Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00515/2013

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
on 16th September 2013	**on 3rd October 2013**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MAJED MOHAMED AL-JA'ADY

Respondent

Representation:
For the Appellant: Mr Hussain - Home Office Presenting Officer.
For the Respondent: Mr Ali instructed by Ahmed & Williams Solicitors.

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a decision of a panel of the First-tier Tribunal composed of Judge Forrester and Mrs Endersby (hereinafter referred to as 'the Panel') who in the determination promulgated on the 11th July 2013 allowed the Respondent's appeal by reference to Article 8 ECHR against the decision to deport him from the United Kingdom.

Background

2. The Respondent, a national of Yemen, was born on 6th June 1986. He entered the United Kingdom on 16th February 2001 and claimed asylum four days later. His claim was refused on 5th June 2001 but as it was accepted he was an unaccompanied minor he was granted ELR until 5th June 2005. On 2nd June 2005 he made an 'in time' application

for ILR which was only dealt with by the Secretary of State at the same time as the decision to deport in 2013.

3. In March 2003 the Respondent was arrested for being in possession of Class A drugs and on 1st December 2003 at Sheffield Crown Court was convicted on two counts of (1) possessing Class A controlled drugs with intent to supply - Heroin and (2) possessing Class A controlled drugs with intent to supply - Cocaine. On 5th January 2004 he was sentenced to 46 months detention in a young offender institution. On 2nd November 2007 a liability to deportation letter was sent which he completed and returned on 22nd November 2007. A similar letter was sent on 25th January 2013 which the Respondent also responded to by returning the completed questionnaire with further representations on 20th February 2013.

4. On 25th April 2013 a decision to make a deportation order was made and served upon the Respondent without reference to his claim for asylum although a subsequent letter dated 1st July 2013 contained a rejection of the claim for asylum made in the further representations of February 2013.

5. Having considered the evidence and submissions the Panel set out their findings from paragraph 13 of the determination. Key findings made by the Panel include that since attaining the age of 18 and on release from custody the Respondent has show himself to be an exemplary citizen who has learnt his lesson and the error of his ways [20], that the delay to which he has been subjected is gross and inordinate [21], that he did not constitute any threat to the public or was not likely to commit further crimes and having considered the guidance in Maslov the public interest did not demand his expulsion [22], the Respondent has for the last eight years demonstrated an ability to put behind him the consequences of a crime committed when a vulnerable juvenile [23], he has over the past four years had a close and settled relationship with the person to whom he is now married and whom wish to re-marry again in the UK. Removal of the Respondent will mean separating this unit is it was not possible for his partner to relocate to Yemen [24], and that the Respondent has no prospect of finding family or support in Yemen as the Red Cross have been unable to locate any member of his family and he has spent more than half of his life, including all his formative and adult years, away from that country. His skills and contacts at a private and family level have been obtained in the UK as the evidence testifies [25].

The Grounds

6. The Secretary of State sought permission to appeal on three grounds which can be summarised as follows:

i. The Panel failed to have regard to the Immigration Rules in making its Article 8 assessment.

ii. The Panel reached a conclusion without giving adequate consideration to the public interest in removal in the proportionality assessment and so misdirected itself in law. The grounds allege the Respondent's personal circumstances were less compelling than those found in SS (Nigeria) [2013] EWCA Civ 550 and that if the Panel had considered the public interest it may well have reached a different conclusion.

Discussion

7. Having considered the evidence and submissions made by the advocate's I announced in court that it is my decision that no material error had been proved in relation to the findings of the Panel which must therefore stand. I now give my reasons.

8. The chronology shows the Respondent was convicted on 1st December 2003 in relation to offences committed as a minor. He was in fact still under 18 at the date he was sentenced. Notwithstanding it being alleged that the Respondent's conduct and criminality is such that the interests of society require his removal from the United Kingdom it was not until 25th February 2013 that a decision to deport him from the United Kingdom was made by the Secretary of State. I find the reference in paragraph 3 of the determination to a deportation order being made is an error but not one that has been shown to be material. No order was made as there is no right of appeal against a signed deportation order in circumstances where it is not an automatic deportation case. The decision under appeal is the decision to make the deportation order which gives rise to an in country right of appeal.

