Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00340/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14th December 2015	**On 12th January 2016**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LUIS ENRIQUE REYES GARZON
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Miss E Savage, Home Office Presenting Officer
For the Respondent: Mr G Lee, Counsel, instructed by Lawrence & Co Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State; however I shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of Colombia who was born on 21st May 1967. His appeal against deportation was allowed by the First-tier Tribunal on 8th July 2015.

2. The Secretary of State appealed against this decision on the grounds that the First-tier Tribunal [the panel] had misdirected themselves in law in finding that there were very compelling circumstances. The fact that the Appellant had family in the UK did not amount to very compelling

circumstances. The Appellant's relationship with his partner was not a durable one. Therefore, the Appellant's circumstances could not be said to amount to very compelling circumstances over and above the Immigration Rules.

3. Secondly, the judge failed to address the three discrete components in the public interest and deportation in OH (Serbia) v Secretary of State [2008] EWCA Civ 694:
   (a) the risk of reoffending by the person concerned;
   (b) the need to deter foreign criminals from committing serious crimes by leading them to understand that whatever the consequences one consequence of them may well be deportation; and
   (c) the role of deportation as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serous crime.

3. There were no findings on these issues. The starting point was that it was in the public interest to deport the Appellant and the Tribunal appeared to have approached the case from a neutral starting point instead of one heavily weighed in favour of deportation.

4. When assessing the Appellant's case under the principles of Maslov and Uner the Tribunal failed to factor into their assessment their findings at paragraph 117 regarding the Appellant's connections to Colombia. The Appellant had demonstrated a propensity to reoffend in the escalation of serious offences since 1987. The Tribunal had erred in law in failing to consider the public interest when fully assessing the Appellant's very compelling circumstances.

5. Permission was granted by First-tier Tribunal Judge Grimmett on the basis that it was not possible to ascertain from [118] to [125] what the very compelling circumstances were and the panel appeared to have simply relied on the Appellant's family life in the UK and some evidence that he had changed his lifestyle. It was also arguable that the judge failed to take into account the public interest in deportation.

The Appellant's immigration history and criminal convictions

6. The Appellant arrived in the UK on 30th October 1978 and was given leave to remain on 12th July 1979. On 28th May 1980 he was granted indefinite leave to enter the UK. On 17th August 1987 the Appellant was sentenced to three years' imprisonment at Southwark Crown Court for possession of controlled drugs with intent to supply.

7. Between 1987 and September 2010 the Appellant received eight convictions for eleven offences which comprised offences against a person, public disorder and offences relating to the police courts and prisons.

8. The Appellant was granted indefinite leave to remain on 28th June 2006. On 17th September 2010 the Appellant was convicted at Inner London Crown Court of wounding with intent to do grievous bodily harm and was sentenced to 45 months' imprisonment. He did not appeal against the sentence or conviction. On 6th February 2014 the Appellant was served with a deportation order and reasons for his deportation and the Appellant appealed against that decision.

9. The circumstances of the offence were that the Appellant was found guilty of wounding with intent to cause grievous bodily harm. The offence took place in the Appellant's own home and the victim was an uninvited guest.

10. From the sentencing remarks of the judge it would appear that the victim stayed a few hours before the offence occurred and behaved in a provocative manner. When the offence occurred the victim was about to leave the flat and it was at that point that the Appellant assaulted him with a glass. The Appellant's defence of self-defence was rejected because the Appellant went far beyond what was necessary to protect himself from further attack. The injuries to the victim were serious and he had a scar on his cheek which he would carry for the rest of his life.

The Panel's findings

11. In allowing the appeal under the Immigration Rules the panel made the following findings:

> [111] "From the evidence before us we find that it is likely that the Appellant had been involved with criminal activity in the past for which he was not arrested or charged."
>
> [116] "We find that the Appellant's parents see their granddaughter on a regular basis but the Appellant does not see her so regularly. We find that there was insufficient evidence to show that the Appellant has genuine and subsisting parental relationship with a British national child. The Appellant's daughter is clearly able to travel to Colombia because she is currently on an extended holiday in Colombia. Indeed it appears that she would have spent at least five months in Colombia if not longer by the time she returned. She will be able to maintain a level of contact with the Appellant if he is returned to Colombia and there was insufficient evidence before us to suggest that it would be unduly harsh for the Appellant's daughter to remain in the UK without the Appellant."

12. At [117] it was accepted that the Appellant had lived lawfully in the UK for most of his life and that he was socially and culturally integrated into life in the UK. However, after considering the Appellant's extended family in Colombia and other relevant factors, the panel found that there were no 'very significant obstacles' to the Appellant's reintegration into Colombia. Therefore, the Appellant could not satisfy paragraphs 399 and 399A of the Immigration Rules and the panel turned to considering whether there were

very compelling circumstances over and above the exceptions in Section 117C and paragraphs 399 and 399A.

