Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00344/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
on 21 August 2013	**on 27 August 2013**

Before

UPPER TRIBUNAL JUDGE JORDAN

UPPER TRIBUNAL JUDGE PITT

Between

JOSEMAR DIAS DOS SANTOS FERNANDO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Umoh-Abuidu of Duncan Lewis & Co. Solicitors
For the Respondent: Mr Walker, Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. In a decision dated 18 June 2103, Upper Tribunal Judge Pitt, sitting with Lord Burns, found that a panel of the First-tier Tribunal composed of First-tier Tribunal Judge Robinson and Dr CJ Winstanley (Non Legal Member) had made a material error of law in their determination dated 15 April 2013 in which they allowed the appellant's appeal

against the decision dated 7 February 2013 of the Secretary of State which refused to revoke a deportation order made against him.

2. Following on from the finding of an error of law, the decision of the First-tier Tribunal was set aside and must now be re-made. It was common ground that the appeal before us was limited to consideration of whether the deportation order made against the appellant should be revoked because it breached his rights under Article 8 of the ECHR.

3. It was also common ground that our task was to assess whether the appellant's claim could succeed under the "second stage" Article 8 consideration identified most recently in **Green (Article 8 – new rules) [2013] UKUT 254 (IAC)** and that it was only the proportionality of the interference with the appellant's family and private life that required assessment.

Preliminary Issues

4. Ms Umoh-Abuidu applied for an adjournment. The application was made in order for Ms Neolino Bernardo to attend to give evidence. She was said to be unable to attend the hearing for unspecified medical reasons. Ms Bernardo's evidence before the First-tier Tribunal had been significant and, maintained Ms Umoh-Abuidu, in order for justice to be seen to be done her presence at the hearing was necessary.

5. We did not find that the hearing should be adjourned in order for Ms Bernardo to attend. Firstly, as confirmed by Mr Walker, the respondent agreed that the evidence Ms Bernardo gave to the First-tier Tribunal could be taken at its highest. There was no dispute that the appellant's community work was a "*significant*" factor weighing in his favour, as found by the First-tier Tribunal. Ms Umoh-Abuidu suggested that more evidence had been given in front of the First-tier Tribunal that was shown on the face of the determination and that we needed to hear that evidence. If that were so, however, it should have been the subject of further witness statement, in line with the direction of 18 July 2013 but was not. It did not appear to us to be in the interests of justice or in line with the overriding objective of avoiding delay to adjourn to hear evidence from a witness whose evidence was undisputed and where the findings of the First-tier Tribunal on that evidence were settled.

6. Ms Umoh-Abuidu also submitted that the appeal should be remitted to the First-tier Tribunal in order to be re-made. We did not agree. We were somewhat surprised at this submission as it was made only after the hearing before us had commenced and no earlier. In any event, the Senior President's Practice Statement dated 25 September 2012 indicates that when a decision of the First-tier Tribunal is set aside, it is "*likely*" that the Upper Tribunal will proceed to re-make the decision unless:

> "the nature or extent of the judicial fact finding which is necessary in order for the decision to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

7. There are no facts to be found by us. The decision of the First-tier Tribunal panel was set aside for a failure to weigh the public interest correctly but their findings of fact were not challenged and remain intact. Indeed, very few of the facts in this case, if any, were disputed by the respondent. We concluded that we remained correctly seized of the re-making of this appeal.

8. On the morning of the hearing Mr Walker served a letter dated January 2008 setting out why, at that time, the respondent was seeking to deport the appellant's father. Mr Walker indicated that the father's appeal against deportation had subsequently been allowed by a Tribunal and that he currently has discretionary leave to remain (DLR). That the appellant's father had an irregular immigration history but had subsequently been granted DLR were matters already in evidence. However, Ms Umoh-Abuidu suggested that this letter was prejudicial to the appellant and that an adjournment was required in order to deal with it. We gave our view that this letter did not undermine the appellant's case given that his father had not been deported and now had lawful leave. Having been afforded time to discuss this matter with the appellant, Ms Umoh-Abuidu confirmed that she was ready to proceed.

