Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01345/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 28th November 2013	**On 13th December 2013**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HI RUY HAGOS BEYENE

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Presenting Officer
For the Respondent: Miss C Hulse, Counsel instructed on behalf of Duncan Lewis & Company Solicitors

DETERMINATION AND REASONS

1. This is the appeal of the Secretary of State but for convenience I will refer to the original Appellant, Mr Hi Ruy Hagos Beyene, a citizen of Ethiopia born on 14th January 1989, as the Appellant herein.

2. The Secretary of State has been given permission to appeal against the decision of the First-tier Tribunal panel (Judge Adio and Mrs S I Hewitt JP) who in a determination promulgated on 19th September 2013 allowed his appeal against the Respondent's decision that Section 32(5) of the UK Borders Act 2007 applies.

3. The Appellant arrived in the United Kingdom using his own passport on 19th December 2004 and claimed asylum as a dependant on his mother's claim. The application was refused on 2nd February 2005 and the family's appeal against this decision was dismissed on 5th May 2005. The family's appeal rights against the refusal of asylum were exhausted on 11th November 2005. On 3rd April 2008 the family were granted indefinite leave to remain outside the Rules.

4. On 2nd April 2009 at Blackfriars Crown Court the Appellant was convicted of an offence of robbery and 30th April 2009 he was sentenced to two years' imprisonment. The Appellant had been on bail for the previous eighteen months.

5. On 14th July 2009 the Appellant was notified of his liability to automatic deportation and on 6th August 2009 the Appellant submitted representations against deportation which amounted to a fresh claim for asylum in his own right. He was interviewed in connection with that claim and further representations were submitted. A second notice of liability to automatic deportation was issued to the Appellant on 27th June 2011. Further submissions were made on behalf of the Appellant.

6. On 18th June 2013 a deportation order was signed against the Appellant and a decision was made that Section 32(5) of the UK Borders Act applied.

7. The Appellant exercised his right to appeal that decision and the appeal came before the First-tier Tribunal panel, consisting of First-tier Tribunal Judge Adio and Mrs S I Hewitt JP, at Hatton Cross on 5th September 2013. The panel heard oral evidence form the Appellant, his family members and his partner in respect of his claim that he fell within one of the exceptions identified in the legislation. In a determination promulgated on the 19th September 2013, the panel allowed the appeal on Article 8 grounds.

8. Permission to appeal was sought on behalf of the Secretary of State. On 7th October 2013 First-tier Tribunal Judge Cruthers refused permission to appeal for the following reasons:-

> "The grounds on which the Respondent seeks permission to appeal do not establish that a grant of permission would be appropriate:
>
> The primary argument in the grounds seem to be that if an appeal cannot succeed pursuant to the 'new Article 8 Rules', then a Tribunal cannot properly allow an appeal on 'classical Article 8 principles.' But whether the Respondent likes it or not, that argument is contrary to the current case law in the area, and probably contrary to this country's obligations under the ECHR.
>
> The secondary argument in the grounds seems to be that if this sort of appeal does not succeed pursuant to the 'new Immigration Rules', the Tribunal must identify some

> exceptional circumstances that would result in an unjustifiably harsh outcome before it can allow this sort of appeal. Again, that suggested approach is contrary to existing case law.
>
> Referring to specifically to (b) and (c) on the second stage of the Respondent's grounds, it may be true that the Tribunal made no specific finding as to there being insurmountable obstacles to any relocation of the Appellant, his girlfriend and his family members to Ethiopia. But there is no material error here because the 'insurmountable obstacle test' is relevant only to the new Immigration Rules, and not to the application of classical Article 8 principle.
>
> Referring specifically (to (d)) on the third page of the Respondent's grounds, the likely consequences of undue delay on the Respondent's part are self-evident (as explained in **EB (Kosovo) [2008] UKHL 41**) and the Tribunal did not need to spell out the particular consequences of delay in this particular case before taking that delay as a factor weighing in the Appellant's favour.
>
> The Tribunal took into account the seriousness of the only offence the Appellant has been convicted for in this country (see paragraph 35). Overall, the Tribunal is entitled, by reference to the factors explored at paragraphs 33 to 57, to find that the Respondent's decision represented a disproportionate breach of the Article 8 rights of the Appellant and others affected by the Respondent's deportation decision of 18th June 2013 (as per **Beoku-Betts [2008] UKHL 39**).
>
> The grounds do not identify any arguably material error of law. There was no basis upon which to interfere with the decision of the First-tier Tribunal."