13. The panel set out their findings at [119] to [125]. They found that the Appellant's partner was credible, but there was insufficient evidence to show that they were in a durable relationship. The panel found that the evidence of cohabitation was somewhat limited because the address given on the Appellant's employment in 2015 was different to his partner's address and from the address given on the witness statements.

14. The panel found at [122] that the Appellant had strong family ties in the UK and much weaker family ties in Colombia:

> "His only family in Colombia was his mother's sister and extended family in the form of family members of his sister-in-law. The Appellant's relationship with his parents and brother in the UK would not be sufficient in themselves to avoid deportation, but are indicative of his ties to the UK and his lack of ties to Colombia."

15. At [123] the panel stated:

> "The paragraph 399A exception appears to have its origin in the Maslov principle, but it has been given a very significantly harsher twist in the final requirement of 'very significant obstacles to integration'. There could, therefore, be said to be an important gap between the private life exception in the Immigration Rules and statute on the one hand and the Maslov approach on the other. If the Maslov approach is introduced in the proportionality test envisaged at paragraph 44 of MF (Nigeria) then the fact that the Appellant has not lived in Colombia from the age of 11 and has spent over 30 years in the UK meaning that he has been settled in the UK for most of his life would amount to significant additional circumstances over and above the private life exception."

16. At [124] the panel concluded:

> "The evidence of reform and rehabilitation is also of importance. This is also a matter not mentioned in the exceptions. It is a significant factor in the Uner and Maslov criteria. The Appellant has not committed any further offences since his conviction in 2010 and has not come to the attention of police intelligence during this time. There is evidence that he has completed courses and that he has shown some insight into his offending. There is also evidence that he has moved away from his previous lifestyle. Whilst the likelihood of reoffending does not carry much weight in assessing the public interest it is still of some significance."

17. At [125] the panel stated:

> "We have read Chege and we note what is said at paragraph 26 about the meaning of 'compelling', namely having a powerful and irresistible effect, and being convincing. We also note the observation that the word 'very' indicates the very high threshold. In deportation cases great weight must of course be given to the public interest in deporting foreign national criminals. However, there may be

circumstances where the public interest is outweighed by the Appellant's particular circumstances. We find in light of our finding above that that in this Appellant's particular circumstances the very compelling circumstances test is met."

Submissions

18. Miss Savage relied on the grounds of appeal and submitted that there were no 'very compelling circumstances' sufficient to resist deportation under paragraph 398 of the Immigration Rules. The judge had concluded at [111] that the Appellant was likely to blame others for his involvement and his criminal conduct.

19. The Appellant had no regular contact with his daughter and no genuine parental relationship. The panel considered the Appellant's private life and concluded that there were no significant obstacles to reintegration in Colombia. Therefore the exceptions in 399 and 399A did not apply.

20. However, the panel concluded that there were compelling circumstances over and above those identified in the Immigration Rules. The panel's findings at [118] to [125] did not identify what those compelling circumstances were or support such a finding. The Appellant's length of residence was considered at [117] but this did not affect his reintegration.

21. The panel's conclusion at [119] that the Appellant's mindset had changed since his imprisonment conflicted with the findings at [111] and was also contradicted by the findings at [126]. Although, the Appellant had not come to the attention of the police for five years he had been in detention until 2012 and had been well aware of his deportation on release.

22. The circumstances set out at [118] to [125] did not constitute 'very compelling circumstances' particularly since the Appellant's relationship with his family would not constitute family life for the purposes of Article 8. The case of Maslov was entirely different to this case. In this case the Appellant was a 48 year old man not a juvenile offender, notwithstanding the Appellant had received youth custody for his first offence. Further, there was only one violent offence in Maslov where in this case the Appellant had a history of violent offending.

23. The panel concluded that the Appellant had weaker ties in Colombia than he did in the UK. This was a factor taken into account in paragraph 399A [117]. The panel had failed to identify factors not considered under paragraph 399 or 399A and had not applied the 'very compelling test' in paragraph 399A. The panel had failed to identify circumstances capable of meeting that test because those which were referred to in the decision had already been considered under 399 or 399A.

24. Miss Savage submitted that the public interest was relevant to the assessment of 'very compelling circumstances' and the panel had failed to

take it into account. The public interest in this case must prevail and the appeal should have been dismissed. Had the judge assessed the Immigration Rules properly the panel would have come to the opposite decision.

25. Mr Lee submitted that the grounds amounted to a perversity challenge. It could not said that the correct test had not been applied or that relevant factors had not been taken into account. The panel identified the issues at [67], namely whether the Appellant was in a durable relationship and, secondly, the role of Maslov in determining 'very compelling circumstances'. The panel relied on the relevant Rules and case law which they set out extensively. They concluded that Maslov fell to be applied as Strasbourg jurisprudence was still relevant to an assessment under the Immigration Rules.

