Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00239/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 January 2014	**On 28 January 2014**
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Before

THE HON MR JUSTICE FOSKETT
UPPER TRIBUNAL JUDGE LATTER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KYLE MBWEBWA KALALA

Respondent

Representation:

For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Mr R Rai, instructed by Freemans, Solicitors

DETERMINATION AND REASONS

1. Following a hearing on 20 November 2013 the Upper Tribunal (The Hon. Lord Matthews and UTJ Latter) found that the First-tier Tribunal had erred in law by allowing an appeal by Kyle Kalala against the Secretary of State's decision of 22 January 2013 to make a deportation order. A copy of that

decision is annexed to this determination. The decision was set aside and it was directed that it would be re-made in the Upper Tribunal and was listed accordingly. We will refer to the parties as they were before the First-tier Tribunal, Mr Kalala as the appellant and the Secretary of State as the respondent.

2. On 20 January 2014 the respondent indicated that the deportation decision would be withdrawn while she formulated her position in respect of deporting foreign national offenders to the Democratic Republic of the Congo in the light of the judgment of Phillips J in R (P) v Secretary of State for the Home Department [2013] EWHC 3879 (Admin). The hearing remained listed to give the appellant an opportunity of making submissions on this issue. Mr Rai indicated that there was no objection to this course in the particular circumstances of the appellant.

3. In these circumstances, we give our consent to the respondent withdrawing her case under rule 17(2). As the decision has been withdrawn, there is no valid appeal pending before us and no decision to be re-made.

Decision

4. The First-tier Tribunal erred in law and its decision allowing the appeal was set aside. The respondent has now withdrawn the original decision with the consent of the Tribunal. There is no valid appeal pending before the Tribunal.

Signed Date: 28 January 2014

Upper Tribunal Judge Latter

ANNEX

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing an appeal by Kyle Kalala against the decision made on 22 January 2013 to make a deportation order. In this decision we will refer to the parties as they were before the First-tier Tribunal, Mr Kalala as the appellant and the Secretary of State as the respondent.

Background

2. The appellant is a citizen of the Democratic Republic of Congo (DRC) born on 20 May 1987. According to the respondent's records as set out in the decision letter, the appellant entered the UK as his mother's dependant on 12 December 1992 age 5. He was granted indefinite leave to remain on 8 April 2004 but a subsequent application for naturalisation was refused on 1 December 2005.

3. The appellant has an extensive history of offending which is summarised in [3] of the First-tier Tribunal's determination. His most recent conviction was on 25 August 2011 when he was convicted at the Central Criminal Court of conspiracy to rob and on 4 October 2011 he was sentenced to three years, six months' imprisonment. On 3 November 2011 he was notified of his liability to deportation and invited to make representations which he did on 7 November 2011. The deportation decision was eventually made on 23 January 2013.

4. When considering whether deportation would result in a breach of the appellant's rights under Article 8, the respondent considered the provisions of para 398 and 399A of the Immigration Rules. The respondent did not accept that the appellant had no existing ties to the DRC saying that, although it was noted that he had entered the UK at a relatively young age, 4 by his own account, it was believed that he would have still retained his language within his household and it would not be unduly harsh for him to integrate back into life in the DRC. The respondent went on to consider whether there were exceptional circumstances but found, in the light of his conviction for conspiracy to rob and his background of persistent offending, that deportation would be proportionate to the legitimate aim of the prevention of crime and disorder.

The Hearing before the First-Tier Tribunal

5. The Tribunal heard evidence from the appellant, his mother and sister and took into account the documentary evidence which included a probation report and a letter from the probation officer dated 18 August 2013 together with statements of support from various family members and

friends. It noted at [22] that there was a statement in the bundle from his partner but in evidence the appellant had said that he was not at present in a serious relationship.

6. The Tribunal considered at [24] the appellant's position under the Immigration Rules and in particular para 399A. It was not disputed that the appellant's family background was from the DRC and that the appellant had some knowledge of Lingala as it was spoken at home. It took into account the Tribunal determination in Ogundimu [2013] UKUT 60 on the issue of the extent of his ties to the DRC and found that he did not have any ties which would bring him within para 399A and in that regard the respondent's decision was not in accordance with the rules.

7. The Tribunal then said:

> "26. The respondent in the refusal seems to have conceded that the appellant otherwise came within rule 399A and if we do not go behind that concession then the appellant's appeal would succeed under the rules. However we have concerns about the respondent's concession which were not raised at the hearing. In particular we note that in sub-paragraph (a) the requirement is for the appellant to have lived at least twenty years immediately preceding the immigration decision discounting any period of imprisonment. The appellant is accepted as having entered the United Kingdom on 12 December 1992. The decision was made on 23 January 2013 meaning that as of that date the appellant had spent 21 years, one month and eleven days in the United Kingdom. However from that must be deducted his time in prison which appears to be one year and nine months, bringing him just below the twenty years required. Therefore the appellant cannot succeed under sub-paragraph (a).
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> 27. It is sub-paragraph (b) that the respondent has made the concession. However it is clear that the respondent was wrong in his calculation. The appellant was 25 years old at the date of decision. He is therefore not under the age of 25 years. On that basis the appellant cannot comply with the Immigration Rules. However the respondent having conceded that in the decision we do not feel it is proper for us to go behind it and therefore we do allow the appeal under rule 399A of the Immigration Rules."

