Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00323/2013

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 14 October 2013	**On: 16th October 2013**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LANCE LUMLEY
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr P Deller, Senior Home Office Presenting Officer
For the Respondent: Ms N Mallick, instructed by Fountain Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Lumley's appeal against the decision to deport him from the United Kingdom. For the purposes of this decision, we shall refer to the Secretary of State as the respondent and Mr Lumley as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

2. The appellant is a citizen of Jamaica, born on 30 May 1989. He entered the United Kingdom lawfully on 30 June 2000 with a visitor visa, which was subsequently extended, and on 10 October 2001 was granted indefinite leave to remain as the child of a settled parent, his mother. He was convicted of several offences, as follows.

3. On 29 July 2004 he was convicted at Warley Juvenile Court of using disorderly behaviour or threatening/ abusive/ insulting words likely to cause harassment, alarm or distress, for which he was ordered to pay a fine; on 27 July 2006 he was convicted at Birmingham Juvenile Court of possessing controlled drug – Class C, for which he was sentenced to 12 months conditional discharge; on 11 January 2008 he was convicted at Manchester City Crown Court of possessing a handgun – prohibited weapon, for which he was sentenced to twelve months in a Young Offenders Institution, suspended for two years; on 17 December 2009 he was convicted at Birmingham Crown Court of committing an act/ series of acts with intent to pervert the course of justice, for which he was sentenced to four months in a Young Offenders Institution; on 3 March 2011 a warrant for custodial sentence was made against him, for committal to prison for eleven weeks, for failure to comply with a requirement specified in a notice from the Secretary of Sate, failure to attend supervision, failure to reside where directed and failure to provide written proof of absences; on 17 August 2011 he was convicted at Coventry District Magistrates Court of failure to surrender to custody – the sentence was absolute discharge; and on 29 March 2012 he was convicted at Birmingham Magistrates Court of destroying or damaging property and using threatening and abusive words/ behaviour or disorderly behaviour to cause harassment/ alarm/ distress, for which he was ordered to pay a fine and given one day’s detention.

4. On 18 May 2012 the appellant was convicted at Coventry Magistrates Court of burglary and theft of a dwelling and failure to surrender to custody and was sentenced to twenty months imprisonment; and on 31 May 2012 he was convicted at Birmingham Magistrates Court of robbery and possessing a controlled drug of Class B Cannabis/ Cannabis resin, for which he was sentenced to thirty months imprisonment.

5. As a result of those convictions the appellant was considered for automatic deportation under section 32(5) of the UK Borders Act 2007 and on 20 June 2012 he was served with a notice of liability for deportation. He responded to that notice, claiming that his deportation would be a breach his rights under Article 8 of the ECHR on the grounds that his entire family, including his daughter, was in the United Kingdom. A deportation order was nevertheless signed on 28 January 2013 and a decision subsequently made that section 32(5) applied.

6. The respondent, in making that decision, gave consideration to the immigration rules with respect to Article 8 of the ECHR, concluding that the appellant fell within paragraph 398(b), applicable to offences leading to a sentence of imprisonment of less than four years but at least twelve months. The respondent did not accept that paragraph 399(a) applied to the appellant

since it was not accepted that he was in a genuine subsisting relationship with his daughter, although it was accepted that she was a British citizen and that she could not be expected to return with him to Jamaica. Neither was it accepted that paragraph 339(b) applied, although it was accepted that he was in a genuine and subsisting relationship with a British citizen (not the mother of his daughter), or that paragraph 399A applied. The respondent did not accept that there were exceptional circumstances such that the appellant's right to family and/or private life outweighed the public interest in his deportation, bearing in mind his propensity to re-offend, his failure to settle into a law-abiding or productive life here, his eight convictions for eleven offences between 2004 and 2012, his flagrant disregard for United Kingdom laws and the strong public interest in removing foreign criminals convicted of serious offences. It was accordingly concluded that his deportation would not breach Article 8.