9. These issues having been decided, the parties accepted that the appeal could be dealt with by way of submissions with reference to the documentary evidence before us.

Background

10. The following matters are not in dispute. The appellant was born on 26 May 1988 and is citizen of Angola. His father brought him to the UK illegally in September 2001 when he was aged 13. The appellant has never been back to Angola and has no relatives there. The appellant's father claimed asylum and the appellant was a dependent on that claim which was refused in 2004. The appellant lived with his father, step-mother and a half-brother. He obtained GCSEs in 2004.

11. When the appellant's father was arrested by immigration authorities in 2004 or 2005, as he did not get on with his step-mother, the appellant left the family home in Rochdale and came to London. He was aged approximately 16 or 17 years old at that time. On 8 January 2008 he committed the offence of affray. On 31 May 2008 he committed a robbery and an attempted a robbery, both involving the use of an imitation firearm. On 5 December he was sentenced to 3 years and 6 months imprisonment for these offences.

12. On 27 January 2009, the respondent informed the appellant of his liability to automatic deportation. On 4 February 2009 the appellant applied for the Facilitated Removal Scheme (FRS) and his application was approved but on 21 May 2009 he indicated that he no longer wished to return to Angola under the scheme. On 30 November 2009 he applied again for the FRS and his application again approved. On 1 December 2009 he withdrew the application. On 17 February 2010 the respondent informed the appellant that he was subject to the automatic deportation process and served him with a deportation order made on 10 February 2010. The appellant did not appeal the decision.

13. An emergency travel document (ETD) application was made by the respondent on 23 February 2010. It is not clear what happened to that application. When the appellant's custodial sentence ended on 6 March 2010 he was detained in immigration detention but was released on bail on 21 July 2010.

14. The appellant returned to London and formed a relationship with Deborah Rose, a German national who came to the UK at the age of 5. In September 2010 the appellant began voluntary work at the Nutmeg Community, a youth project in London working with young people to show them the risks of anti-social behaviour and dangers of carrying knives and guns.

15. The respondent made a further ETD application to the Angolan authorities on 11 June 2012 and when the appellant went to report on 6 August 2012 he was detained. On 29 October 2012 he made an application for the deportation order to be revoked. That application was refused on 7 February 2013 and it is that refusal which gave rise to these proceedings. As above, the appeal against the refusal to revoke the deportation order was allowed by the First-tier Tribunal after a hearing on 4 April 2013. That decision was set aside for error of law by the Upper Tribunal after a hearing on 11 June 2013. The appellant was granted bail by an Immigration Judge in July 2013.

Article 8 ECHR

16. It was accepted by the advocates that the issue before us is the proportionality of the decision as none of the other intermediate questions set down in **Razgar [2004] UKHL 27 [2004] INLR 349** are in dispute.

17. We have set out our proportionality assessment in line with the guidance provided in **Boultif v Switzerland [2001] ECHR 54273,** as confirmed by **Uner v the Netherlands [2007] Imm AR 303,** in which the European Court of Human Rights said that in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued, the following criteria had to be considered:

    (i) The nature and the seriousness of the offence committed by the Appellant;
    (ii) The length of the Appellant's stay in the country from which he or she was to be expelled;
    (iii) The time that had elapsed since the offence was committed and the claimant's conduct during that period.
    (iv) The nationalities of the various parties concerned;
    (v) The Appellant's family situation, such as length of marriage and other factors expressing the effectiveness of the Appellant's family life;
    (vi) Whether the spouse knew about the offence at the time he or she entered into the family relationship;
    (vii) Whether there are children in the marriage and if so their ages;
    (viii) The seriousness and the difficulties which the Spouse is likely to encounter in the country of the Appellant's origin;

(ix) The best interests and well being of any children of the Appellant; and in particular the seriousness of any difficulties that they would be likely to encounter in the country to which the Appellant would be expelled;
(x) The solidity of social, cultural and family ties with the host country and with the country of destination.