26. At [103] it was clear that the panel were aware of the strong public interest in deporting the Appellant and that the only reason for considering 'very compelling circumstances' was in order to identify whether they outweighed the strong public interest. The threshold in a perversity challenge was a high one. If the panel had identified something amounting to 'very compelling circumstances' then the decision was open to them.

27. Applying Maslov, this Appellant was a settled migrant and therefore there had to be very serious reasons justifying his expulsion. The panel applied this at [123] and the Appellant's sheer length of residence could amount to very compelling circumstances, notwithstanding the fact that the Appellant did not have significant obstacles to integration in Colombia. The panel were applying the jurisprudence in accordance with MF.

28. The panel set out at [123] the reasons why they considered certain factors were not covered by the Immigration Rules. The evidence of reform and rehabilitation was an additional circumstance which the panel could take into account. It was also clear from [125] that the panel has attached great weight to the public interest. The only reason to interfere with the decision was if the Appellant's length of residence and his reform and rehabilitation could not amount to 'very compelling circumstances' outside the Immigration Rules.

29. The panel had looked cumulatively at all the factors and had carefully weighed all the evidence. They had applied the correct test and it was difficult to see how the decision could be challenged given the panel's careful consideration of the circumstances and the relevant case law.

30. The panel had clearly identified in the decision at [118] to [124] what amounted to compelling circumstances. Length of residence was not subsumed in paragraph 399 and 399A because it was limited by the requirement that the Appellant show significant obstacles to integration. Paragraph 399A was not compatible with Maslov, applying MF, and there was no consideration of the total length of residence under 399A.

31. In response, Miss Savage submitted that the panel had misapplied the Immigration Rules. Length of residence and reform and rehabilitation did not amount to compelling circumstances over and above those considered under paragraph 399 and 399A. The factors relied on in [118] were not factors over and above those considered under the Immigration Rules. The Tribunal had not applied the case law set out in substance, particularly that at [108], and the factors identified in [118] onwards were not compelling in the sense that they had a powerful and irresistible effect or they were convincing. Thirty seven years' residence could not amount to compelling circumstances on the facts of this case.

Discussion and Conclusion

32. Paragraph 399A of the Immigration Rules was not inconsistent with the decision in Maslov which found that where a settled migrant has been in the UK lawfully since childhood then very serious reasons were required to justify expulsion. I am of the view that these serious reasons exist and are set out at [110] and [111] of the decision.

33. There was no error of law in the panel's application of paragraphs 399 and 399A of the Immigration Rules. The Appellant could not show that he had a subsisting parental relationship with his daughter or that he was in a durable relationship with his EEA partner. In addition, there were no significant obstacles to his integration in Colombia. There was no challenge to the panel's finding on these points.

34. The panel found that the Appellant's lawful residence of 37 years [123] and the evidence of reform and rehabilitation [124] were sufficient to show 'very compelling circumstances' over and above the private life exception in the Immigration Rules. The panel found that the Appellant had shown some insight into his offending behaviour, but acknowledged that the risk of re-offending would not carry much weight in assessing the public interest.

35. I find that the panel had identified factors not considered under the Immigration Rules, namely, 37 years lawful residence and evidence of reform and rehabilitation. Length of residence was not only relevant to re-integration. These factors could amount to very compelling circumstances.

36. I find that the panel did not start from a neutral standpoint and they were well aware of the significant weight to be attached to the public interest. They concluded that the Appellant had been in the UK since the age of 11 and had been settled in the UK for most of his life. They properly directed themselves following Chege (Section 117D – Article 8 approach) [2015] UKUT 00165 (IAC) [125] and their finding that the Appellant's particular circumstances were very compelling such that they outweighed the public interest was open to them on the evidence before them.

37. The panel applied the correct test and took into account all relevant factors applying relevant case law and the Immigration Rules. They

acknowledged the weight to be attached to the public interest and having identified very compelling circumstances, concluded that they outweighed the public interest. Whilst a different panel may have come to a different conclusion, it could not be said that the conclusion reached by this panel was not open to them on the evidence.

38. Looking at the factors set out at [118] to [124], the panel's conclusion that these were sufficient to outweigh the public interest, in that they were powerful, irresistible and convincing, was open to them on the evidence. I find that there was no error of law in the panel's conclusion that the particular circumstances of the Appellant's case were 'very compelling.' There was no error of law in the decision to allow the appeal under the Immigration Rules.

Notice of Decision

The Secretary of State's appeal is dismissed.

No anonymity direction is made.

Signed Date 8th January 2016

Upper Tribunal Judge Frances