8. The Tribunal went on to say at [28] that if they were wrong in that respect they would consider the appellant's claim in accordance with the "ordinary common law principles of an article 8 claim". It referred to the decision of the ECtHR in Maslov [2008] ECHR 546 and on this issue said:

> "31. It is argued before us on behalf of the Secretary of State that Maslov does not apply in this case, firstly, because the appellant did not commit most of the offences in his history whilst a juvenile. We think this misunderstands the nature of the appellant's criminal history. It is clear from the details we set out above that the cautions and first two convictions did take place when the appellant was a juvenile. However a number of the convictions and in particular those arising out of the

drug and the vehicle crime from August and July 2005 took place when the appellant was just aged 18. It was noted by the judge in the final case that even at the age of 24 the appellant was immature. That would certainly seem to indicate that having just turned 18 he was not in possession of any adult characteristics and was clearly also very immature. Much jurisprudence has indicated there is not a bright line between a person being 17 years old and turning 18 years old. In those circumstances it appears to us that the bulk of his convictions were convictions in the form of juvenile delinquency and not those of an adult. We also note that other than the possession of the knife (which did occur when he was only 15 years old and in respect of which there was no suggestion he actually used it for any violence) none of the convictions were for violent crimes. Most of them related to possession of cannabis and driving offences. The level of sentencing seems to indicate that he was not considered to be a risk to the public.

32. Even if his latter two offences were committed when he was only 19 years old and again we would point out that it would appear that he was still immature at this stage and even though these could be considered to be juvenile offences. In those circumstances we do find that the appellant has proved that he comes within Maslov in so far as the bulk of his offending behaviour did occur when he was a youth and was of the nature of juvenile delinquency."

On this basis the appeal was also allowed under Article 8.

The Grounds and Submissions

9. In the grounds it is argued that the Tribunal was wrong to apply a two stage test and that in any event paras 398, 399 and 399A of the Rules reflected the Maslov principles in a way that ensured consistency of assessment. The Tribunal should not have simply regarded the rules as a starting point before moving on to a second freestanding article 8 assessment. The Tribunal was wrong to find that the appellant's situation was exceptional and to allow the appeal on article 8 grounds and it failed to give adequate reasons for its finding that he no longer had ties to the DRC.

10. Mr Melvin submitted that it was clear from the respondent's decision letter that in fact no concession had been made and in particular no point had been made about the appellant being under 25 years of age. In these circumstances, the Tribunal had erred by allowing the appeal under the rules. Although the appellant had said that he arrived in the UK in 1991, the Tribunal had been entitled to proceed on the basis of the respondent's assertion that it was December 1992. In the light of MF (Nigeria) [2013] EWCA Civ 1192, it was clear that there was no freestanding article 8 appeal and in circumstances where an appellant could not meet the requirements of para 399 the issue was whether exceptional circumstances were identified which would outweigh the public interest in deportation. He referred to and relied on the judgment of Sales J in Nagre [2013] EWHC 720 and submitted that in any event the appellant did not

bring himself within the Maslov criteria as he had been 24 when he had committed the offence of conspiracy to rob and that offence could not on any basis be regarded as one committed by a juvenile delinquent.

11. Mr Rai accepted that there had been an error in relation to the concession and if it was material, the judge ought to have invited the representatives to make submissions. In any event the Tribunal's assessment under article 8 was proper and disclosed no error of law. Further, no adequate reasons had been given by the respondent for the delay in reaching the decision. When considering proportionality the Tribunal had looked at the position overall and when all the relevant factors were taken into account, a decision had been reached within the range of decisions reasonably open to the Tribunal.

12. Mr Rai also sought to argue that the respondent should not have been granted an extension of time for fililng the notice of appeal by the Upper Tribunal . He referred to the Tribunal decision in Wang and Chin (Extension of time for appealing) [2013] UKUT 343 and in particular to the matters to be taken into account set out at [15]-[16].

Assessment of the Issues

13. The issue for us at this stage of the appeal is whether the Tribunal erred in law such that its decision should be set aside. We will deal firstly with the issue of the grant of permission to appeal. It is correct that time was extended. An application was made in the respondent's notice of application and the reason given for the delay was as follows:

> "It is respectfully asked that the Tribunal extends the time limit for making this application. The main reason for delay was because the Specialist Appeals Team (SAT) on behalf of the Secretary of State did not receive the determination from the Immigration and Asylum Tribunal until 2 October 2013, when we received a copy from the appellant's representatives who informed us of the outcome. It is submitted that the delay was not on account of SAT and they have endeavoured to submit these grounds within five working days of receipt. An extension of time is respectfully requested."