A renewed application for permission to appeal was made before the Upper Tribunal and Upper Tribunal Judge Rintoul on 23rd October 2013 granted permission stating:-

> "It is arguable that in allowing the appeal the First-tier Tribunal failed to give adequate reasons why they considered the Appellant's circumstances were such that, although he did not meet the requirements of paragraphs 399 or 399A, there were nonetheless exceptional circumstances such that he should not be deported. Whilst there is less merit in the Respondent's reliance on **HH [2012] UKSC**, particularly in the light of the observations in **MF** at [34], [37] and [39], all grounds are arguable**."**

9. Thus the appeal came before the Upper Tribunal. The Secretary of State was represented by Mr Melvin, Senior Presenting Officer and the Appellant by Miss Hulse, who appeared on his behalf before the First-tier Tribunal. Mr Melvin relied upon the grounds as drafted that the panel erred in law by applying a two stage test and should have considered whether "exceptional circumstances" applied. In this case, he submitted that the Secretary of State mounted a "reasons challenge" against the determination of the panel that they had failed to give adequate reasons for reaching the conclusion that the Appellant succeeded in establishing "exceptional circumstances" or in the alternative "outside the Rules" under Article 8. In particular, the private life/family life aspect of the case he did not give reasons as to why the family life and private life existed and in respect of his partner/girlfriend, the evidence was that she would return with him to Ethiopia.

10. The next challenge on behalf of the Secretary of State was that the panel had failed to give weight to the legitimate aim of preventing crime and disorder and had failed to take into account that it was not a matter of risk of reoffending but the issue of deterring other foreign nationals. He submitted that the panel gave scant regard to the public interest and the panel therefore erred in law in their consideration of the weight that should be attached to the public interest.

11. As to the issue of delay, the grounds acknowledged that there had been "handling errors" on the part of the Secretary of State however he submitted that delay was not determinative and that the panel had failed to address the effects of delay when considering the facts of the appeal. He submitted that there was nothing on the facts of this case to show any compelling circumstances; he could not meet the new Immigration Rules and this was an unreasoned judgment of the panel and they erred in law. He submitted that the decision was approaching that of irrationality and thus the decision should be set aside.

12. Miss Hulse relied upon the Rule 24 response that had been issued on behalf of the Appellant. She submitted that the determination of the panel did not disclose any error of law and that whilst they did not have the advantage of the Court of Appeal decision in **MF (Nigeria) v SSHD [2013] EWCA Civ 1192**, they could not have been criticised for following the approach of **Izuazu** and the two stage approach which was the law at the time. In any event, as noted in the Rule 24 response, the decision of **MF** did not change the substance of what needed to be done in assessing an Article 8 claim in the context of deportation. For those reasons she submitted that the first ground raised on behalf of the Secretary of State was not made out.

13. She submitted that the grounds were simply a disagreement with the findings of fact made and the conclusions reached by the panel. She submitted that they had gone through any aspect of the facets of the appeal and applying the decision of **R (Iran)** this being a "reasons challenge", it was easy when reading the determination to see how the panel had reached their conclusions and on what evidence. This was a very careful determination she submitted and what they have done is to arrive a decision which is not in accordance with the Home Office view. She submitted that the question the Tribunal should consider was whether or not the panel had considered all the evidence before them and that the answer to that question was that it appeared that they had. As to the issue of delay, the panel did not treat this as determinative and it was only one factor that they took into account.

14. As to the ground in which it is suggested that the panel failed to give consideration to the public interest and the seriousness of the offence, the panel made specific reference to the seriousness of the offence in the determination not only in the light of the risk of reoffending but also taking account the issue of deterrence. The panel took into account that whilst he had a troubled adolescence, having abused drinks and drugs, they did not find that to be an excuse for his conduct. However, they took into account the evidence before them that he had turned his life around since the offence during the pre-trial period of eighteen months but also in the last three years since his release from prison. They noted that he had undertaken a degree

(which he completes in January), that he had been of previous good character having committed only one offence although it is plain that they considered it to be a very serious offence indeed. There was no minimisation of this offence and looked at it in the light of all the other aspects.

15. As to the issue of the family life/private life relating to his family relatives and his girlfriend, it was not necessary to show an exceptional degree of dependency. On the facts of the case the family had left Ethiopia together, he had come as a minor and during that time they had never been separated and had a strong bond.

