisfy the "twenty years" continuous residence. Further, although he was aged under 25, he had not spent at least half his life living in the UK (discounting any periods of

imprisonment). Though it is again not recorded in the determination, that may well have been the basis for the concession that he could not meet the requirements of para 399A because, given the judge's finding that he had been in the UK for twelve years, had not returned to Zimbabwe since 2001 and had no family living there, it would seem that he had "no ties" left with Zimbabwe in the sense that would allow him to reintegrate having left twelve years ago as an 11 year old child.

19. Leaving those matters aside, where a person relies upon Art 8 to resist deportation, the Immigration Rules provide a "complete code" (see MF (Nigeria)). The assessment of whether the individual's deportation breaches Art 8 is subsumed within the "exceptional circumstances" assessment under para 398. The public interest is reflected in the well recognised three facets of – the risk of reoffending, the expression of society's revulsion at the commission of serious crime and the general deterrent effect upon other foreign nationals committing serious offences (see OH (Serbia) v SSHD [2008] EWCA Civ 694). The public interest reflected in both the Secretary of State's policy set out in the Immigration Rules and also by Parliament in the automatic deportation provisions in the UK Borders Act 2007 (which apply to foreign offenders who have been sentenced to twelve months or more imprisonment) a "very strong claim indeed" is required to outweigh the public interest (see, e.g. SS (Nigeria) v SSHD [2013] EWCA Civ 550). The assessment must be made through the "lens" of the Rules (see SSHD v AJ (Angola) [2014] EWCA Civ 1636). In order to establish a breach of Art 8, an individual must show "very compelling circumstances" in order to succeed (see MF (Nigeria) at [43]). The balancing exercise, however, involves the application of the "proportionality test" required by the Strasbourg jurisprudence (see MF (Nigeria) at [44]).
20. I now turn to consider Mr Richards' submissions on behalf of the Secretary of State.
21. First, it is clear that the First-tier Tribunal directed itself correctly as to the approach to Art 8. First, the panel correctly applied the well-known five stage test in Razgar [2004] UKHL 27 at para 38 of the determination.
22. Secondly, in considering proportionality under Art 8.2, the panel adopted the two-stage approach of first considering whether the appellant could succeed under the Immigration Rules (namely paras 399 or 399A) and then, secondly whether there were any "exceptional circumstances" to outweigh the public interest (see Singh and Khalid v SSHD [2015] EWCA Civ 74).
23. Thirdly, the panel correctly identified, having set out the relevant paragraphs in MF (Nigeria) that the public interest could only be outweighed by "very compelling reasons".
24. Fourthly, in assessing proportionality it is clear beyond a peradventure that the panel had well in mind the importance of the public interest. At

para 49, the panel set out in full the head note from Masih ([2012] UKUT 46 (IAC)) reminding itself that there was a “strong public interest in removing foreign citizens convicted of serious offences” and the need to take into account not only the importance of preventing further offences, but of expressing society’s condemnation of serious criminal activity and deterring other foreign criminals from committing offences. At para 50 the panel again reminded itself of the “important feature” of the public interest where a foreign citizen has committed “serious crimes”.

25. Fifthly, the panel considered in detail the appellant’s individual circumstances and the evidence that had been given including the oral evidence of the appellant and his partner. The panel accepted the evidence of both witnesses. The panel dealt with the evidence at paras 39 – 46 as follows:

- “39. We find that the Respondent’s decision to deport the Appellant amounts to an interference with any private life that the Appellant has established in the UK. As he has lived in the UK since the age of 11 years, and as he has friends within the Cardiff community and as he has an established relationship with [SH] whom we heard in evidence, we find that the Appellant has an established private life in the UK.
40. It is no part of the Appellant’s case that he has an established family life with his natural family in the UK. His mother and aunt attended the hearing but did not give evidence. We find that the Appellant is aged 23 years and that he is living independently from his mother who also lives in Cardiff and is part of the Appellant’s private life.
41. Having heard the Appellant give evidence we found him to be an impressive witness. He gave evidence in what we find was a naturally relatively quiet voice. He listened carefully to each question put to him and answered each question respectfully in an understated but earnest manner. At no time did he attempt to deny or minimise any aspect of his previous criminal offending. Although he stated that he had ‘fallen in with the wrong crowd’ and associated with the wrong sort of people, he did not blame those influences for his criminal offending for which he accepted responsibility. We find that throughout his evidence the Appellant adopted a most straightforward manner. His evidence was free from exaggeration and we assess him as an honest witness. We find that the Appellant has not committed any criminal offence since before his 19th birthday. We further find that there is no evidence of the Appellant’s behaving inappropriately in any way since that time. The Appellant told us that immediately upon release from custody he was fortunate enough to meet [SH] who is culturally from a Pakistani family and who also lives in Cardiff. The Appellant stated that they have been in a committed relationship since they met on 23 December 2011. They intend to marry. However, the Appellant appreciates that [SH’s] parents would prefer her to marry a young boy from within the Pakistani community. He has accepted that and has also accepted that if he is to marry [SH] that he will have to wait until she has

completed her degree and studied for the bar. Her parents have expressed a wish that the relationship between the Appellant and [SH] does not adversely affect her studies. The Appellant upon this issue gave mature evidence in stating that he accepts their position and that he is prepared to wait for [SH] to complete her education.

