Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01271/2014

THE IMMIGRATION ACTS

Heard at : Royal Courts of Justice	**Determination Promulgated**
On : 9 March 2015	**On : 13 March 2015**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

POLOKALIKO AMOS KAINJA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Walsh, instructed by Paragon Law
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Malawi, born on 17 December 1990. He has been given permission to appeal against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision that section 32(5) of the UK Borders Act 2007 applied.

2. The appellant first entered the United Kingdom on 31 January 1994, aged three, with his mother and siblings. They were granted leave to enter until 31 January 1996. On 3 December 1994 he returned to Malawi to live with his grandmother but he re-entered the United Kingdom on 10 May 1996, aged five, and was granted further leave to enter for six months. His leave was extended annually, as a dependant on his mother's student visa,

until 21 November 2000. On 20 November 2000 his mother made an application on his behalf for leave outside the immigration rules, which was refused on 15 May 2001 and an appeal against that decision was dismissed on 17 November 2004. The appellant made a further application for leave to remain on human rights grounds on 29 December 2004, but that was refused on 25 June 2007.

3. Between June 2008 and March 2014 the appellant received 6 convictions for 9 offences in the United Kingdom: On 26 June 2008 he was convicted of possessing a knife blade in a public place for which he received a ten month referral order; on 23 June 2009 he received an 18 month community order for possession of controlled drug Class B – cannabis; on 26 February 2010 he was convicted of two counts of possession of class A drugs (heroin and crack cocaine) with intent to supply and received two sentences of 30 months' imprisonment running concurrently; on 10 February 2011 he was fined £50 for possession of a class B drug – cannabis; on 4 July 2013 he was convicted of possession of a class B drug – cannabis; on 28 January 2014 he was convicted of having an article with a blade in a public place and, together, on 25 February 2014 was convicted of unlawful wounding, for which he received on 21 March 2014 a sentence of 12 months and 6 months imprisonment running concurrently.

4. Following the appellant's conviction on 26 February 2010 he was notified of his liability for automatic deportation. His mother was granted indefinite leave to remain on 11 May 2010 on the basis of having lived in the United Kingdom for over 14 years and on 22 November 2010 a decision was made not to pursue deportation action against him. A warning letter was issued to him. On 22 November 2010 he was granted discretionary leave to remain until 16 November 2013. His application, made on 18 November 2013, for further discretionary leave, was refused**.**

5. As a result of the most recent convictions, the appellant was notified, on 10 April 2014, of his liability for automatic deportation. He made representations in response on 9 May 2014, claiming that his deportation would breach his human rights on the basis of his family and private life, referring in particular to his British citizen child and his length of residence in the United Kingdom.

6. A deportation order was signed against the appellant on 16 June 2014 and a decision was made that section 32(5) of the UK Borders Act 2007 applied. The decision was served on him on 19 June 2014.

7. In that decision the respondent noted that the appellant had a three year old daughter who was a British citizen, but did not accept that he was in a genuine and subsisting relationship with her. An attempt had been made to contact his daughter's mother for confirmation of the relationship but no response was received and there was no evidence of a subsisting relationship. The appellant accepted that he had separated from her mother and accordingly he could not meet the requirements in paragraph 399(a) and (b). With regard to paragraph 399A, the respondent accepted that the appellant was under the age of 25 and that he had spent more than half his life in the United Kingdom, but did not accept that he had no ties to Malawi and considered that he had a subsisting cultural link which could aid him in reintegration. It was noted that his passport showed that he had visited Malawi in June/ July 2012 and September/ October 2012. Accordingly it was

not accepted that he could meet the requirements under paragraph 399A. The respondent considered that there were no exceptional circumstances outweighing the public interest in his deportation.

8. The appellant appealed against that decision and his appeal was heard on 16 December 2014 by First-tier Tribunal Judge Miles.

Appeal before the First-tier Tribunal

9. Judge Miles heard from the appellant, his mother and his brother and had before him a witness statement from his sister. He did not accept that the appellant had a genuine and subsisting relationship with his daughter, noting that he did not know the whereabouts of her or her mother and, as such, found that he did not meet the requirements of paragraph 399(a) and (b) of the Immigration Rules. With regard to paragraph 399A, it was noted that the rule had changed since the decision was originally made and the judge concluded that the appellant could not meet the requirement at paragraph 399A(a) of having been lawfully resident in the United Kingdom for most of his life. He calculated that the appellant had been lawfully resident in the United Kingdom for a total of twelve years, four months and three days as at the date of the hearing, which he took to be the relevant date, rather than the date of the immigration decision, noting that no submissions were made otherwise in that latter respect. He included, within that period, the initial period of leave from 31 January to 3 December 1994 of ten months and three days and the subsequent period from 10 May 1996 which, at the date of the hearing, was eleven years and six months. He found that the appellant, being one day short of 25 years of age at the date of the hearing, had not been lawfully resident in the United Kingdom for half of his life and he found that, on that basis, he had not been lawfully resident in the United Kingdom for most of his life. Accordingly he found that the requirements of 399A could not be met and did not go on to consider the further requirements in paragraph 399A(b) and (c), relating to integration. He found there to be no compelling circumstances over and above those described in paragraphs 399 and 399A and he concluded that the appellant's deportation would not breach his Article 8 human rights. He dismissed the appeal on all grounds.

10. Permission to appeal to the Upper Tribunal was sought on behalf of the appellant, on the grounds that the judge, having made an error in the appellant's age at the date of the hearing, was wrong in concluding that he had not spent more than half his life in the United Kingdom. Since he had not gone on to consider the question of integration, that remained to be considered.

11. Permission was granted on 22 January 2014.

Appeal hearing and submissions

12. The appeal came before me on 9 March 2015.

13. Mr Avery accepted that the judge had made an error in the appellant's age and that he did in fact meet the requirement at paragraph 399A(a), but he submitted that that was not a material error since the appellant could not meet the requirements in paragraph

399A(b) and (c) in any event. However I preferred the submissions made by Mr Walsh in that respect, namely that the error was a material one and that accordingly the decision had to be re-made by considering paragraph 399A(b) and (c).

14. Mr Walsh was happy to proceed with the re-making of the decision without an adjournment, on the basis of the documentary evidence already available. The appellant's mother, brother and sister were present but Mr Walsh advised me that they simply stood by their previous statements and evidence and had nothing to add.

15. The appellant, however, gave further oral evidence and confirmed his previous statement. He said that he had last had contact with his daughter at the end of 2012. There was no contact between her and any of his family members. He was in the process of commencing contact proceedings before going to prison but could not pay the solicitors' fees. He planned to continue when released from prison. His mother, brother and sister are all settled in the United Kingdom. He had visited Malawi twice in 2012, first with his mother and then with his brother, for a month each time and stayed in a hotel. He went there because he was getting into trouble here and had been shot at and his mother suggested that he went on holiday with her to keep himself out of trouble. The second time was also to keep himself out of trouble, but also to sort out a headstone for his grandfather's grave. He could not go back to live in Malawi as his family was all here and he needed to be around for his daughter. Also he would find it hard to communicate as English was spoken only in business and in shops in Malawi whereas the main language was Chichewa.

16. When cross-examined, the appellant said that he had accepted his guilt in the stabbing offence and confirmed that he was carrying a knife and was intoxicated at the time. He was mixing in the wrong crowd and was naïve. He had not been able to come up with the £750 for the mediation process for contact with his daughter but hoped to find the money to continue the process.

17. In response to my enquiries, the appellant confirmed that he had been told that he had a half-brother and sister through his father but had never met them and did not know where they were.

18. Mr Avery submitted that the appellant had had the opportunity to make some progress in seeking contact with his daughter but had not taken it and there was no reason to disturb the First-tier Tribunal Judge's findings in regard to his relationship with his daughter. He had not met the test with regard to integration in the United Kingdom as he had committed serious offences. He had significant connections in Malawi and it was of note that his family's reaction to his problems in the United Kingdom was to take him to Malawi. The family therefore maintained strong connections to Malawi. Neither was the test in paragraph 399A(c) met as the appellant was unable to show anything like very significant obstacles to integration in Malawi. There were no other circumstances to consider outside the rules. The seriousness of the offence and his history of criminal offending weighed very heavily against him.

