



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/00996/2013

**THE IMMIGRATION ACTS**

Heard at : Manchester Crown Court  
On : 29<sup>th</sup> November 2013

Determination Promulgated  
On : 9<sup>th</sup> December 2013

Before

Upper Tribunal Judge McKee  
Upper Tribunal Judge Martin

Between

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

and

**MAIKA NAITINI**

Respondent

**Representation:**

For the Appellant: Mr Geoff Harrison, Home Office Presenting Officer  
For the Respondent: Mr Tom Royston, instructed by Lei, Dat & Baig Solicitors

**DETERMINATION AND REASONS**

1. Mr Naitini, a native of Fiji, enlisted in the British Army in July 2008, which rendered him exempt from immigration control. He had signed up for a twelve-year stint, and had served a tour of duty with the Royal Welch Fusiliers in Afghanistan when his promising military career was cut short. He was discharged from the Army in June 2012, following his conviction of a serious offence. He was found guilty of causing grievous bodily harm to a young woman when they were both drunk, and she had apparently taunted him. A sentence was passed of 2½ years in prison.

2. This sentence rendered Mr Naitini liable to 'automatic deportation' under section 32(5) of the UK Borders Act 2007, and a deportation order was duly made on 3<sup>rd</sup> May 2013. An appeal to the First-tier Tribunal came before a panel comprising Judge Crawford and Mr Armitage on 9<sup>th</sup> August, when oral evidence was taken from Mr Naitini and his girl-friend, Sarah McLaughlin. The appeal was allowed under Article 8 of the European Convention on Human Rights, an outcome which is habitually challenged by the Secretary of State. Permission to appeal to the Upper Tribunal was granted by Judge Cheales, and so the matter has come before us today.
3. At the outset of the hearing we indicated that three of the four paragraphs setting out the grounds of appeal could now be discounted. The first two expressed disagreement with the 'two stage' approach adumbrated by the Upper Tribunal in *MF (Nigeria)* and since followed in a line of other cases. The two-stage approach has recently been endorsed by the Court of Appeal in *MF (Nigeria)* [2013] EWCA Civ 1192, which means that, where an appellant fails to satisfy the provisions of paragraphs 398-399A of the Immigration Rules in resisting deportation, tribunal judges should go on to consider the appeal within the wider ambit of Article 8, as expounded by Strasbourg and by our own senior courts. That is what the panel did here.
4. The third paragraph complained that the panel had conducted "an inquisitorial analysis" into the best interests of Mr Naitini's two British children, in a manner deprecated by Lord Justice Laws in *SS (Nigeria)* [2013] EWCA Civ 550. That complaint is ill-founded. Laws LJ did indeed say that "*the circumstances in which the tribunal should exercise an inquisitorial function on its own initiative will be extremely rare*", but this was with reference to the sort of inquisition advocated by HHJ Thornton in *Tinizaray*, where the tribunal was urged to answer the questions set out in the 'check list' at section 1 of the Children Act 1989, and if necessary conduct its own inquiries in order to find the answers. In *AA (Iran)* [2013] EWCA Civ 1523 Maurice Kay LJ has recently remarked that "*Tinizaray* should receive its quietus." The panel here did not follow *Tinizaray*.
5. That left only the fourth paragraph of the grounds, which contends that the panel did not give adequate consideration to the public interest, in particular "*the need to deter others and to prevent serious crime generally and to uphold the public abhorrence of such offending.*" Mr Harrison very fairly acknowledged that the challenge to the 'two stage' approach had now fallen away, and that it was only the First-tier Tribunal's assessment of the public interest when carrying out the proportionality balancing exercise which could arguably be regarded as legally erroneous.
6. We did not need to hear from Mr Royston, since it was clear to us that the First-tier panel had given proper and adequate consideration to the public interest when weighing the competing factors in the Article 8 balance. They were well aware of the seriousness of the offence committed by the appellant, describing it as "*appalling conduct, which is totally unacceptable in a civilised society.*" While dealing with the best interests of Mr Naitini's two children as 'a primary consideration', they recognised that "*there are some circumstances where the offence is so serious that deportation outweighs the best interests of the children.*" They acknowledged in terms that there was "*a strong argument that [the appellant] should be deported.*" But having found there to be no evidence that Mr Naitini constituted a danger to the

public or that he was likely to re-offend, the panel concluded that the many factors weighing in Mr Naitini's favour (which we have not listed here) outweighed the public interest, in the particular circumstances of the case.

7. This was a conclusion which the panel were plainly entitled to reach, on the evidence before them. Among the factors weighing in Mr Naitini's favour was his service with the British Army in Afghanistan. As emphasized by politicians of all hues, the public owes a debt of gratitude to those who have risked life and limb protecting the vital interests of this country in such a dangerous theatre of war. This was a factor which rightly added weight to Mr Naitini's side of the balance. We might also observe that the violent outburst which caused Mr Naitini to end up in prison was not the sort of premeditated wickedness – such as drug dealing, robbery and burglary – that rightly triggers the deportation of foreign criminals, but a 'one off' act of aggression which, on the evidence before the panel, was unlikely ever to happen again. In fine, the panel made no error of law.

### **DECISION**

The determination of the First-tier Tribunal is upheld, and the Secretary of State's appeal is dismissed.

Richard McKee  
Judge of the Upper Tribunal

A handwritten signature in blue ink, appearing to read 'R. McKee', with a large, sweeping flourish underneath the name.

29<sup>th</sup> November 2013