IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01842/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 September 2015	**On 18 September 2015**

Before

UPPER TRIBUNAL JUDGE WARR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JOHANNES GHEBREHIWET
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Miss A Brocklesby-Weller, Home Office Presenting Officer
For the Respondent: Miss S Iqbal, Counsel, instructed by MKM Solicitors

DECISION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the original appellant, a citizen of Eritrea born on 11 August 1972, as the appellant herein. He appeals the Secretary of State's decision on 23 September 2014 to refuse to revoke a deportation order made on 17 April 2008. His appeal was allowed by the First-tier Tribunal following a hearing on 23 March 2015 on Article 8 grounds. The appeal was dismissed on asylum, humanitarian protection and Article 3 grounds and there has been no challenge to that aspect of the decision.

2. The appellant had arrived in this country on 22 September 1990. An application for asylum was refused. He was granted leave to remain for a limited period and was granted indefinite leave to remain on 12 February 2000. He has a very extensive criminal history. The First-tier Judge dealt with the appellant's Article 8 case in the following extract from her determination:

> "27. The appellant is liable to deportation as a persistent offender who shows a particular disregard for the law (398(c)) of the Rules. As has been stated in **R (on the application of Akpinar) [2014] EWCA Civ 937** –"Frequent and continuing repetition of offences that were not individually serious might amount to serious offending which could justify expulsions". This is the case here.
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> 28. This is aggravated by the fact that since the 2008 decision the appellant has continued to offend as shown in the PNC. He has the following convictions – 12/11/08 – travelling on railway without a train ticket (£20 fine), 25/5/09 – shoplifting (detention), 16/7/09 – breach ASBO (Community Order and 12 months supervision and 6 months DRO), 14/8/9 possession of crack cocaine (£100 or 1 day), 8/6/10 possession of article for use in fraud (3 months imprisonment), 11/10/10 assault on a constable (suspended 4 months imprisonment), offer to supply cannabis (4 month prison consecutively) and supply Class B drug (3 months suspended imprisonment and DRO) 13/8/13 supply of crack cocaine (16 months suspended imprisonment and DRO and ASBO 5 years), 11/12/14 shoplifting (£80 fine), 15/1/05 travelling on a railway without paying (£400 fine). He has a further conviction for stealing two sandwiches from Pret a Manger on 21 November 2014. His evidence was that he was hungry and had run out for money. He has trouble managing his finances. He regularly collects food from Pret, which is given away at the end of the day. He sometimes does so in bulk to share with fellow residents at his hostel.
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> 29. The appellant does not meet the requirements in the Rules for family life (A362 and 399 – relationship with child or partner) or for private life (399A) for reasons stated by the respondent such that the public interest in his deportation is outweighed by reason of his family and private life. He has not been **lawfully** (emphasis added) resident in the UK for most of his life, his lawful residence amounts to approximately 17 of his 43 years and in the respondent's view he is not socially and culturally integrated in the UK and there would be very significant obstacles to his integration into Eritrea.
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> 30. The Rules provides that in those circumstances 'the public interest in deportation will only be outweighed in by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A'. In assessing this issue I have taken into account **AJ (Angola) [2014] EWCA Civ 1636** and **MA (Somalia) [2015]**

EWCA Civ 48, that the Rules are a complete code in deportation and any assessment of proportionality (including under Article 8 ECHR) and the public interest must be seen through the lens of Parliament's determination of where the public interest lies and that considerable weight is to be given to the public interest in deporting foreign criminals who do not satisfy the Rules. It is only exceptionally that such foreign criminals would succeed in showing that their Article 8 rights trumped the public interest in deportation – **SS (Nigeria) [2013] EWCA Civ 550** and **Richards [2013] EWCA Civ 244**. I have also taken into account that the appellant is a settled migrant as in **Maslov–MA (Somalia)** and 'very serious reasons' are required to justify expulsion again in the framework of the new Rules'. In addition, I bore in mind that the public interest requirements in the 2012 Act are not 'exhaustive' – **Dube (ss117A-117D) [2015] UKUT 00090 (IAC)**.

31. The appellant has been found to be liable for deportation as a persistent offender. Mr Alagh noted that the appellant has 19 convictions for 30 offences, began offending when he was 29 years old and is now 43 years old. Parliament has deemed it in the public interest to deport him because he has shown little regard for the laws. Mr Bazani noted with some force that those sentencing him did not believe that prison was a suitable tool for dealing with the offending because he is suffering from addiction. He referred not the need to assess the criminality in issue – **McLarty (Deportation – proportionality balance) [2014] UKUT 315 (IAC)**.