Appeal before the First-tier Tribunal

7. The appellant's appeal against that decision was heard in the First-tier Tribunal on 1 August 2013, before a panel consisting of First-tier Tribunal Judge Cooper and Mr R Bremmer JP. The panel heard from the appellant and his aunt, noting that his daughter's mother had not appeared as a witness and that there was an absence of documentary evidence of the relationship between the appellant and his daughter. They noted that the appellant claimed to no longer be in a relationship with his partner. They recorded his evidence, that he had had contact with his daughter by telephone twice or three times a week, but that she had not visited him in prison because her mother was in prison herself – she had gone into prison last year and was released in April 2013, during which time his daughter was living with her mother. His daughter had walking and talking difficulties. Before he went to prison he had seen her three or four times a week and would take her to the park and help her to walk. He and his daughter's mother were still friends and there was therefore no problem with contact. He had lived with his daughter and her mother for the first two and a half years after her birth before they split up. He had last worked two or three years before going to prison, as a car mechanic. He had undertaken educational and vocational courses in prison, including learning English.

8. The panel accepted that the appellant had not returned to Jamaica since coming here at the age of eleven years, that all his immediate family were settled in the United Kingdom and that he had spent nearly half of his life, his formative years, in the United Kingdom. They noted that there was no OASys or other such report to demonstrate that he had changed his ways, although they took note of the letters of support that had been submitted. They found that the only real basis upon which the appellant could show that there would be a breach of Article 8 arose from his claimed relationship with his daughter. They were "exasperated" by the lack of evidence of that relationship, in particular the absence of any evidence from her mother, but they were "just about persuaded", from the appellant's evidence and that of his aunt, that he had a regular and committed relationship with his daughter and they considered his

regular presence in her life was potentially important and that his deportation would sever that relationship. The panel found that the appellant could not meet the immigration rules but considered that, "applying conventional Article 8 principles", his deportation would be disproportionate. They accordingly allowed the appeal on Article 8 grounds, but commented that the appellant succeeded "by the skin of his teeth".

9. The respondent sought permission to appeal to the Upper Tribunal on the grounds that the Tribunal had reached its conclusion without giving adequate consideration to the public interest in removal, in the proportionality assessment, relying on the principles in SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550; and that the Tribunal had failed to give adequate reasons for its finding that it would be in the best interests of the appellant's daughter for him to remain in the United Kingdom.

10. Permission to appeal was granted on 13 September 2013.

Appeal before the Upper Tribunal

11. The appeal came before me on 14 October 2013. The appellant was not present, as his transfer from prison had been delayed and he was expected to arrive in the afternoon. Both parties were content to proceed with the error of law issue in his absence.

Error of Law

12. Mr Deller relied upon the grounds of appeal. He accepted the fact-finding of the Tribunal but submitted that it had erred by failing to make any reference to the public interest in the proportionality assessment.

13. Ms Mallick commenced, in her submissions, by relying on the reference in R (Iran) & Ors v Secretary of State for the Home Department [2005] EWCA Civ 982 to the "anxiety of an appellate court not to overturn a judgment at first instance unless it really cannot understand the original judge's thought processes when he/she was making material findings" and to the comment that " the practice of bringing appeals because the adjudicator or immigration judge has not made reasoned findings on matters of peripheral importance must now come to an end." It was her submission that the Tribunal's thought process could be readily ascertained from a reading of the detailed summary of the appellant's criminal history, the reasons for refusal, the grounds of appeal and the oral evidence and that it was entitled to decide to accept what it had heard with regard to the appellant's relationship and commitment towards his child. The Tribunal had conducted a balancing exercise and was entitled to conclude that it was disproportionate to interfere with that family life.

14. In response, Mr Deller accepted that the Tribunal had undertaken a balancing exercise, but submitted that it had used the wrong test as it had failed to consider material matters on the public side, such as public order and deterrence. Mr Deller had no complaints about the findings made in the

appellant's favour, but submitted that the error of law lay in the failure to undertake a proper balance against the public interest.

15. I advised the parties that, in my view, the Tribunal had made an error of law in its decision. Although reference had been made to the public interest in the removal of foreign criminals at paragraph 27 of the determination, that was simply as part of the Tribunal's summary of the respondent's reasons for deportation. Nowhere in the Tribunal's findings, at paragraphs 71 to 79, was there any indication that consideration had actually been given to the weight to be attached to the public interest, including a consideration of the deterrent effect of deportation and the nature of the appellant's offences. There was no indication in those findings that the Tribunal had taken on board the significant weight attributed by the higher courts, in the recent spate of authorities including SS (Nigeria), to the State's policy of deporting foreign criminals as reflected in primary legislation in the UK Borders Act 2007. The proportionality assessment was accordingly not a completely balanced one and needed to be re-made.