The grounds are dated 2 October 2013 and were faxed on that day to the Upper Tribunal. We have very real doubts whether we have jurisdiction to set aside a grant of permission and we note that in Wang and Chin the Tribunal at [19] found that it was unnecessary to determine that issue in those proceedings. That of course does not undermine in any way the guidance given on the factors to be considered when an application is made to extend time: to consider all the available material, the extent of the delay and whether the explanation covered the whole of the period. In the present case the appeal was out of time only by a matter of days. An explanation was given and there is no reason to doubt its truthfulness. Even assuming we have jurisdiction, we would have found in any event that the decision to extend time was clearly open to the judge granting

permission and cannot even arguably be categorised as wrong in law, irrational or unreasonable.

14. We now turn to the issue of whether the First-tier Tribunal was right to proceed on the basis that a concession had been made by the respondent about the length of time the appellant had been in the UK. The relevant provisions of the rules are para 399A which read as follows:

> "This paragraph applies where paragraph 398(b) or (c) applies if –
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> (a) the person has lived continuously in the UK for at least twenty years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or
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> (b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK."

15. The passage at page 5 of the decision letter said to amount to a concession reads as follows:

> "Paragraph 399A of the Immigration Rules requires that each of the criteria contained in it is satisfied:
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> (a) it is accepted that you have lived continuously in the UK for at least half of your life immediately preceding the date of the immigration decision (discounting any period of imprisonment) and
>
> (b) it is not considered that there are no ties to Democratic Republic of the Congo to which you are to be deported."

16. The reference in the decision letter to the appellant living continuously in the UK for at least half of his life preceding the decision cannot be interpreted as a concession either in relation to the twenty year period under sub-paragraph (a) or that he could meet the requirements of (b) of having spent at least half of his life living continuously in the UK as a person aged under 25. The Tribunal pointed out in [27] that the appellant was 25 years old at the date of decision and therefore could not comply with the Immigration Rules. There was no concession that the appellant met the residence requirements to bring himself within the provisions of either paragraph 399A(a) or (b) and the First-tier Tribunal erred in law by finding that there was. We also accept, as Mr Rai submitted, that if there had been an issue on this point it should have been raised at the hearing so that the parties could have had an opportunity of addressing it.

17. We now turn to the grounds relating to article 8. The judgment of the Court of Appeal in MF (Nigeria) has confirmed that the Rules contain a

complete code in deportation appeals and that where an appellant is unable to bring himself within the provisions of paras 398, 399 and 399A, the issue which then arises is whether he is able to show exceptional circumstances outweighing the public interest. In that assessment the Tribunal is entitled (and required) to take into account the factors set out in Strasbourg jurisprudence.

18. We are satisfied that when carrying out that exercise the First-tier Tribunal failed to give proper weight to the public interest as set out in the UK Borders Act 2007 and the current Immigration Rules. The offence which led to the deportation order was committed when the appellant was 24. It is clear from the judge's sentencing remarks that this offence involved committing a cash-in-transit robbery from a security custodian. When sentencing the appellant the judge said although he was the getaway driver and that it was right to describe that as a somewhat lesser role than the role of those physically involved with the victims, it was still equally essential to the success of the crime. The judge said that the appellant was significantly the oldest of the three but not necessarily the most mature. This comment did not entitle the Tribunal to proceed on the basis that the appellant was at the age of 24 immature or to equate his offence with those committed by him as a juvenile or when he was 19. There was a significant increase in the seriousness of the offence which appears not to have been taken into account by the Tribunal. We are therefore satisfied that the Tribunal erred in law in respect of its assessment under article 8 by failing to take all relevant matters into account or to give adequate reasons for its decision.

19. Mr Rai's submission was that there should be a full rehearing before the First-tier Tribunal whereas Mr Melvin submitted that the matter should be reconsidered by the Upper Tribunal. We are satisfied that the case should remain with the Upper Tribunal. In further submissions it was also made clear that there was a dispute about when the appellant had arrived in the UK, which could have a direct bearing on whether he was able to meet the requirements of para 399A(a). In this context, we are satisfied that the Tribunal's finding on the appellant's lack of ties with the DRC is well-reasoned and does not disclose any error of law and that finding is to stand. The proper course is for this appeal to be adjourned for further evidence and submissions at a resumed hearing.

20. In summary, we find that the First-tier Tribunal erred in law such that its decision should be set aside. The decision will be re-made in the Upper Tribunal. It will be re-listed on 23 January 2014. If either party seeks to call further evidence, an application must be made under rule 15(2A). Otherwise the appeal will be determined on the basis of the evidence before the First-tier Tribunal.

Signed Date: 5 December 2013

Upper Tribunal Judge Latter