32. The appellant has been sentenced in total to 3 years and 5 months in prison of which he has spent approximately only one and half years there. This is not to minimise the extent and proliferation of his criminality but it is at the lower end of the scale. The appellant has not been in prison for the past 10 years. The PNC appeared to incorrectly state he was last there in 2005. There was not a judge's sentencing remarks or a probation report before me. In my view there is a very low risk of reoffending if the appellant's underlying problems are treated. The evidence was that the depression is being tackled for the first time and he is making 'remarkable progress'. He has not relapsed into illicit drugs since 2013.

33. The appellant presented as a gentle and sensitive person as described in his brother's witness statement. This is not to detract from the fact that he has committed offences against the person in the past due to his addiction. The appellant's addiction is an illness. The appellant has a strong private life in the UK that would be seriously interfered with if he is returned to Eritrea. He is, though 43 years old, close to his family. They are very supportive of him. They have attended all his hearings and put up surety for his bail. They see him every weekend. I have no doubt that there is family life (as indeed found by the previous Tribunals) between them for the purposes of Article 8 because he is financially and emotionally dependent on them beyond one would expect to see between adult

siblings. Family life between adult siblings as such is not recognised in the Rules though it is arguably falls under private life. His private life appears to consist mainly of his family in the UK.

34. The issue of whether the appellant is socially and culturally integrated into life in the UK is difficult. The appellant has spent more than half his life in the UK. He speaks his native language, Tigrinian and English. He gave his evidence in English. He presented as a solitary and introspective person. He lacks the ability to function socially. He has not been able to form strong personal friendships. He does not have a girlfriend and has never married. He spent only 10 years of his life in Eritrea and 8 years in Ethiopia. He has difficulties integrating. He has his close family here. They have been able to integrate because they were young enough when they arrived to have the benefit of education in the UK. He and his older brother appear to have fallen outside the safety net. His siblings have made good use of their opportunities and have responsible jobs and contribute to the economic wellbeing of the country while he has not been able to maintain a job. He is dependent on public funds – he receives ESA and lives rent free in a hostel (s117B of the 2002 Act), but it must not be overlooked that he has lived lawfully here for 17 out of 25 years in the UK.

35. It is notable that S117C provides that a **foreign** (emphasis added) criminal who has been sentenced to a period of at least four years imprisonment requires deportation unless there are very compelling circumstances over and above those in Exceptions 1 and 2. This appellant is not a foreign criminal or been sentenced to four years or more.

36. The appellant is able to live independently in the UK only because of the support of his siblings and the treatment for his illness and for accommodation provided by the State (NHS etc). In my view looked at in the round and on balance there would be very significant obstacles to his integrating in Eritrea even if he has family there (whom he has not seen for 25 years). The way of life would be almost alien to him. The combination of the length of his residence in the UK, the dependency on his family and his mental health and his addiction show in my view that his right to physical and moral integrity would be breached if he is returned to Eritrea – **MM (Zimbabwe) [2012] EWCA Civ 279** approved in **GS (India) [2015]** above. In my view it is not necessary to deport this appellant where with the support of his family and medical treatment there is little risk that he will reoffend. I find that the strong public interest in deportation is outweighed by the exceptional circumstances in his case.

37. I would come to the same conclusion in assessing the proportionality of the decision under Article 8 ECHR which I would have looked at through the lens of the Rules – **MA (Somalia) [2015]** above. I would find that the respondent's decision is 'a more drastic interference with the primary

> Convention right than is necessary for public safety and the prevention of crime and disorder' – **Huang** when balanced against this appellant's circumstances and rights and those of his family."

3. The judge, as I have said, allowed the appeal under Article 8 only.

4. The Secretary of State appealed. Permission to appeal was refused by the First-tier Tribunal but was granted in a decision dated 3 June 2015 by Upper Tribunal Judge Coker.

5. Miss Brocklesby-Weller relied on the two sets of grounds that had been filed. The appellant had not met the requirements of the Rules and very compelling reasons were required to outweigh the strong public interest in deportation – I was referred to paragraph 46 of **AJ (Angola) [2014] EWCA Civ 1636**. I was also referred to the case of **McLarty [2014] UKUT 00315 (IAC)** and in particular the third and fourth paragraphs of the head note which read as follows:

> "(3) Where the facts surrounding an individual who has committed a crime are said to be 'exceptional' or 'compelling', these are factors to be placed in the weighing scale, in order to be weighed against the public interest.
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> (4) In some other instances, the phrase 'exceptional' or 'compelling' has been used to describe the end result: namely, that the position of the individual is 'exceptional' or 'compelling' because, having weighed the unusual facts against the (powerful) public interest, the former outweighs the latter. In this sense 'exceptional' or 'compelling' is the end result of the proportionality weighing process."