16. In summary she submitted that the determination was careful and reasoned and that they had looked at all the factors and had not left anything out of account. They did not find it to be proportionate for the Appellant to return to Ethiopia. She therefore submitted that the appeal by the Secretary of State should be dismissed and the decision stand.

17. Mr Melvin by way of reply reiterated that the panel had failed to consider the public interest sufficiently and that in respect of his relationship, he had entered into the relationship at a time when he knew that he was liable for deportation.

18. I reserved my determination.

Discussion and decision:

19. The first ground advanced on behalf of the Respondent relates to the panel having erred in law by applying a two stage test (which had derived from the principles set out in **MF (Nigeria) [2012] UKUT 00393 (IAC)**. Since the appeal was heard by the First-tier Tribunal panel, **MF (Nigeria)** has been the subject of further hearing before the Court of Appeal. The court stated that the question being addressed by a decision maker applying the new Rules set out at paragraph 398 of HC 395 in considering a claim founded upon Article 8 of the ECHR and that being addressed by the judge who carries out what was referred to in **MF (Article 8 – new Rules) Nigeria** as the second step in a two stage process, is the same one that, properly executed, will return the same answer. Furthermore it was stated that the new Rules relating to Article 8 claims advanced by foreign criminals seeking to resist deportation are a complete code and the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence (see **MF (Nigeria)** at paragraph 43. Furthermore, the court, observing that whether a case satisfies the requirements of paragraph 398 and 399, is a question partly of hard-edged fact and partly of evaluation. The court noted that Rule 398 expressly contemplates weighing "other factors" against the public interest in the deportation of foreign criminals and these necessarily included all the other factors relevant to proportionality. By reference to "exceptional circumstances" in Rule 398 did not herald a restoration of the exceptionality test.

20. Thus in those circumstances the panel in carrying out a proportionality assessment either "inside the Rules" or "outside the Rules," could not be categorised as erring in law.

21. In the context of the proportionality assessment it is submitted on behalf of the Secretary of State that the panel failed to give adequate reasons for its decision and further, failed to weigh in the balance the public interest identified in the Rules and the issue of deterrence.

22. The starting point is to consider the decision of the First-tier Tribunal. The panel heard from a number of witnesses including the Appellant. His mother Hamanot Tesfamariam Haile gave evidence as did his brother Abl Hagus Beyene and his partner, Sheren Hibu, who is a recognised refugee from Eritrea. The panel set out the evidence heard from the witnesses at paragraphs 4 to 21 of the determination. The panel also had regard to submissions made on behalf of the Secretary of State by the Presenting Officer and also by Miss Hulse, who appears on behalf of the Appellant before the panel as she does today in these proceedings.

23. The findings of fact made in respect of the appeal are set out at paragraphs 33 to 57. The first issue that the panel was required to consider related to the certificate under Section 72 of the Nationality, Immigration and Asylum Act 2002. As the panel set out at paragraph 34, the Section states that a person shall be presumed to have been convicted of a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if:-

    (a) he is convicted in the UK of an offence, and

    (b) sentenced to a period of imprisonment of at least two years.

    In this case, the Secretary of State took the view that as the Appellant had a conviction for robbery he had not been able to rebut the presumption that his continued presence in the UK would constitute a danger to the community. The panel considered the evidence before them and made a number of findings in relation to the issue under Section 72 of the 2002 Act. The panel took into account the Appellant's background that had been elicited from the evidence of his family members. As recorded in the determination, the Appellant entered the United Kingdom as a minor dependant child with his mother and brother. His father had died six months before he had come to the UK and the evidence before the panel related to the difficulties that the Appellant had in settling in the United Kingdom, which was exacerbated by the family being dispersed to Newcastle and having been the subject of attacks on three occasions during this period of time. The panel however did not find that to be an excuse for having committed the crime for which he was convicted. Nonetheless they took into account his antecedent history in relation to his criminal background noting that this had been the only offence for which he had appeared before a court and whilst he had been on bail for the previous eighteen months before his sentence, he had not committed any crime during that period. They also took into account that he had been released from prison on 22nd June 2010 and that at the date of the hearing there had been a period of over three years that the Appellant had been at large in the community and had not committed or been convicted of any other offence.