Re-making the Decision

16. It was agreed by the parties that the decision could be re-made on the basis of submissions addressing proportionality, but also taking into account evidence from the appellant's daughter's mother who was in attendance. Ms Mallick did not wish to adduce further evidence from the appellant's aunt Caffion Collar, who was present at the hearing, or from the appellant, whose presence, she confirmed, was not required.

17. I therefore heard from the appellant's daughter's mother, Charelle Rankin, who confirmed that she had been in a relationship with the appellant from 2004 until the end of 2007. Their daughter was born on 2 January 2007 and at that time the appellant was living with her. After they split up, he would come and take their daughter on occasions and she would come with her to see him at his aunt's house where he was living. There was no set arrangement but they would visit about three times a week. He would take their daughter to the park and they had a close relationship. Since he had gone to prison he had maintained the relationship through telephone calls and their daughter would draw pictures for him and send them to him. Her daughter found the lack of physical contact distressing, particularly as her two siblings would see their father, and she would keep telling her that he was working in London. She was badly affected by the lack of contact and would cry and ask why he was still at work. Ms Rankin said that her daughter had cerebral palsy which affected her speech and walking. She was very intelligent but had a different way of understanding. She was suspected as also suffering from autism and OCD but that had not been diagnosed and was still being investigated. When asked why she had come to court, Ms Rankin said that she wanted her daughter to have a father in her life. The appellant was not a bad person and he had changed and was trying to do something good in his life. She did not think that he would end up back in the same situation but knew that he really wanted to try and do something about his circumstances.

18. When cross-examined, Ms Rankin named her daughter's primary school and said that she had a carer with her there at all times. She was in her second year at school. When asked if the school had raised any concerns about the effect on her of not having a father around, she said that they just concentrated on her medical condition. However the absence of her father was having a detrimental effect on her, particularly when she saw her siblings with their father. When re-examined by Ms Mallick, Ms Rankin said that her daughter was diagnosed with cerebral palsy when she was a year old. It was very frightening as she was not doing the things that she was supposed to be doing and they tried to find a programme she could go on. She was more upset about the fact that that was her first baby, whilst the appellant was more concerned about dealing with the situation.

19. Mr Deller, in his submissions, accepted that the criticisms of the First-tier Tribunal in its findings about the best interests of the child had now been addressed by the evidence from the child's mother, which he accepted as credible. He submitted that the child's best interests was not, however, a trump card and could be outweighed. He referred to the change in the Secretary of State's policy with respect to Article 8 in deportation cases, as reflected in the introduction of automatic deportation in the 2007 Act and the 2012 Immigration Rules which set out the executive's view of where the public interest lay, and the need for exceptional circumstances where the requirements of the rules were not met. He referred to the interpretation by the Court of Appeal in MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192, of the expression "exceptional circumstances" as meaning something so compelling as to be disproportionate and submitted that such circumstances did not exist in the appellant's case, when considering the factors not in his favour.

20. Ms Mallick relied in her submissions on the cases of Maslov v. Austria - 1638/03 [2008] ECHR 546, Masih (deportation - public interest - basic principles) Pakistan [2012] UKUT 46 and ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4. She submitted that the majority of the appellant's offences had been committed as a juvenile and the same weight could not be given to those convictions. His background was a relevant consideration in that he was the child of an alcoholic mother who would have had no parental control and was left to offend. With regard to the offences in May 2012 it was relevant to note that the wing member of the panel in the First-tier Tribunal was a magistrate and thus familiar with the work of the Magistrates Court, and was content to find that the interference with the appellant's Article 8 rights was disproportionate, so demonstrating that he did not consider the offences so serious as to warrant deportation. With regard to the conviction on 31 May 2012 for possession of cannabis, that should be considered in the context of cannabis being commonly used in the Jamaican community and in the context of the appellant's background. These were mitigating circumstances. Prior to the convictions in May 2012 the appellant had never been incarcerated. He was a changed person because of his incarceration. Ms Rankin's evidence that the appellant was a changed person

should be accepted as true and was relevant to the question of the risk of re-offending. The offences in May 2012 were not so serious as to lead to removal. The appellant had spent over half his life in the United Kingdom, including his formative years, and had built up relationships here. He had acquired carpentry skills and had a job offer as a kitchen porter. Most importantly he had a child here, for whom he had been very supportive in the face of her medical condition. There was a close bond between them. There was a solidity of social, cultural and family ties, as in the case of Maslov, and the best interests of the child carried a lot of weight in this case. Deportation was therefore disproportionate.