18. The placing of offending behaviour at the beginning of the list of the **Boultif** criteria is reflected in the guidance provided by **Masih (deportation – public interest – basic principles) Pakistan [2012] UKUT 00046 (IAC)** in which a Presidential panel set down basic principles derived concerning the public interest in deportation cases:

(i) In a case of automatic deportation, full account must be taken of the strong public interest in removing foreign citizens convicted of serious offences, which lies not only in the prevention of further offences on the part of the individual concerned, but in deterring others from committing them in the first place.

(ii) Deportation of foreign criminals expresses society's condemnation of serious criminal activity and promotes public confidence in the treatment of foreign citizens who have committed them.

(iii) The starting-point for assessing the facts of the offence of which an individual has been committed, and their effect on others, and on the public as a whole, must be the view taken by the sentencing judge.

(iv) The appeal has to be dealt with on the basis of the situation at the date of the hearing.

(v) Full account should also be taken of any developments since sentence was passed, for example the result of any disciplinary adjudications in prison or detention, or any OASys or licence report.

19. We noted the comments in **Masih** that the public interest in deportation lies "*not only in the prevention of further offences … but in deterring others*" and that the same principle was expressed by the Court of Appeal in **OH Serbia v SSHD [2008] EWCA Civ 694**, the latter case also emphasising the role of deportation in expressing the public's revulsion and building public confidence in the treatment of foreign citizens who have committed serious crimes.

20. Following the guidance in **Boultif** and **Masih**, we start by considering the appellant's offences and the view taken by the sentencing judge.

21. The appellant was cautioned in 2004 for a common assault committed when he was 15 years old.

22. On 8 January 2008 the appellant committed an affray. He was sentenced to 8 weeks in a Youth Offender Institution (YOI) for that offence.

23. On 31 May 2008, the appellant committed a robbery for which he was sentenced to 3 ½ years in prison. On the same date he committed an attempted robbery for which he was sentenced to 3 years in prison. On the same date he was in possession of an imitation firearm for which he was sentenced to 2 ½ years.

24. All of the custodial sentences for the offences in 2008 were to be served concurrently making the total to be served 3 ½ years.

25. In his sentencing remarks on 5 December 2008, the His Honour Judge Fraser sitting at the Inner London Crown Court, stated:

> "… the facts in respect of the affray … were that you ended up being part of a larger group trying to gain entry to a party being held in a houseboat.
>
> It is quite clear that this was an extremely serious affray, to the extent that knives were certainly used and two of the doormen were stabbed and as a result one of them had life-threatening injuries. Now, against that, I must balance the accepted basis of plea that you have entered to this on the basis that you had no knowledge of any knives being there or being used, or indeed at any stabbing as well. Clearly, obviously, given the nature of the affray, I have to take into account the nature of the offending as a whole, as well as your individual part in it.
>
> As far as the matters on 31st of May are concerned, they are significantly more serious. In respect of that robbery and the attempted robbery committed using an imitation firearm, with others, you approached the person on the first occasion, pointed the gun towards his stomach, demanding his wallet and phone. Now, when you were searched later on, the wallet was found on you, and you were identified as the person with that firearm. Both the wallet and the phone were taken, and you ran off.
>
> But that was not an end of it because shortly after that, again with another, you approached another person, and again demanded his phone. You said you were not fucking about, and you showed you had a gun. You then went to cock the imitation firearm when your victim – and, frankly, extremely bravely, and he is to be congratulated for that – took hold of your gun, and you ended up on the floor before your accomplice hit the victim and you were both able to escape. Thankfully, again, the armed police who had been alerted after the first incident found you before any more damage could be done.
>
> In respect of the firearm charge, I have obviously considered the relevant issues as I must … . I take account of the fact that this is an imitation firearm that you were using. I take into account what you did with it. You used it quite clearly to intimidate and frighten and ensure your victim complied with your demands, and that is specifically - certainly true in both cases, rather more serious in the first, I might suggest, given the firearm was actually brought out and pointed at your victim. I have also take into account of the fact that you had the imitation firearm

with the intention, quite clearly, by the nature of the offence that you have pleaded guilty to, of committing robberies, and also finally I have taken note of the fact that you have got no convictions and the caution - apart from you have a caution, in fact, for common assault which was when you were just 15 years old, back in 2004.