42. We have read the correspondence from the Prince's Trust Cymru and we have also read the references from [AH] and [TA] (already mentioned above). Those documents amount to positive evidence in favour of the Appellant. The Appellant undertakes activities with and for the Prince's Trust and is committed to working with young people with a similar history to his own so that he can show them how people can change if they take responsibility for their own actions. We find that the Appellant undertakes valuable work for the community in this respect.
43. We then heard evidence from [SH] herself. She is aged 18 years and is studying for her A level examinations this summer. She has been provisionally accepted to study law at Reading University and at the University of South Wales. She wishes to study for a law degree and she intends to become a barrister. We also note that she is a volunteer for the Alzheimer's Society and that she is also prepared to carry out unpaid work for the benefit of those who suffer from that unfortunate condition. [SH] was indeed a most impressive witness. Despite her young age we find that she gave evidence calmly, carefully, and in a most thoughtful and mature manner. She answered fully every question that was put to her and she did her best to assist the decision making process. We have no hesitation at all in finding that she is an entirely honest witness. She has a close relationship with her parents which she does not wish to jeopardise. However, unmistakably, she is committed to the relationship that she has with the Appellant. She confirmed that they met on 23 December 2011 and that they have been in a close relationship since that day. She does not wish to offend her parents and she is prepared to continue her relationship with the Appellant in the hope that eventually her parents will accept the fact that she wishes to marry the Appellant. She is prepared to delay that wedding/marriage until she has completed her studies in order not to upset or offend her parents.
44. We find that the Appellant and [SH] have been in a committed relationship since 23 December 2011 which is now more than two years. We find that they intend to marry and that they are planning their future with considerable maturity.
45. [SH] told us that the Appellant told her about his criminal history from their very first date. She is particularly close with her mother and has told her mother everything about the Appellant. [SH] has done this in the knowledge that her mother will speak with her father. Although [SH] has a close relationship with her father the fact of the matter is that she speaks to her mother constantly in a freer way than she would speak with her father. She explained to us that the Appellant has met both her parents

and that her parents liked the Appellant despite the cultural difference.

46. Having considered all the evidence from the Appellant and [SH] we find that the Appellant's private life is established such that it fulfils Article 8(1) of the ECHR".

26. Then, having reminded itself of the public interest reflected in the appellant's offending, at para 50 the Tribunal noted that the appellant's earlier deportation appeal had been successful and said this:

"We find that the 2008 deportation proceedings did not dissuade the Appellant from committing further criminal offences. However, we also acknowledge that the Appellant was then considerably younger and less mature than he is today".

27. At para 52, the panel applied the criteria set out in the Strasbourg decision in Maslov as follows:

"52. In a case such as the Appellant's appeal, the relevant criteria to be considered (following para 71 of the decision in Maslov) are:

- (i) The nature and seriousness of the offence committed by the applicant

As we have stated above, we consider the offences committed by the Appellant to be serious offences. We take due note of the sentencing remarks of the learned sentencing judge. We note that the Appellant did not commit the drugs offences to obtain heroin himself but because he was being used by people who had some form of hold over him. We find that he no longer moves within those circles. We find that to a large extent the Appellant has seen the error of his previous ways. We have no hesitation in finding that the Appellant's girlfriend [SH] is and has been a most positive influence in his life. It is likely that she will continue to be a positive influence for his distinct benefit.

- (ii) The length of the Appellant's stay in the country from which he is to be expelled

The Appellant has been in the United Kingdom since 9 December 2011. He was then aged 11 years.

- (iii) The time elapsed since the offence was committed and the applicant's conduct during that period

As we have already stated above, we have been told that the Appellant's offences were committed in 2009 when he was still aged 18 years. He has committed no offences since that time. Additionally, we have been told of no bad or inappropriate behaviour committed by the Appellant since that time.