24. The panel had documentary evidence from the probation services relating to this Appellant and they noted at paragraph 36 that he had made

> "a conscience and positive change to his lifestyle and had overcome his previous substance misuse issues. He appeared to have embarked on a new and social way of life and seemed determined not to have any further contact with the criminal justice system in the capacity of a perpetrator of crime."

25. The panel also noted from the probation service records that when the Appellant was on licence he had attended all his appointments punctually and had taken an active part in all the rehabilitative work that was carried out with him (see [36]).

26. The panel considered the oral evidence they had heard against the background of the probation service's involvement and in particular, a letter from the probation officer dated 11th July 2011. They observed at paragraph 37, that having heard the evidence from the Appellant's brother, who had noted a lot of changes in the Appellant, they also took into account that the Appellant was now studying for a degree and thus having considered all of those matters the panel stated as follows:-

> "We are prepared to find without any reservation that the Appellant has rebutted the presumption that his continued presence in the United Kingdom will constitute a danger to the community."

Thus the panel did not uphold the certificate under Section 72 for the reasons that they gave at paragraph 33 to 37.

27. The panel then turned to the Appellant's asylum claim and observed that the Appellant originally had been a dependant on his mother's claim but had now made a claim in his own right. The basis of his claim was that he had left Ethiopia as a minor due to his mother's support of the political party known as the Oromo Liberation Front ("OLF"). It was noted that the Appellant himself did not attend OLF meetings with his mother, who had not only done so in Ethiopia but did so in the United Kingdom, but that he did not support or have any interest in political parties. They also found that he had no contact with anyone in Ethiopia. The panel were referred to the background evidence in respect of Ethiopia and were prepared to accept that in view of that evidence and in the country guidance decision of **MB (OLF and MTA-risk) Ethiopia CG [2007] UKAIT 0030** that those who were perceived to be OLF members or sympathisers will be at risk upon return to Ethiopia. The panel therefore considered the Appellant's background in the light of the country material that that been placed before them. They noted that the Appellant had not participated in any OLF activities in the United Kingdom and had never been arrested or threatened by the authorities when a minor in Ethiopia. Whilst his mother had attended meetings in the United Kingdom, the panel reached the conclusion that they were not satisfied that there was a reasonable likelihood that the Appellant would be perceived by the authorities as an OLF member. They reached the conclusion that there would be no indication that the authorities would know that the Appellant's mother was carrying out OLF activities in the UK.

Therefore they did not accept that he would be at risk of persecution on the grounds of imputed political opinion if returned to Ethiopia.

28. The panel then turned to the issue under the UK Borders Act. As set out earlier the panel reminded themselves this was an automatic deportation case and applying the case of **Masih** the panel directed themselves in such case, "Account must be taken of the strong public interest in removing foreign citizens convicted of a serious offence which lies not only in the prevention of further offences on the part of the individual concerned but in deterring others from committed them in the first place." The panel began as their starting point, an assessment of the facts of the offence for which the appellant had been convicted of as set out on the remarks of the sentencing judge. The panel at [47] observed that the sentencing judge noted that the Appellant's offending was persistent, that he targeted a vulnerable man and that there was also the spectre of the use of a knife (although the Appellant did not have a knife). The trial judge also noted that the Appellant was of previous good character and that he had not committed any offence in the course of the previous eighteen months after the offence had been committed but before he had been sentenced. As the panel noted the judge in the sentencing remarks made reference to this and reduced his sentence accordingly.

29. The panel then considered the Immigration Rules. At [50] the panel applied paragraph 396 which states that "Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with Section 32 of the UK Borders Act 2007." The panel correctly identified that paragraph 398 of Rules stated that

> "Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention paragraph 399 or 399A has to be considered. If that does not apply it will only be exceptional circumstances that the public interest in deportation will be outweighed by others factors."