Now, the reality is, these, as your counsel has very rightly accepted, are extremely serious offences with a number of aggravating features. It is clear there was some planning here, given the use of a weapon to threaten. The fact you armed yourself with an imitation firearm and used it, particularly in the robbery offence, to point at the victim again aggravates that matter. The fact you were operating with others, and with one another as far as the attempted robbery is concerned, again weighs in my mind, and the fact that both offences were committed at night. The result of all of those matters must have been a horrendously frightening experience for the two victims of what you did.

Now, turning to you: you are 20 years old; you were 19 at the time of the earlier affray. You have, as I say, no previous convictions.

…

I have to say that I can see a basis of the concluding that there is a significant risk of committing further specified offences. However, it seems to me there is not sufficient evidence before me to suggest there is a significant risk of those offences resulting in death or serious injury, and so on that basis I am going to pass a determinate sentence in your case.

Now, in mitigation - and I have listened very carefully to the helpful mitigation put forward on your behalf by your counsel - quite clearly your plea of guilty to the affray at a somewhat later stage certainly results in me having reduced the sentence I am going to pass in respect of that to (sic) about 20%. In respect of the robbery offences and firearm offence, you pleaded guilty at the earliest opportunity, and I have reduced the sentence I am going to impose by a third as a result.

I have taken full account of everything that has been put forward on your behalf. I have read very carefully the pre-sentence report. I have also noted the letters that are put before me, particularly the letter that you have written, and also the matters that show you have, I am pleased to say, certainly shown remorse for what you have done, and indeed, there are some hopeful signs of progress whilst you have been on remand, and I certainly view that with certain - certainly is a positive sign. I note, also, the comments that have been made by people who know, or certainly have seen a better side to you, and I also take account of your early life in Angola.

Given all the factors, it is clear that, as you know and has been accepted on your behalf, all these offences pass the custody threshold, certainly the serious matters by a significant margin. I do intend to pass sentences of detention in a Young Offender Institution in your case. They will be the shortest which in my opinion match the seriousness of your offences and take into account the mitigating factors in each of your cases, and indeed the period you will spend on licence following your release."

26. It is clear from the sentencing remarks that the appellant's offences must be weighed extremely heavily against him given that the robbery and attempted robbery involving an imitation firearm are described as "*extremely serious*" and were considered by the judge to be "*significantly more serious*" than what was an "*extremely serious affray*". As indicated by the Presidential panel of the Upper Tribunal in the head note of **Sanade and others (British children - Zambrano - Dereci) [2012] UKUT 00048(IAC):**

> "The more serious the offending, the stronger is the case for deportation, but Parliament has not stated that every offence serious enough to merit a penalty of twelve months or more imprisonment makes interference with human rights proportionate."

27. We noted that there were aspects of the sentencing remarks that went in the appellant's favour, however. He had no previous convictions and he pleaded guilty. He had not known that others in the affray had knives. He had "*shown remorse*" and had shown "*hopeful signs of progress*" whilst on remand.

28. The sentencing judge had before him, as we did, the Pre-Sentence report (PSR) dated 27 November 2008. In essence, this expresses the same positive and negative features that we have noted in the sentencing remarks. The PSR identified that the motivation for the offending "*was financial gain with the trigger possibly being financial difficulties and peer influence.*" The appellant's risk of reoffending was assessed as medium even though he did not have a significant pattern of offending. It was accepted that "*[h]is early history and his subsequent family difficulties have contributed to him currently being on the margins of society, where he has started to offend*." It was accepted that he had "*expressed remorse*" and "*appeared pro-social in attitude and anxious to improve his circumstances so he does not reoffend in future*." It was also found positive that he did not have a substance abuse problem.

29. We bore in mind these varying aspects of the appellant's criminal offences when reaching our conclusion.

30. Turning to the other **Boultif** criteria that have purchase in this case, the appellant has been in the UK for 12 years, since the age of 13. This is quite a long period of time and included almost all of his formative teenage years. Against that, the appellant's presence in the UK has always been unlawful.