We have, however, read correspondence from the Prince's Trust Cymru which indicates that the Appellant is a great team leader and sets a good example amongst his peers; he is also very open-minded and has inspired others to become

more like this and to think about and learn about other cultures. The Prince's Trust have discussed with the Appellant his past and his future. He is very keen to move forward and to help others with their problems, specifically around tackling poverty. He has reflected on his past behaviours and understands what he did wrong. Jo Micklewright, Senior Outreach and Development Worker believes the Appellant is not a threat to society and will not repeat his previous behaviour in the future. Due to his positive approach to his role the Appellant has been referred to The Enterprise Programme in which it is hoped he will be engaged in the future. This programme is designed to help unemployed young people start their own business through the provisions of start-up funding and mentoring.

(iv) The solidity of social, cultural and family ties with the host country and with the country of destination

The Appellant's father who lived in Zimbabwe was killed in 2005. The Appellant now has no links with any family in Zimbabwe. The Appellant's mother and aunt live in the UK. They have made their home in this country and they wish to remain in this country. The Appellant too has made his home in this country and has not returned to Zimbabwe since he arrived in the UK in 2001.

The Appellant is in a committed relationship with [SH] whom he intends to marry when she completes her studies. The Appellant wishes to make something of himself in the UK and wishes to help others in the community initially through the Prince's Trust".

28. At para 53, the panel noted the appellant's "genuine remorse" and a number of positive features relevant to its decision:

"53. We find that the Appellant has shown genuine remorse and insight into his previous offending. He realises why he committed those offences and he blames no one but himself. He realises that it is important to take responsibility for one's own actions and he is committed to do that in the future. We find that prison has had a positive effect upon the Appellant. We also find that the Appellant has matured as an individual and as a member of society since he committed his offences. We further find that his girlfriend [SH] and indirectly her family are a positive influence upon the Appellant".

29. At paras 54 and 55 the Tribunal reached its ultimate finding that the public interest was outweighed by the appellant's circumstances:

"54. We find that all these factors and all those matters to which we have referred above we now carefully and delicately balance in the assessment of proportionality. Assessing proportionality in an appeal such as this is an exercise in taking all relevant matters into consideration and appropriately balancing them. It is a most delicate matter. Although we find most definitely that society is entitled to express its revulsion against the Appellant's criminal

offending, we also find that there is much to be put in the balance in his favour.

55. For these and for all the other reasons we have set out above, we consider that the Respondent's decision to deport the Appellant is in all the circumstances not proportionate in a democratic society to the legitimate aim to be achieved. We have formed the view that despite the Appellant's criminal offending, all those factors set out above, make this particular case one of those cases where the public interest in deporting the Appellant is outweighed by the established private and family life that exists".

30. I do not accept Mr Richards' submission that this experienced tribunal reached its decision other than on the basis that it considered there were "very compelling reasons" to outweigh the public interest. The Tribunal clearly acknowledged the importance of the public interest and referred to it a number of times, including when stating its ultimate decision at paras 54-55. It was undoubtedly aware of the seriousness of the appellant's offending. In my judgment, the panel identified the factors that outweighed the public interest, especially at paras 52 and 53. I accept Mr Simmonds' submission that the panel expressed those reasons as including the fact that the appellant was 11 when he came to the UK; that he had been here for twelve years and so for around half his life; the strength and sincerity of his relationship with his partner since December 2011, and the fact that he had no links with any family in Zimbabwe. His mother and aunt lived in the UK and his father had been killed in 2005. In my judgment, the Tribunal's reasoning was adequate in the sense that it gave a sufficient explanation of the basis for its conclusion that the public interest was outweighed by the appellant's circumstances.
31. I did not understand Mr Richards to challenge the decision on the basis that the finding was irrational. However, I see no sound basis upon which the decision can be challenged on the ground of irrationality. The Tribunal itself recognised that its decision was "delicately balance[d]". By that, as I understand it, the Tribunal acknowledged that the appellant had narrowly persuaded it that the balance should be struck in his favour. Having given full weight to the "strong" public interest but having regard to all the circumstances including the appellant's positive approach to his future behaviour, I am unable to conclude that this was a decision which a reasonable Tribunal could not reach. As Carnwath LJ (as he then was) pointed out in Mukarkar v SSHD [2006]EWCA Civ 1045 at [40]:
- "The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law..."
32. It may not necessarily be the conclusion which every Tribunal would reach. That, however, does not establish irrationality, in the sense that no reasonable Tribunal could reach this finding.

33. For all these reasons, I reject the Secretary of State's submissions that the First-tier Tribunal was not entitled in law to conclude that the appellant's deportation would breach Art 8 of the ECHR.

Decision

34. For the above reasons, the decision of the First-tier Tribunal to allow the appellant's appeal under Art 8 did not involve the making of an error of law. Its decision stands.

35. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

Date

A Grubb
Judge of the Upper Tribunal