9. The significance of the chronology is that it was eight years from the date the Respondent was sentenced and seven years ten months from the date that he was released back into the community that the Secretary of State finally made the decision which, the chronology also indicates, was only made when the threat of judicial review proceedings was invoked by the solicitors advising the respondent in October 2012. Further details of the events are set out in paragraph 21 of the determination.

10. In Yousuf (Somalia) v SSHD [2008] EWCA Civ 394 the Court of Appeal said that the amount of time the Home Office allowed to pass before serving a deportation order did not create any kind of legitimate expectation that the claimant would not be deported, but it did mean that the Home Office, and, in turn, the Tribunal, had to consider a period in which, unlike most deportees who had offended, the

claimant had been able to show himself capable of living a law abiding life.

11. No explanation was given for the Secretary of State's failure and the Panel did not find the delay created a legitimate expectation but clearly placed weight upon the uncontested evidence that during the period of delay the Respondent had shown himself capable of leading a law abiding life.

12. The ground alleging the Panel failed to consider the Immigration Rules has no merit as in paragraph 17 the determination the Panel state "We accept that an application of the Immigration Rules to the facts of the Appellant's case leads to the decision that he be deported". This is clearly a finding that he could not succeed under any aspect of the Rules including those relating to the way in which the Secretary of State believes Article 8 should be assessed.

13. The Panel correctly identified that it was necessary to consider the case by reference to Article 8 ECHR and referred to the relevant case law in paragraph 18 of the determination.

14. This is a case in which the Respondent is lawfully resident in the United Kingdom. The chronology shows that he was granted leave to remain on 5th June 2005 and thereafter made an in-time application for indefinite leave to remain. His leave was therefore extended by virtue of section 3C of the 1971 Act which remains the case until a final determination of this appeal. Although this is not an appeal against a decision made under UK Borders act 2007 in RG (Automatic deport – Section 33(2)(a) exception) Nepal [2010] UKUT 273 (IAC) the Tribunal held that (i) when considering the automatic deportation provision in s. 32(5) UK Borders Act 2007, and the exemption at s.33(2)(a) relating to the claimant's private and family life (Article 8 ECHR), the Tribunal must give careful consideration to the factors set out at paragraphs 70-73 of **Maslov v Austria [2009] INLR 47 ECHR**; and (ii) particular care is required in relation to the consideration of the Article 8 ECHR impact on those who were lawfully resident in the UK at the time when the offence was committed.

15. In MW (Democratic Republic of Congo) v Secretary of State for the Home Department [2011] EWCA Civ 1240 that Appellant had various convictions as a juvenile, including stealing a motor vehicle. In adult life he had been fined for possessing an offensive weapon and had been convicted of driving whilst disqualified on 4 occasions. His sentences included 28 days youth custody and then, most recently, 16 weeks imprisonment suspended for two years. The Court of Appeal held that **Maslov v Austria** clearly provided that very serious reasons were required to justify the deportation of a settled migrant who had lawfully spent all, or the major part, of his childhood and youth in the host country. Whether the reference to very serious reasons was

described as a rule, test or threshold, or as an inevitable consequence of the criteria in **Uner v Netherlands (2006) ECHR 46410/99**, Maslov pulled the threads together and in so doing made it clear that very serious reasons are required to justify expulsion in such a case. In the absence of very serious reasons the deportation of a settled migrant will not be proportionate under Article 8. Although the Claimant's offences of driving whilst disqualified were frequent, it was difficult to see how they could sensibly be described as very serious reasons.