30. It is common ground that the Appellant could not satisfy the provisions of either paragraph 399 or paragraph 399A on the facts of the appeal. The panel set out their findings in this regard at [51]. Whilst the panel did not state in terms that they were considering the Appellant's appeal under paragraph 398 (exceptional circumstances) the panel considered his claim on the principles of Article 8 (outside the Rules) in line with the jurisprudence at the time, namely **Izuazu (Article 8-new Rules) [2013] UKUT 0045**. The panel therefore applied the well-established five stage test in **Razgar**. In doing so they found that the Appellant had family life in the UK with his mother and brother noting that they had left Ethiopia together as a family and that they had always lived together as a family since that date. They accepted the evidence that the Appellant and his siblings whilst young adults had a close and "inclusive family life with their mother." The panel stated that the Appellant's mother had been taking care of the two children since the Appellant's father died and that they had lived together since they arrived in the United Kingdom. The panel also took into account the Appellant's relationship with his girlfriend/partner Sherin Hibu, who had also given oral evidence before them. They accepted his relationship

with his girlfriend and this constituted "private life" and that the interference would have such consequences of gravity that removal would mean that the Appellant would live apart from his siblings, his mother as well as his girlfriend. The panel observed that had it not been for the current situation of the Appellant, he and his girlfriend might have been engaged with plans with to marry each other. The evidence of the Appellant was set out at [12] was that when he was released from prison he was told that he could not marry anyone otherwise it would look as if he was doing so to support an entitlement to stay in the United Kingdom. The Appellant had met his girlfriend at university after he began his second year.

31. The panel then dealt with the issue of proportionality. The panel reminded themselves again that they found as a fact in favour of the Secretary of State that "Is the strong case that this is a very serious crime committed by the Appellant. He attacked a vulnerable elderly man who he also threatened. There is a strong public interest for deterrence in this kind of case." The panel then turned to the other factors that they had indentified in the balance namely that prior to the offence he was of good character and he had only committed one offence and that he had been of "exemplary character" since the time he had been bailed for the offence of robbery before conviction, a period of eighteen months. The panel reminded themselves of the evidence that they had read from the probation officer whom they described as "speaking of him in very glowing terms" and took into account the Appellant's "numerous letters of support". They paid regard to the oral evidence they had heard from the Appellant's brother who they found to be a credible and convincing witness as regards the changes made by the Appellant and also accepted the evidence of his girlfriend as credible, that she intended to have a family with the Appellant in the future. They took into account that the Appellant had turned his life around that he was now studying for a degree, had stopped taking any drugs which was what they considered to have fuelled his previous offending behaviour and also paid regard and weight noting "There are numerous points in favour of the Appellant which satisfy us that he is not likely to commit an offence of this nature again or any other offence. All the indicators before us show that the Appellant is living a crime free life and intends to do so for the rest of his life." (see [56]).

32. The panel also took into account the issue of delay, noting that it had taken the Secretary of State over three years to issue the deportation order. As to the effects of the delay the panel stated at [57] that whilst it had given the Appellant the advantage of time to reintegrate himself into the community and to show that he was a law abiding citizen, it also demonstrated that the public interest factors had diminished. They recorded that they had already found him no longer to be a danger to the community by dismissing the certificate under Section 72 of the 2002 Act. The panel reached the conclusion that it would be a breach of the Appellant's rights under Article 8 to be deported from the United Kingdom. Thus the panel allowed the appeal.

33. I do not consider that the panel failed to give appropriate weight to the public interest when addressing the issue of the proportionality of the decision. In this appeal the panel reminded themselves that this was an automatic deportation case

and that it was not in dispute that the Appellant was a foreign criminal within the meaning of Section 32 of the UK Borders Act 2007, whose deportation was deemed to be conducive of the public good and that the Respondent must make a deportation order in respect of him unless one of the exceptions set out in Section 33 of the Act applied. In this case there were two exceptions identified on behalf of the Appellant, firstly his claim under the Refugee Convention and secondly his claim under Article 8 of the ECHR.

34. At paragraph [50] the panel, in its application of the relevant paragraphs stated:-

> "Paragraph 396 states that where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation in accordance with Section 32 of the UK Borders Act 2007. Paragraph 398 states that where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention paragraph 399 or 399A has to be considered. If that does not apply to only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors."

35. The panel in considering this issue further referred themselves to the Tribunal decision in **Misih [2012] UKUT 0046** at [46] and in particular where they stated:-

> "We note that 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."

36. Later at [47-48] they properly dealt with the facts of the offence committed by the Appellant and set out the judge's sentencing remarks:-

> "47. The Tribunal went on to state that in that case that 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. In the present case we note that the sentencing judge noted that the Appellant's offending betrays not only persistent but betrays the fact that he targeted a vulnerable man and there is also the spectre of the use of a knife here.
>
> 48. We also note that the trial judge noted the fact that the Appellant is of effective good character and that the fact he has not committed any offences in the course of the ensuing eighteen months before the offence enables a moderate sentence to be given."