31. The appellant's conduct since his arrest in 2008 has been positive. He has not reoffended. He has continued to show the "*hopeful signs of progress*" noted by the sentencing judge, attending courses and obtaining qualifications whilst in prison and continuing to do so after his release, building on the GCSE qualifications he obtained while at school. We accepted that his conduct since his period of imprisonment reflects the remorse that he has expressed.

32. Of particular note is the voluntary work he undertook for the Nutmeg Community from September 2010 to July 2012. As indicated above, we accepted at its highest the evidence of Ms Bernardo from that organisation. The appellant assisted in running

workshops for young people in order to try to avoid them being drawn towards offending behaviour. In her statement, Ms Bernardo found that the appellant had made "*excellent contributions*". In her oral evidence before the First-tier Tribunal she said that his:

> "contribution to the organisation was highly important. She found him to be a completely different person since his conviction for robbery. She said he had a few problems getting on with people at first but his communication skills have improved to the extent that young people were able to confide in him."

It was our view that the appellant must be given full credit for his work with Nutmeg Community and that it was a significant factor to be weighed in his favour.

33. It is accepted that the appellant has a number of relatives in the UK, including his father, a half-brother, uncles and aunts and cousins. He has some contact with these relatives but it was not seriously argued that his relationships with them could amount to a family life albeit they form part of the private life he has established in the UK since 2001. We accepted that he has no relatives remaining in Angola, his mother and her current family living in Portugal.

34. It is also accepted that that the appellant has a genuine and subsisting relationship with his partner, Deborah Rose, who has lived in the UK for most of her life. We accepted that this relationship weighed in the appellant's favour. Ms Rose has acted in support of the appellant during his detention and throughout these proceedings. We accepted that Ms Rose, who was only ever lived in either Germany or the UK, could not reasonably be expected to accompany the appellant to Angola and that if he is deported this would effectively end their relationship. It remained the case that, in our judgement, somewhat less weight should be placed on the relationship with Ms Rose as it was formed only after the appellant had been served with a deportation order and the couple have never lived together.

35. We accept that the appellant has limited ties to and knowledge of Angola given that he came here at the age of 13, some 12 years ago. We did not accept that he has no ties or knowledge of the country at all, however, given that he spent the first 13 years of his life there. That said, we accept that his social, cultural and family ties to the UK are much stronger than any he will be able to establish for some time on return to Angola. We recognise, as indicated in the country evidence relied upon by the appellant, that Angola will offer him far more limited opportunities for education, work and so on to those he might enjoy in the UK.

36. Ms Umoh-Abuidu commented on the respondent's delay in dealing with the appellant's case, the appellant having been released from criminal detention over 2 years ago. It will be evident from the background set out above, however, that the respondent informed the appellant of his liability to deportation in early 2009, only a few months after he was sentenced and that there have been a number of attempts to deport him since then, the failure of which cannot solely be laid at the door of the

respondent. It appeared to us that little weight, if any, fell to the appellant's side of the balance in this regard given that he has been aware since early 2009 of the respondent's intention to deport him, his withdrawal of two FRS applications in 2009 and that the current proceedings arise from his own application in October 2012 made at a time when the respondent was again taking steps to deport him to Angola.

37. Ms Umoh-Abuidu also submitted that the appellant's family background, being brought here illegally by his father, his father's own immigration difficulties and the domestic circumstances that led to the appellant leaving home at a young age, should also be weighed in his favour. We accepted that the evidence before us did not suggest that appellant has had particularly positive or stable family support.

Conclusion

38. Having set out our view on the competing factors in this matter, we must come down on one side of the balance.

39. In the final analysis, it was our view that the seriousness of the appellant's offending behaviour brought the balance down in favour of the public interest and made the interference with his family and private life proportionate. Put simply, his "*extremely serious*" offences were *so* serious that the factors in the appellant's favour, even when weighed cumulatively and at their highest, were not sufficient outweigh the public interest in the deportation of the appellant.

Decision

40. **The determination of the First-tier Tribunal disclosed an error on a point of law and was set aside.**

41. **We re-make the appeal as refused.**

Signed:
Upper Tribunal Judge Pitt Dated: 22 August 2013