Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01031/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 December 2015	**On 4 January 2016**

Before

UPPER TRIBUNAL JUDGE McWILLIAM
UPPER TRIBUNAL JUDGE BLUM

Between

MR AMR TAREK EL-SAID ABDELLATIF ABOUELNAGA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Unrepresented
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Egypt and his date of birth is 19 June 1991.

2. The Secretary of State made a decision to deport the appellant on 30 May 2014 pursuant to Section 32(5) of the UK Borders Act 2007. He appealed against this decision and his appeal was dismissed by Judge of the First-tier Tribunal Mayall following a hearing on 10 October 2014. The decision was promulgated on 12 November 2014. The appellant was granted permission to appeal by Judge of the First-tier Tribunal P J G White. Thus the matter came before us.

3. At the start of the hearing the appellant made an application to adjourn because he had not secured legal representation as a result of lack of funding. We noted that the matter had been listed on 30 October 2015 and on this occasion the Upper Tribunal allowed the appellant's application to adjourn, in order to enable him to seek legal representation. The appellant informed us that he hoped that by mid-January 2016 he would be put in funds as a result of an inheritance which was due to his mother. He informed us that his partner had agreed to give him £1,000 by the end of this month and that he had £500 available to him. However, he needed £2,000 to £3,000 in order to secure legal representation. In addition to the funding issue, his mother and partner, were unable to attend the hearing for reasons explained in an email that was sent to the Upper Tribunal on 3 December 2015.

4. We explained to the appellant that in our view it was in the interests of justice to proceed with the hearing and although we sympathised with his position there was no certainty that he would be able to fund legal representation by January 2016. The appellant has not produced any letters from his partner or his mother confirming the future availability of funds. We noted that the grounds seeking permission to appeal have been drafted by Counsel who represented him before the First-tier Tribunal. The matter had been listed for an error of law hearing and it was not necessary for his mother or partner to attend. However, we indicated to the appellant that if became necessary to hear evidence from family members we would agree to adjourn, but that we intended to proceed to consider whether the judge had made an error of law.

5. The appellant's immigration history can be summarised. He came to the UK in 2006 aged 15 with his mother and younger siblings. He was granted leave to enter as his mother's dependant until May 2008. This was extended until 5 July 2010. On 11 June 2010 he was granted indefinite leave to remain. On 29 October 2013 he was convicted of intention to supply class A and class B drugs and he received a custodial sentence of two years' imprisonment. As a result of this a deportation order was made pursuant to paragraph 32(5) of the 2007 Act.

The Decision of the First-Tier Tribunal

6. The judge heard evidence from the appellant, his mother (Salwar Elshafey) and his wife (Shahida Shah), whom he married in an Islamic ceremony. It was submitted on his behalf that the appellant met the requirements of paragraph 399 (b) of the Immigration Rules (IR).

7. The judge made findings at [58] to [70] and [76] to [77]. It is necessary to quote the following paragraphs:

> "60. The fact that the appellant still does not recognise the extent of his offending and still seeks to absolve himself from a large portion of the blame, causes me to doubt his protestations as to his change of heart and

lifestyle. I have no OASys Report setting out the risk of reoffending in the Probation Services' view. The only document I have is the monthly progress report from the Home Office. Whilst not entirely clear this suggests that his release carries a medium risk of public harm. Later it says that there is a medium risk that he will reoffend and he is assessed as posing a serious risk of harm to the public as a result of his offences.

61. On the basis of the evidence before me I also consider that there is a medium risk of reoffending in this case. If he does reoffend the risk to the public is of serious harm from drug dealing and, in particular, in class A drugs.

…

64. I accept that he has a close relationship with his mother and younger brother. That is to be expected. Although his younger brother would, quite naturally, look up to the appellant as his older brother, I do not consider that the appellant has been the father figure to the younger brother that he makes out. His use of cannabis, including in the garden of the house, which he must have known his mother found completely unacceptable, does not suggest that he is a good role model to the young boy.

…

69. There was, however, no evidence put before me to suggest that [Ms Shah] would be unable to find employment in Egypt. There was no suggestion that she would face difficulties as a result of her ethnicity in Egypt. Again, I would expect her to be able to put into good effect her fluency in English and her work experience in the UK.

70. Their life together faces severe problems whether in the UK or in anywhere else as a result of what I am told is her family's probable opposition to this marriage. It seems unlikely that she would have the support of her family in the UK.

…

78. As set out above, however, it seems to me that there was no evidence to suggest that it would be unduly harsh for his partner to live in Egypt because of compelling circumstances over and above those described in paragraph EX.2 of Appendix FM. That paragraph provides as follows:

> 'EX.1. This paragraph applies if
>
> (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) 'insurmountable obstacles' means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.'

79. As stated, whilst it would undoubtedly be a wrench for the partner to leave the UK and forge a new life for herself and her partner in Egypt, there was nothing before me to suggest that there were compelling circumstances over and above the insurmountable obstacles as defined in EX.2.