37. The panel had already noted at [35] that whilst this was the only offence he had committed and that they had accepted his evidence concerning his background and the difficulties that he had settling in the UK (including attacks upon his family members), the panel stated "We find this no excuse for robbing a vulnerable victim."

38. They later concluded at [54]:-

> "We find as a fact that in favour of the Secretary of State is the strong case that this is a very serious crime committed by the Appellant. He attacked a vulnerable elderly man who he also threatened. There is a strong public interest in deterrence in this kind of case. However we have considered on the other side that this is the only offence the Appellant has been convicted of. We find that the Appellant has been of exemplary character since the time he had been bailed for the offence of robbery before he was convicted."

The panel in the determination went on to note what they found to be "numerous points in favour of the Appellant" when considering other factors weighing in the balance.

39. In reaching those findings, it cannot be said that the panel failed to consider the public interest. They clearly had regard to it and attached weight to what they described as a "strong public interest in deterring foreign criminals." It is unarguable that the legitimate aim of the prevention of crime is confined to those who are likely to re-offend and the case law indicates that in those cases affecting public confidence in the criminal justice and immigration system, the deportation of offenders has a legitimate role in the deterrence of others. Whilst the grounds challenge the determination on the basis that the panel only considered the risk of re-offending rather than the issue of deterrence, that is not a justified criticism. It is plain that the panel had firmly in mind and paid regard to the fact that as part of the public interest and the legitimate aim of the prevention of crime, that this necessarily involved the need to deter foreign criminals by leading them to understand that a consequence of their actions would be deportation. The panel expressly made reference to this at [46] and [54] where they identified "there is a strong public interest for deterrence in this kind of case." The panel, in my judgment did not seek to minimise the circumstances of the offence nor did they seek to downplay what was the serious nature of the crime committed by this Appellant when carrying out the balancing exercise.

40. I now turn to the challenge mounted by the Respondent that the panel failed to give adequate reasons in reaching their conclusions that the decision to remove was a disproportionate one. In this context I remind myself of the words of Lord Phillips MR in English at paragraph 19:-

> "I[f] the Appellant process is to work satisfactorily, the judgment must enable the [IAT] to understand why the [Adjudicator] reached his decision. This does not mean that every factor which weighed with the [Adjudicator] in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the [Adjudicator]'s conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the [Adjudicator] to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon."

41. The factors identified by the panel that were weighed in the balance in favour of the Appellant can be summarised as follows:

(i) The Appellant had committed one offence of robbery and albeit a serious offence as the panel noted, he had been of hitherto good character and in the period between the commission of the offence and before sentence (a period of eighteen months) the Appellant was on bail and had not committed any further offences. Further at the date of the hearing a further three year period had elapsed when the Appellant had led a crime free life and had not committed offences (see [34], [35]).

(ii) The panel reached the finding that he had been of "exemplary character since the time he was bailed for the offence of robbery before he was convicted." (see [54]).

(iii) In this respect the panel accepted the evidence of his probation officer that he had made an "conscious and positive change" to his lifestyle and overcome his previous substance misuse. He appeared to have embarked on a new and social way of life and seemed determined not to have any further contact with the criminal justice system in the capacity of a perpetrator of crime. It was noted that the Appellant when on licence attended all these appointments punctually and took an active part in all the rehabilitative work that was carried out with him (see [36]).

(iv) The evidence of the probation officer was supported by the oral evidence of the Appellant's brother, who the panel had the advantage of seeing and hearing from. The panel found him to be a "credible and convincing witness" in respect of the changes made by the Appellant (see [55]). They noted that he was now studying for a degree [37].

(v) They made a finding that his continued presence would not constitute a danger to the community [34-37].

(vi) At paragraph 56 the panel concluded that there were

> "numerous points in favour of the Appellant which satisfy us that he is not likely to commit an offence of this nature again or any other offence. All the indicators before us show that the Appellant is living a crime free life and intends to do so for the rest of his life."