6. The judge had failed properly to address the public interest in the light of this guidance. I was also referred to **Chege [2015] UKUT 00165 (IAC)** and the need to identify very compelling circumstances informed by the seriousness of the criminality and taking into account the factors set out in Section 117B. However, the judge had concluded that the appellant was not a foreign criminal in paragraph 35 and it was clear that she had erred in so concluding. She did not appear to have accepted that the appellant was socially and culturally integrated. The judge had referred to **Maslov** but the appellant's circumstances were distinguishable as he had arrived aged 18 and was a persistent offender.

7. I was referred by Ms Igbal to paragraph 46 of **AJ (Angola)** where **Maslov** was a matter to be brought into the overall assessment and there was a need to demonstrate very compelling circumstances. She referred in particular to the last sentence of paragraph 46 and distinguished the applicant's circumstances as found by the judge. The judge had taken into account the length of residence and the fact that the appellant although imprisoned in the past had been making remarkable progress. The findings in paragraph 33 had not been challenged. What was said in paragraph 35 was possibly a slip. Although the appellant had not met the Article 3 threshold, his mental health and addiction were still a relevant factor in the balancing act.

8. At the conclusion of the hearing I reserved my decision. I remind myself that I can only interfere with the decision if it was materially flawed in law.

9. The appellant, as is clear from paragraph 28 of the decision, continued with his offending behaviour after the decision to deport him in 2008. Although as the judge said in paragraph 32, he had not been in prison for the past ten years, he had been sentenced to imprisonment on some five occasions, albeit the sentences were suspended. The judge noted that the appellant had not been lawfully resident in the UK and in paragraph 34 does not appear to conclude that he was socially and culturally integrated.

10. In paragraph 35 of the determination the judge finds that the appellant is not a foreign criminal and the respondent takes the point that in that respect the judge erred because under Section 117D the appellant had been accepted (in paragraph 27 of the determination) to be a persistent offender and was therefore a foreign criminal. In such circumstances the appellant would need to bring himself within the exceptions set out at 117C(4):

    (a) C has been lawfully resident in the United Kingdom for most of C's life,

    (b) C is socially and culturally integrated in the United Kingdom, and

    (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

    The three requirements referred to in the statute and at paragraph 399A were not all met on the judge's findings. She appears to have found in the appellant's favour in relation to significant obstacles to integration but made no clear findings on social and cultural integration and appears to have accepted the respondent's contention that the appellant had not been lawfully resident in the UK for most of his life.

11. In addition, the circumstances of the appellant's case are not similar to the circumstances in **Maslov** as argued by the respondent and what is said in **Maslov** needs to be read in the light of what the Court of Appeal said in **Akpinar** to which the judge refers in another context paragraph 27 of her determination.

12. I find that the respondent's arguments sufficiently demonstrate a material error of law on the part of the First-tier Judge. Ms Iqbal argues that what the judge said in paragraph 35 might have been a slip but on the face of it is a serious misdirection. It is one thing to fail to refer to s 117 considerations if it is clear they have been applied (see **Dube)** but it is quite another to say they do not apply when they do: see the third paragraph of the headnote in **Forman (ss 117A-C considerations)** [2015] UKUT 00412 (IAC): "In cases where the provisions of sections 117B-117C of the 2002 Act arise, the decision of the Tribunal must demonstrate that they have been given full effect." In defence of the judge I would acknowledge that at the start of the proceedings she refers to Counsel (not Ms Iqbal) not providing a skeleton argument and handing a bundle of cases with little attempt to explain their significance or relevance. This would render her task more difficult than it already was. Having

said that, I am unable to find that this determination is salvageable. I have come to the conclusion, bearing in mind the Senior President's Practice Statements, that the appeal must be reheard before the First-tier Tribunal so that the factual issues relevant to Article 8 can be determined in the correct context. There has been no challenge to the judge's decision in respect of the asylum, humanitarian protection or Article 3 grounds.

The determination is flawed by a material error of law. Accordingly I set aside the decision and remit the appeal to be heard afresh on Article 8 grounds before a different First-tier Judge.

Anonymity Direction

The First-tier Judge made no anonymity order and no anonymity direction is made.

Fee Award

No fee is paid or payable and therefore there can be no fee award.

Signed Date 16 September 2015

Upper Tribunal Judge Warr