…

80. Furthermore, I bear in mind that this is a relationship in which the purpose of the marriage, as the appellant himself said, was to enable them to have sexual relations and still remain true to Islamic principles. They have never lived together. They both live with their respective families (at least, so far as the appellant is concerned, before he was imprisoned). There are no immediate plans to live together. In these circumstances, even if the appellant were to be removed to Egypt and the partner, as she said, were not to go with him, I do not consider that it would be unduly harsh for her to remain in the UK without him. The position would be not a great deal different from what it is at present. In essence, given the limited nature of the relationship, I do not consider that it would be unduly harsh for her to remain in the UK without the appellant.

81. To put it in terms of the statute, I do not consider that exception 2 in paragraph 117C applies because I do not consider that the effect on her would be unduly harsh.

82. There is nothing exceptional or compelling about the relationship between the appellant and the remainder of his family which could possibly bring him within the exceptions in the Rules or the Act."

Conclusions

8. We heard oral submissions from Mr Duffy and the appellant. We did not consider the grounds in sequential order. Ground 2 maintains that the judge failed to consider the evidence relating to risk of reoffending when he concluded that the appellant posed a medium risk.

9. There was no OASys Report, printout of the appellant's convictions, PSR or NOMS assessment before the First-tier Tribunal. There was a monthly progress report of 2 October 2014 (B2 of the appellant's bundle) which indicated that the appellant's release carried a medium risk of harm to the public. There was an HDC pre-release

home suitability assessment of 29 July 2014 in which the author had assessed the appellant at low risk of harm to the public.

10. There was a letter from Dr India Beason of 19 September 2014 (C27 and C28 of the appellant's bundle). Dr Beason is a volunteer mentor working with the Trailblazers organisation in order to reduce the risk of reoffending amongst young offenders and the evidence contained in the letter was that she had had a number of sessions with the appellant and her evidence was as follows:

> "The mere fact that Amr has registered with the mentoring organisation and engaged positively during our weekly sessions, indicates to me that he is not only a dedicated individual, but he is also committed to reducing the likelihood that he will reoffend. His probation officer has also conducted an assessment which shows Amr to be at low risk of reoffending."

11. There was no application for an adjournment on behalf of the appellant in order to obtain the OASys Report, PSR or NOMS assessment. The respondent had failed to comply with directions of the Tribunal in relation to the filing and service of evidence. At the hearing before us the appellant told us that there was in fact no PSR produced following his conviction for the trigger offence. He had received an immediate custodial sentence, the judge having considered a PSR that had been prepared in relation to an earlier conviction for the offence of perverting the course of justice. He had received a suspended sentence for this. There was no list of previous convictions before the First-tier Tribunal. The judge was not aware of any other convictions and no other convictions have been relied upon by the Secretary of State.

12. Mr Duffy in oral submissions accepted that the monthly progress report was not a reliable assessment of risk, but submitted that the judge was entitled to make his own assessment on the evidence before him and he was entitled to take into account the appellant's evidence in relation to the offence. The finding in relation to the appellant having not accepted responsibility was one that was open to the judge. In addition the judge was entitled to conclude that drug-dealing puts the public at risk of serious harm.

13. It would have been preferable in our view for the judge to have had before him a proper assessment of risk conducted by a probation officer. However, the judge was entitled to proceed without this and to make an assessment on the evidence before him. The judge made no reference to the correspondence from Trailblazers in his decision. However, it is clear from [11] and [20] that he was aware of the appellant's evidence in relation to Trailblazers and that he had a volunteer mentor. The weight to attach to the evidence of the letter was a matter for the judge in the context of all the evidence. The judge took into account the sentencing remarks by the Crown Court Judge which were not consistent with the appellant's evidence in respect of his involvement in the offence and it was open to the judge to take a dim view of this. We note that the judge sentencing the appellant concluded that he had a significant

role in the offence considering the texts which were discovered on one of the mobile phones and the drug dealing paraphernalia found in his possession.

14. We conclude that it was open to the judge to assess risk on the basis of the evidence before him. We conclude that the judge did not rely on the monthly progress report, but on the appellant's oral evidence and the sentencing remarks. The weight to attach to the letter from Dr Beason was a matter for the judge. The assessment of risk was not flawed. We will consider the materiality, should be wrong about this, later in our decision.

15. Ground 3 asserts that the judge did not consider the correct test under Section 117 C (5) of the 2002 Act. The relevant part of Section 117 (C) reads as follows;

> …
>
> (3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh."

16. The basis of this submission is that the judge imported an additional test which is not in Section 117C (5) at [79] namely that of "compelling circumstances over and above…" However, there is no merit in this assertion. At [79] the judge considers paragraph 399(b) of the IR which reads;

> "399. This paragraph applies where paragraph 398(b) or (c) applies if –
>
> (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and
>
> (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
>
> (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and
>
> (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported."