Consideration and findings

21. The appellant relies upon his family and private life pursuant to Article 8 of the ECHR as giving rise to an exception from automatic deportation under section 33 of the 2007 Act.

22. The facts in this case are not in issue: the appellant came to the United Kingdom at the age of eleven and has now lived in the United Kingdom for fourteen years; his residence here has been lawful, with indefinite leave to remain granted in 2001 on the basis of his status as a dependant child of a settled parent; other than his father, his close family members live in the United Kingdom; he has a British daughter now aged six who suffers from cerebral palsy with possible, but as yet undiagnosed, autism and OCD; he lived with his daughter and her mother until his relationship with her mother ended; and he has remained friends with his daughter's mother, Ms Rankin, since the relationship ended and has maintained a regular and committed relationship with his daughter, although contact has been maintained only by telephone since his incarceration. The First-tier Tribunal's finding, that it was in his daughter's best interests for him not to be removed, is no longer the subject of challenge and has been accepted by Mr Deller.

23. What is in issue in this case, however, is where the balance lies in assessing proportionality. The appellant relies on the principles in Maslov in claiming that his exclusion from the United Kingdom cannot be justified. It is indeed the case that he has spent the majority of his life including his formative years here, having arrived as a boy of eleven years of age and that all his close family members live here. It is claimed that his father is no longer in Jamaica and that in any event they had no ongoing relationship. The First-tier Tribunal did not make any specific findings in that regard, but its comments at paragraph 72 suggested that it was accepted that that was the case, although reference was made in the evidence of his aunt to the presence of other extended family members in Jamaica. I proceed on the basis that any remaining ties the appellant has to Jamaica are weak, although not non-existent, considering that he spent eleven years there. It is also accepted that the appellant has established a family life in the United Kingdom with his daughter.

24. The respondent's case, however, is that the public interest considerations outweigh the appellant's own interests and, in that respect, reliance is placed upon the appellant's inability to meet the requirements of the immigration rules and his criminal history, including his propensity to re-offend, his failure to settle into a productive or law-abiding life and the deterrent effect of deportation, as well as the current case-law.

25. Turning, to the appellant's criminal history, it is apparent that he commenced offending only four years after arriving in the United Kingdom, at the age of fifteen. The majority of his earlier offences were not of a particularly serious nature, so as to lead to any significant period of imprisonment, although they included a conviction for the possession of a handgun, for which he received a twelve month sentence suspended for two years. Whilst the earlier offences were committed as a juvenile, it is relevant to note that the appellant has continued to offend well beyond reaching his majority and was last convicted of an offence at the age of 23, only one and a half years ago, for which he currently remains incarcerated. Contrary to the circumstances in Maslov, therefore, this is not a matter solely of juvenile delinquency. It is also of relevance that since the appellant reached his majority, his offences have escalated in their level of seriousness, culminating in his convictions in May 2012 for burglary and theft and for robbery and possession of drugs, albeit Class B drugs. Whilst this does not diminish the fact that very serious reasons are still required for expulsion, it is nevertheless a material factor to be considered when assessing proportionality and plainly reduces the weight to be attached to his ties to the United Kingdom.

26. Of relevance, too, is the appellant's inability to take responsibility for his actions, as clearly reflected in the remarks made by the Judge in sentencing him to 20 months imprisonment for the earlier convictions in May 2012, whereby it was noted that he had "chosen… to have a trial in the teeth of overwhelming evidence but the jury have seen through the lies you have told them…". The same applies to the appellant's denial of culpability in his explanation to the First-tier Tribunal, as recorded at paragraph 57 of its determination, of the circumstances leading to his conviction for robbery. The appellant's criminal history, as set out in the deportation decision, also demonstrates his continual disregard for authority or the law, failing on several occasions, to surrender to custody or to attend supervisions or to comply with requirements imposed upon him, prior to the most recent convictions.

27. As the Tribunal found at paragraph 74 of its determination, other than two letters of support from his wing officer and English tutor, there is little in the way of evidence to suggest that the appellant has changed his ways as a result of his prison sentence. There is no OASys or other such report giving an indication of his risk of re-offending. It was Ms Rankin's evidence that he had changed and that he really wanted to do something about his circumstances and had been offered employment and would not offend again. However, I place little, if any, weight, upon her assertion in that respect, well-meaning though it may be, in the light of his history. The offer of employment remains no more than an offer which must be considered in the context of his overall

behaviour. Whilst it is the case that the appellant's current period of incarceration is the first significant period of imprisonment, I do not consider that the evidence before me suggests that that would act as any deterrence against re-offending. In that respect I find it of particular significance to consider that he continued offending, and indeed offending in a more serious way, even after being issued with a warning letter in March 2011 of potential deportation, following the respondent's decision not to pursue such action at that time. Thus, despite the threat of being removed from the country in which he had lived since the age of eleven, and of being effectively permanently separated from his daughter and his other family members, he made no attempt at that time to settle into a productive life here. That, I find, is a significant indicator of the likelihood of him being able to do so after completing his current custodial sentence.

28. Turning to the appellant's relationship with his daughter, I proceed on the basis that it has been accepted that it is in her best interests for him to remain in the United Kingdom. Whilst that is a primary consideration, however, it is not the only consideration. It is accepted that the appellant's daughter suffers from cerebral palsy and has other, as yet undiagnosed, conditions. There is no medical evidence to show the severity of her conditions and the extent of her requirement for additional care at home, although I note Ms Rankin's evidence that she has a carer at school. Nevertheless I accept that her condition is an additional factor in the consideration of weight to be attached to the appellant's interests in remaining in this country. I accept that it will be distressing for her if her father leaves the country and that their separation is already causing her distress, especially as her siblings are able to be with their own father. However she has not lived with the appellant since she was a baby and no doubt cannot recall a time when her contact with him consisted of anything other than visits. I pause here to add that the evidence before the First-tier Tribunal was that she had lived with the appellant and her mother for the first two and a half years of her life, whilst the evidence before me, which was not challenged, was that her parents separated at the end of 2007, when she was just less than one year old. In any event, it is of relevance that the appellant has continued to offend since her birth and, in so doing, has shown little regard for her best interests. That is particularly the case with respect to his total disregard, as mentioned above, of the warning issued to him in March 2011 and of the real threat of deportation and separation. He has, by his own actions leading to his current period of incarceration, absented himself from her life.

29. Returning to the question of "very serious reasons" in Maslov, I consider that they are present in the appellant's case. He is a persistent offender whose offences have continued past his minority and have escalated in gravity. The fact that he is the child of an alcoholic, although unfortunate, does not detract from the fact that he has continued to offend into adulthood. Neither does the fact that cannabis is commonly used in Jamaican communities mitigate the fact that its possession is a crime. There is no reliable evidence to show that the appellant has sought to rehabilitate himself. On the contrary, he has demonstrated disregard for authority and has not been deterred in his criminal

activity by his family considerations or by warnings of deportation. His own disregard for his child's best interests significantly reduces the weight to be attached to the family life existing between them and his disregard for the public interest reduces the weight to be attached to the ties he has established in this country.

30. Current case law has established that the weight to be given to the public interest in removing foreign criminals is significant. That was emphasised by the Court of Appeal in SS (Nigeria), where Lord Justice Laws stated at paragraph 54:

> "I said at paragraph 46 that while the authorities demonstrate that there is no rule of exceptionality for Article 8, they also clearly show that the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail. The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgment only be justified by a very strong claim indeed."

31. In the very recent case of MF, the Master of the Rolls stated at paragraph 42:

> "in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be "exceptional") is required to outweigh the public interest in removal. In our view, it is no coincidence that the phrase "exceptional circumstances" is used in the new rules in the context of weighing the competing factors for and against deportation of foreign criminals."

32. He went on, at paragraph 43 to state:

> "The general rule in the present context is that, in the case of a foreign prisoner to whom paras 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the "exceptional circumstances".

33. It is the appellant's case that he has demonstrated very compelling reasons that outweigh the public interest in his deportation, by reason in particular of his daughter's best interests and the fact that he has spent the majority of his life, including his formative years, in the United Kingdom. However, in the light of what I have said above, I do not accept that those reasons, albeit weighty, are sufficiently compelling to outweigh the public interest in the prevention of disorder and crime.

34. In the circumstances I find that the appellant's deportation is justified in the public interest and would not amount to a breach of Article 8 of the ECHR. Any interference caused to his family and private life in the United Kingdom, and to that of his daughter, as a result of his deportation, is proportionate. The appellant has failed to establish that he falls within the exceptions set out at section 33 of the UK Borders Act 2007.

DECISION

35. The making of the decision of the First-tier Tribunal involved an error on a point of law. The decision of the First-tier Tribunal is therefore set aside. I re-make the decision by dismissing the appeal on all grounds.

Signed
Upper Tribunal Judge Kebede