19. Mr Walsh submitted that the seriousness of the offence and the criminal offending was not relevant to paragraph 399A, which was geared only towards consideration of life

in the United Kingdom and in Malawi. Section 117 was of no relevance as the test under paragraph 399A was a free-standing one. Mr Walsh took me through the documentary evidence of the appellant's family relationships in the United Kingdom, his studies and his achievements, as well as his potential involvement with his child, as demonstrating his social and cultural integration in the United Kingdom. He relied on the case of YM (Uganda) v Secretary of State for the Home Department [2014] EWCA Civ 1292 in relation to the question of the appellant's ties to Malawi and submitted that there were significant obstacles to his integration in Malawi.

Consideration and findings

20. The relevant provisions of the Immigration Rules relating to deportation and Article 8, as amended in July 2014, in so far as they are relevant to this appeal, are as follows:

> **Deportation and Article 8**
>
> 398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12
> months; or
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,
>
> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.
>
> 399A. This paragraph applies where paragraph 398(b) or (c) applies if –
>
> (a) the person has been lawfully resident in the UK for most of his life; and
>
> (b) he is socially and culturally integrated in the UK; and
>
> (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

21. It is not in dispute that the appellant is able to meet the requirement at paragraph 399A(a) and thus the decision is with respect to the appellant's integration in the United Kingdom and prospects for integration in Malawi.

22. Turning first of all to paragraph 399A(b), and whether the appellant is "socially and culturally integrated" in the United Kingdom, there are, as Mr Avery submitted, various factors which detract from the question of integration, in particular his criminal offending. The appellant has demonstrated, through his repeat offending and disregard of the warning received when a previous threat of deportation was lifted, that he has little regard to the public and to society and has to an extent put himself outside the accepted norms of society. It is also the case that the appellant, having continued to live with his mother when not in prison, has grown up and continues to be part of a Malawian family environment with close connections to the Anglo-Malawian community (as described in the respondent's deportation decision). I also agree with Mr Avery's observation that there is significance in the fact that the first reaction of the appellant's family, when he found himself in trouble after being shot at, was to take him to Malawi. It is also relevant to note that there have been periods of residence in the United Kingdom without any form of leave and that from November 2004 when his section 3C leave expired, he was without leave until the grant of discretionary leave in November 2010 and after the expiry of that leave in November 2013.

23. However, it seems to me that ultimately the most significant factors are that the appellant has been living here continuously since the age of five years after returning from a one year stay in Malawi following his initial entry to the United Kingdom at the age of three years and that he has been educated in the United Kingdom, having attended primary and secondary school and sixth form college and obtained GSCEs and has spent his most formative years in this country. Of less significance, but also relevant, is the fact that he has worked for some periods of time and that his close family members, namely his mother, sister and brother, are settled here. I find that these factors indicate a high level of integration into the United Kingdom and that, despite the undermining factors referred to above, it cannot ultimately be concluded that the appellant is not socially and culturally integrated in the United Kingdom. I find, therefore, albeit with the reservations stated, that the appellant is able to meet the requirements of paragraph 399A(b).

24. I do not, however, find that the appellant meets the requirements in paragraph 399A(c). I do not agree with Mr Walsh that the test of "very significant obstacles to integration" is the same as the "no ties" test in the rule prior to amendment. It seems to me that it was precisely because of the interpretation of that test in Ogundimu (Article 8 - new rules) Nigeria [2013] UKUT 60 and as considered in YM (Uganda) that the rule has been clarified in its new form and that the test as it now stands is a much more rigorous one for an applicant.