17. At [79] the judge properly considered the appeal under the IR (paragraph 399 (b) (ii)). Section 117C (5) does not refer to compelling circumstances, but the impact of deportation on the partner (or child). The IR do not import a more stringent test than that enshrined in primary legislation. The IR at paragraph 399 (b) (ii) simply seek to distinguish insurmountable obstacles from unduly harsh and to inform us that the latter is a more stringent test. In any event, whether or not the judge properly applied the test in paragraph 399 (b) (ii) is not material, because he found that the appellant could not meet paragraph 399 (b) (iii). Thus the appeal fell to be dismissed under the IR in any event. We conclude, for the reasons we explain below, that this finding was open to the judge and grounded in the evidence.

18. The judge's assessment of unduly harsh was sufficiently comprehensive. He conducted an assessment in accordance with MAB (para 399; "unduly harsh") USA [2015] UKUT 00435. The grounds assert that he failed to consider unduly harsh in the context of Ms Shah's family's opposition to relocation, but there is no merit in this. What the judge found at [70] is that her family oppose the marriage whether she is in the UK or in Egypt. There was no persuasive evidence that the family's disapproval would be a bar to relocation. It had not been a bar to their marriage.

19. We have considered [69] of the judge's decision and conclude that a language problem would not be sufficient to establish that relocation would be unduly harsh.

20. The finding of the judge at [80] is not perverse. It was open to the judge to consider the quality of the marriage and conclude that it was lacking in maturity and depth. This is not inconsistent with the finding that the marriage was genuine and subsisting.

21. We now turn to ground 1. Contrary to the assertion contained therein, the IR are a complete code in respect of deportation. Having concluded that the appellant could not meet paragraph 399 it was incumbent on him to consider 398. This reads as follows;

> "398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
>
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
>
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary

> of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A."

22. At [82] the judge considered paragraph 398. The paragraph is succinct and if one is to consider it in isolation the finding could be considered inadequately reasoned; however, it must be considered in the context of the decision as a whole. It is clear from the judge's findings generally that there were no compelling circumstances, identified by the appellant's representatives at the hearing, over and above those described in paragraphs 399 and 399A.

23. We gave the appellant the opportunity to address us in some detail. He told us what he thought the judge had not taken into account, but we were satisfied that the judge properly assessed the evidence. Both the appellant's mother and his brother produced statements of evidence. It is clear that they both want the appellant to stay in the UK and that their relationship with him is close, but the grounds do not disclose that the judge failed to take account of this evidence. The judge took into account the impact of deportation on them. He accepted that the appellant's relationship with both was close, but he did not accept that his relationship with his brother was akin to that of father and son.

24. Ground 4 maintains that the judge did not follow the guidance in Maslov v Austria [2008] ECHR 246 and he misunderstood Akpinar [2014] EWCA Civ 937. The judge did not misunderstand the Court of Appeal's decision in Akpinar (see [73]) and he did not misdirect himself in relation to it or the case of Maslov. The appellant in this case was not a juvenile, but an adult when he committed the offence and he has not spent most of his childhood here. It was incumbent on the judge to consider the appellant's Article 8 claim through the lens of the Rules and the 2002 Act.

25. We have taken into account the case of Balogun (Application no. 60286/09) which Mr Duffy relied on at the hearing before us. We accept that the appellant's circumstances can be distinguished from the appellant in Balogun. However, there is no error of law in judgment of the judge and he was not obliged to identify very serious reasons to justify the appellant's expulsion. He gave sufficient weight, in our view, to the appellant's immigration history, but he was entitled to consider that this did not amount compelling circumstances over and above those in 399 or 399A.

26. We now return to the assessment of risk and whether, if the judge erred in his assessment of risk whether this would be material. The judge considered unduly harsh in the context of the impact on the appellant's wife without conducting an assessment of the wider public interest. He therefore preferred the approach of the Upper Tribunal in MAB (para 399; "unduly harsh") USA [2015] UKUT 00435 rather than that in KMO (section 117 - unduly harsh) Nigeria [2015] UKUT 00543. There is

no challenge to this in the appellant's grounds and there is no cross-challenge by the respondent. In the light of this we cannot see how the risk of offending would impact on the assessment of unduly harsh. Had the judge considered unduly harsh taking into account public interest considerations, it would not in this case, make a material difference to the outcome whether there was a low or medium risk. Indeed it would only have served to make matters even more difficult for the appellant as it would present further hurdles in the light of Section 117 C (1) and (2). The risk of reoffending is only one facet of the public interest and in the case of very serious crimes not the most important facet. The appellant has, by any account, committed a very serious crime and deterrence and public revulsion are important considerations which apply here.

27. The appellants appeal is dismissed. There is no material error of law and the decision of Judge Mayall is maintained.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed *Joanna McWilliam* Date 16 December 2015

Upper Tribunal Judge McWilliam

Approval for Promulgation

Name of Upper Tribunal Judge issuing approval:	Miss J L McWilliam
Appellant's Name:	Mr Amr Tarek El-Said Abdellatif Abouelnaga
Case Number:	DA/01031/2014

Oral decision (please indicate) ☐

I approve the attached Decision and Reasons for promulgation

Name:

Date:

Amendments that require further action by Promulgation section:

Change of address:

Rep: ☐ Appellant: ☐

Other Information:
