Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01506/2014

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**

On 19 October 2015 **On 2 November 2015**

Before

UPPER TRIBUNAL JUDGE STOREY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR CLIVE LEE SPENCER
(ANONYMITY DIRECTION NOT MADE)

Claimant

Representation:

For the Appellant: Mr S Kotas, Home Office Presenting Officer
For the Claimant: Miss D Ofei-Kwatia, Counsel instructed by Hanson Young Solicitors

DECISION AND REASONS

1. The Secretary of State challenges a decision of the First-tier Tribunal Judge Bart-Stewart, who on 29 April 2015 allowed the claimant's appeal under the Immigration Rules dealing with foreign criminals.

2. The claimant arrived in the UK aged 3 on a six month visit visa. After his father was removed in 2005 he remained with his stepmother and stepsiblings in the United Kingdom and in 2005 he began to live with his step great grandmother Shirley Morgan, who entered into a private fostering arrangement with the local authority in January 2006.

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3. On 28 May 2012 an application was submitted for leave to remain outside the Immigration Rules. This was refused in October 2012. On 5 March 2011 the claimant received a reprimand for obstructing powers of search for drugs and on 13 January 2012 he received a warning for possession of a controlled drug and in March 2012 a warning for assault occasioning actual bodily harm, and then on 25 July 2013 he was convicted of causing grievous bodily harm with intent and received a two year detention and training order and he was served a notice of liability to deportation in February 2014.

4. The Secretary of State's grounds contend first of all that the judge failed to give adequate reasons for finding that the claimant's primary carer was his step great grandmother. As Mr Kotas conceded, this ground suffers from the difficulty that this finding, if ever there was such a finding, did not play any apparent part in the balancing exercise that the judge went on to conduct under paragraph 398 and in any event the Secretary of State does not challenge the finding that there was a family life existing between the claimant and this lady.

5. The second ground challenges the failure of the judge to resolve the matter of the whereabouts and fate of the claimant's father (it was pointed out that the witnesses, all of whom were found credible, gave different accounts about this). Given the finding that the father's whereabouts were unknown it seems to me that whether or not he was in fact shot and killed is of secondary importance. The central finding of the judge was that there were no family members that the claimant could turn to on return to Jamaica, and again I do not understand that to be challenged by the Secretary of State. At paragraph 56 the judge said it was unlikely that the claimant or the step great grandmother would have any real ties in the normal sense with Jamaica or that she or the claimant would have any concept of life there.

6. I turn therefore to the third ground, which has two main components. The first component is to allege a failure to follow the case of **MA (Jamaica)** [2005] 00013 and a failure to assess whether the claimant could adapt to life in Jamaica and whether the relatives in the United Kingdom could in fact help the claimant. I find that this component of the ground is a simple disagreement with the judge's findings of fact, findings which were clearly to the effect that the claimant had no real ties to Jamaica or any other country and that his family circumstances were such that he would not be able to integrate there in the normal sense.

7. The second component of the ground, and it is the main basis on which Mr Kotas seeks to rely, is that contrary to para 398 the judge failed to identify sufficiently compelling reasons over and above those set out in paragraphs 399 and 399A for finding that there would be a breach of Article 8.

8. The first thing to observe in this regard is that the judge undoubtedly did set out the legal test correctly. At paragraphs 52, 53 and 61 there is a

perfectly correct identification of the relevant legal test under paragraph 398 and also of the lead cases dealing with its application.

9. The second matter to observe is that the judge conducted a wide-ranging assessment of the claimant’s circumstances attaching particular importance to and the fact that he was 3 years old when he came to the UK and still a minor aged 15 when his principal offence was committed (I note that he remains a young man having been born on 22 November 1996).

10. The judge then considered the seriousness of the offence and gave an extremely detailed analysis of the evidence relating to the risk of reoffending and what had been said by various professionals involved in his case. In the course of her assessment the judge was very clear in identifying the strength of the public interest in deportation, for example in paragraph 52. Although there is not extensive identification of all the factors weighing against the claimant, there was specific identification of the seriousness of his offence and the carrying of knives and the impact on the victims. It is also noteworthy that the judge said at paragraph 61 that this was a finely balanced case. In short, the judge’s paragraph 398 assessment was one which struck a fair balance of all the competing Article 8 considerations.

11. It is said by Mr Kotas that the determination evinces a failure to correctly apply considerations set out in Part 5A of the 2002 Act and he draws particular attention to Section 117B(3) and (5), the latter which states that “little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious”, and of course it is not in dispute that apart from the first six months the claimant has been an overstayer since his arrival in the United Kingdom.

12. It must be observed, however, that this was a case in which the Secretary of State had accepted that there was a family life. Section 117B (3) and (5) do not apply considerations in relation to family life except in respect of a relationship formed with a qualifying partner. Accordingly it was incumbent on any judge faced with the factual matrix in this case to have regard to the broader Article 8 jurisprudence dealing with the right to respect for family life and cases such as **Maslov** where the Grand Chamber of the European Court of Human Rights emphasised the different context of a person who has committed crimes whilst a minor and who has arrived in the host country when a minor.

13. It is true -and important - to say that the Court of Appeal has correctly identified in a number of cases that **Maslov** concerned a person who had a lawful basis of stay in the host country whereas, as I have just emphasised, this claimant in the instant case did not. At the same time the judge in the instant case was clearly mindful of the claimant’s lack of lawful immigration status and can be understood to have weighed that on the public interest side of the scales against the claimant: see for example paragraphs 54 and 39. Against this background and reading the determination as a whole, it was within the range of reasonable responses

for the judge to have placed the emphasis she did on the factor of age in this case.

14. It is also said that, contrary to Court of Appeal cases such as **Danso** and **PF (Nigeria)**, the judge attached undue weight to the low risk of reoffending and the evidence of rehabilitation. However, read as a whole the determination identified an unusual set of facts linked primarily to the age when the claimant came to the UK and the age when he committed those offences, coupled with the quite strong evidence from a number of professionals to the effect that he had turned his life around.

15. For the above reasons I reject the respondent's challenge and find that the First-tier Tribunal Judge did not err in law in allowing this appeal. I would only mention two other points. One is that my task in this case was to decide whether the judge erred in law. My decision that she did not does not necessarily mean that had I been dealing myself with the claimant's appeal on the merits I would reached the same conclusion as this judge. The second matter is that, as the judge herself emphasised, this was a finely balanced case and so the claimant must be in no doubt that if there is further offending the Secretary of State may be in a much stronger position to take action in the future.

Notice of Decision

The Secretary of State's appeal is dismissed.

No anonymity direction is made.

Dr H H_Storey, Judge of the Upper Tribunal