16. The fact the Respondent has been convicted on two counts of possessing Class A drugs does not automatically mean that Maslov can be distinguished as demonstrated by the decision in Khan v UK (application no. 47486/06) ECtHR (Fourth Section) in which the Appellant entered the UK in 1978 aged three. All his immediate family were in the UK. He was granted ILR. He had various convictions and in 2003 was sentenced to seven years imprisonment for the importation of heroin. It was accepted that removal would interfere with his private life and his family life with a partner and daughter. However, having regard to the length of time he had been in the UK, his young age on arrival, the lack of continuing ties to Pakistan, the strength of ties here and the fact that he had not re-offended, removal was disproportionate.

17. The Panel refer to the public interest by reference to the case of Masih [2012] UKUT 00046 and to the submissions made by both advocates included a reference to Maslov made on behalf the Respondent. Whilst paragraph 19 of the determination, in which the Panel set out at length quotes from the case of JO, adds little to the decision it does show that the Panel were aware of the European jurisprudence. The key principle arising from Maslov is that very serious reasons were required to justify the deportation of a settled migrant who had lawfully spent all, or the major part, of his childhood and youth in the host country. Having analysed the evidence the Panel found that as a result of the fact the Respondent had demonstrated himself to be an exemplary citizen who posed no ongoing threat to the public or who was likely to commit further crimes in the future, no such reasons had been proved. The Secretary of State has failed to show this is a conclusion finding outside the range those the Panel was entitled to make on the evidence and the grounds are, in effect, no more than a disagreement with the findings made.

18. In relation to the reference to SS (Nigeria), this is a decision relating to the weight to be given to an automatic deportation made pursuant to UK Borders Act in which the United Kingdom Parliament has set out the circumstances in which an individual must be removed from the United Kingdom, but this is not an automatic deportation appeal. The fact there may be difference between the circumstances of this Respondent and those of the appellant in SS has not been shown to be

material. The Panel considered the facts relating to this case and arrived at a decision based upon the evidence and legal submissions made to them.

19. There is reference in the determination to the refusal of an asylum claim made in further submissions dated February 2013 which the Respondent is said only to have become aware of the time at the hearing when a letter dated 1st July 2013 was served upon him. The Respondent's grounds of appeal include an appeal against the refusal of asylum, according to the summary of his grounds of appeal in paragraph 4 of the determination, although the Panel allowed the appeal by reference to Article 8 ECHR only without making any specific finding upon the asylum claim. It was not argued before me that this is a material error of law requiring the determination to be set aside, on the basis the Panel failed to determine a matter they were required to do by law, and it is clear from reading the evidence relied upon, skeleton arguments filed, and submissions made on the Respondent's behalf that the asylum claim was not pursued before the Panel. The Respondent's case as pleaded and presented relied solely upon Article 8 ECHR. The Panel proceeded to determine the matter by reference to the ground on which the decision was challenged although it is arguable that for the sake of completeness they should have specifically recorded the Respondent's position as it unfolded at the hearing and dismissed the appeal on asylum, humanitarian protection, and under Articles 2 and 3 ECHR. The fact they were aware of the claim and did not allow the appeal on this basis allows me to infer that the appeal on these grounds was rejected. The asylum claim has no merit based on the facts and had I been remaking the decision I would have dismissed it.

20. I also note in the refusal letter specific reference to the application for leave to remain submitted on 5th June 2005 following completion of four years exceptional leave to enter. This was refused by the Secretary of State as it was considered the public interest required the Respondent's deportation from the United Kingdom. Following the rejection by the Panel of this argument the ILR decision will require further consideration and, on the facts and in the absence of any other reason, should be granted. That is no doubt a matter the Respondent will take up with the Secretary of State when considering the nature and duration of the leave to which is now lawfully entitled.

Decision

21. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

22. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008) as there was no request for anonymity and the need for such an order has not been established on the facts.

Signed…….
Upper Tribunal Judge Hanson

Dated the 1st October 2013