25. In the appellant's case it is clear, as already stated, that he has grown up as part of a Malawian family environment with close connections to the Anglo-Malawian community and that his family retain at the very least strong cultural links to that country. It is also significant, again as stated above, that the appellant's family's first reaction to his problems in the United Kingdom was to send him to Malawi. It is the appellant's claim that when he went to Malawi he stayed in a hotel on both occasions since there are no family or other connections in the country. However I have concerns about the truthfulness of his evidence, and that of the witnesses, in that regard. It is notable that the reasons given for those visits are not entirely consistent: the appellant in his statement,

said that the visit with his mother was to see his grandmother's grave and the visit with his brother was simply for a holiday and that on both occasions he took the opportunity to get away from the problems he had in the United Kingdom. He also said that he and his brother arranged a headstone for his grandfather's grave, which was confirmed by his brother in his oral evidence before the First-tier Tribunal. However it was the evidence of the appellant's mother and sister, in their statements, that the appellant and his brother arranged a headstone for their father's grave during their visit. The appellant's statement, at paragraph 46, also appears to suggest that he went to Malawi twice with his mother and then once with his brother, rather than once with his mother and once with his brother as was his oral evidence before the First-tier Tribunal, although that is not consistent with the stamps in his passport. Further, the appellant's oral evidence before me was that he went to Malawi for a month in June 2012 with his mother and for another month in July 2012 with his brother, whereas the stamps in his passport indicate that the visits had been in July and October 2012. There clearly are discrepancies in the evidence which suggests that the precise nature of the visits to Malawi is not entirely as has been claimed.

26. It is also significant, I find, that none of the statements of the appellant and his witnesses make any mention of the fact that the appellant and his sister and brother have two half-siblings through their father's second marriage in Malawi. That was mentioned only at the hearing before the First-tier Tribunal, when the appellant's mother's evidence was that there had never been any contact with her ex-husband's children from his new wife and that she did not know where those children were. The appellant's brother, however, said that he had thought he had met them in 2011. The appellant, at the hearing before me, said that he had never met his half-siblings and had never thought of making contact with them. I find the contradiction between the evidence of the appellant's mother and brother to be striking and it seems to me that the claim as to a lack of any extended family members or any contacts in Malawi is not an entirely truthful one.

27. In the circumstances it seems to me that the appellant has failed to demonstrate that there would be very significant obstacles to his integration into Malawi. He is a healthy, single young man who has spent around two months in the country fairly recently and who has grown up within the Anglo- Malawi community in the United Kingdom. Whilst he claims not to speak the local language, it is the case that English is the official language of the country. Other than his mother, brother and sister, there are no specific details of family ties to the United Kingdom. He has no contact with his daughter and does not even know where she is. He has no basis of stay in the United Kingdom, having been refused a further period of discretionary leave. I do not accept that he has no remaining family or other ties in Malawi and consider that he has at least some half-siblings living there. In any event, the requirement for there to be realistic family or other ties, as set out at [54] of YM (Uganda) is no longer, as I have already said above, the relevant test. There is no reason why he would not be able to find work there and re-establish himself in that country, with the benefit of the qualifications he has gained in the United Kingdom. Neither has any satisfactory reason been offered as to why his mother, brother and sister would not be able to assist in his integration from the United Kingdom.

28. Accordingly I find that the appellant cannot meet the requirements of paragraph 399A(c). Exception 1, at section 117C(4) of the 2002 Act, does not, therefore, apply and

pursuant to section 117C(3) of the 2002 Act the public interest requires the appellant's deportation.

29. Turning to the question, in paragraph 398, of whether there exist very compelling circumstances over and above those described in paragraphs 399 and 399A which would outweigh the public interest in deportation, the First-tier Tribunal made detailed findings in that regard, as set out [23] to [27] of its decision, considering all relevant factors and taking into account paragraph s117B and s117C of the 2002. Those findings have not been challenged and, aside from a brief submission in his skeleton argument at [20] which, in my view, adds nothing to the findings already made, Mr Walsh did not seek to argue before me that such circumstances existed. Accordingly I see no reason to depart from the First-tier Tribunal's findings, which were clearly and cogently made, and I conclude, as did the First-tier Tribunal, that the appellant's deportation would not be in breach of his rights under Article 8.

DECISION

30. The making of the decision of the First-tier Tribunal involved an error on a point of law with respect to its findings on paragraph 399A(a). The decision of the First-tier Tribunal in relation to that matter is therefore set aside. I re-make the decision by dismissing the appeal on all grounds.

Signed Date
Upper Tribunal Judge Kebede