(vii) As to family life/private life, the findings made by the panel are challenged by the respondent. The panel had the benefit of hearing from the Appellant's close family members and his partner, including his mother and brother. It is plain from the determination that the panel accepted the evidence of the Appellant's brother as "credible and convincing" [55]. In this context, whilst the Appellant was over 18, the panel reached the conclusion on the evidence before them that he had entered the UK as a dependent minor with his mother and sibling, his father having died and having no relations in Ethiopia. Since that time he had

had a "close and inclusive family life with his mother and brother". Whilst the panel did not make reference to the level of dependency, it is implicit in the findings of the panel where they went on to state that the Appellant, despite his age continued to enjoy family life with his family members. In respect of his partner/girlfriend, the panel concluded that he had established a private life with her by virtue of their relationship and that but for the current situation, which they had explained evidentially at [12], they might have been engaged with plans to marry. Additionally the panel accepted that she had given credible evidence that she intended to have a family with the Appellant (see [55]).

42. I consider that the weight to be given to the evidence was essentially a matter for the panel having heard the oral evidence of the witnesses before them. They gave sustainable reasons for reaching the conclusions concerning the extent of family and private life in their decisions.

43. The panel considered the issue of delay. It was common ground that the Respondent had taken three years to sign the deportation order and in this regard the panel noted that the effect of this had led to the situation whereby the Appellant had reintegrated himself into the country further and that the imperative to deport on the part of the Secretary of State had diminished in the light of the delay (see [57]). In the grounds filed on behalf of the Secretary of State it was acknowledged that "such handling errors took place and these were regrettable" but submitted the issue of delay should not be determinative. Such a submission is misplaced. It is plain from reading the determination at paragraph [57] that the panel did not treat the issue of delay as determinative but treated it quite properly as a factor to be placed in the balance in the proportionality exercise.

44. Having considered the grounds advanced on behalf of the Respondent I do not find that they have been made out. I have concluded that the weight to be given to the evidence was a matter for the panel who had the benefit and advantage of hearing the oral evidence before them. It is plain from the determination that they found that evidence to be both compelling and credible not only concerning the extent of family and private life but also the changes made by the Appellant since the commission of his crime, which was supported by the independent evidence of the probation officer. In the well-known case of Piglowska v Piglowski [1999] UKHL 27, Lord Hoffmann said this:

> "...the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. ..."

Then there is a quotation from his own decision in Biogen Inc v Medeva Ltd [1997] RPC 1:

> "The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional

> courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.

45. The panel carefully weighed the evidence and gave sustainable reasons for reaching the conclusions that they did. I have considered whether the findings were perverse or irrational, that is to say no reasonable panel would have concluded as they did on the evidence before them. However I do not consider that such criticism can be successfully advanced in this case. The grounds amount to no more than a disagreement with the findings and the conclusions reached. Contrary to the assertion made in the grounds, the panel did not fail to pay regard and attach due weight to what was a very serious offence and the strong weight that should be attached to the public interest in the deportation of foreign criminals. They acknowledge this in the determination and they did not seek in any way to downplay the serious nature of the crime committed. I would acknowledge that another constitution of the Tribunal might have resolved matters differently and it may well be that this was not the only outcome possible on the facts of this particular case and may be categorised as a generous decision of the First-tier Tribunal. However that does not establish that the panel made an error of law and the question for this Tribunal is a different one from that before the First-tier Tribunal. As Lord Carnwath LJ (as he then was) said in **Mukarkar v SSHD [2006] EWCA Civ 1045**:-

> "Factual judgments of this kind are often not easy, but they are not made much easier or better by excessive legal or linguistic analysis. It is of the nature of such judgments that different Tribunals, without illegality or irrationality, may reach different conclusions on the same case… That the mere fact that one Tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law, so as to justify an appeal under the old system, or an order for reconsideration under the new. Nor does it create any precedent, so as to limit the Secretary of State's right to argue for a more restrictive approach on a similar case in the future. However, on the facts of the particular case, the decision of the specialist Tribunal should be respected."

46. The panel directed themselves correctly and plainly had regard to the proper exercise of proportionality, including the strong public interest identified by them but found that on the particular facts of this case that the balance lay in favour of the Appellant. Appeal to the Upper Tribunal is on a point of law only. In this appeal I have reached the conclusion that the panel did give proper consideration to the material before it and reached findings that were open to it even if a differently constituted Tribunal might have concluded otherwise.

46. Drawing those matters together, the panel did not make an error of law and the conclusion reached does not disclose an error in the assessment that the panel took on the facts of this case.

Decision

47. The First-tier Tribunal panel did not make an error of law. The decision shall stand.

Signed Date

Upper Tribunal Judge Reeds