Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18546/2018

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reason Promulgated**
On 19 February 2019	**On 26 March 2019**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Sodiq Lanre Alafe
(no anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: **Ms C. Jaquiss, Counsel instructed by Perera & Co Solicitors**
For the Respondent: **Mrs H. Aboni, Senior Home Office Presenting Officer**

DECISION and REASONS

1. The Appellant is a national of Nigeria born on the 11th March 1999. He appeals with permission the decision of the First-tier Tribunal (Judge O'Hagan) to dismiss his human rights appeal against a decision to deport him from the United Kingdom.

Background and Legal Framework

2. The Appellant was born in Nigeria and lived there with his parents until he was about seven years old. In 2006 his father left the family home and in 2007 he, his

mother and baby sister travelled to the United Kingdom. They were given leave to enter as visitors. They overstayed those visas and have never returned to Nigeria. In 2018 the Appellant's mother and sister were granted discretionary leave. The Appellant's position has never been regularised: instead he faces deportation.

3. The reason that the Appellant faces deportation is that he has been convicted of a serious crime. On the 19th June 2017 he was convicted at Aylesbury Crown Court on two counts of possessing a Class A controlled substance with an intent to supply. The drugs were heroin and cocaine. He was sentenced to 45 months in prison. That sentence was sufficiently serious to trigger automatic deportation proceedings under s32 of the United Kingdom Borders Act 2007.

4. It is also relevant to note that this was not the Appellant's first offence. When he was 15 he was convicted of battery; when he was 17 he was convicted of possession of a bladed article in a public place. Neither of these convictions resulted in a custodial sentence.

5. When the appeal came before the First-tier Tribunal it was the Secretary of State's case that the Appellant was a serious criminal and that any interference that might be caused to his family or private life by removing him to Nigeria was insufficient to displace the very substantial weight to be attached to the public interest in doing so.

6. It was common ground that in order to avoid deportation the Appellant would have to demonstrate that one of the 'exceptions' set out in s.33 of the Borders Act 2007 applied in his case. That section contains 6 exceptions, only one of which was potentially engaged on the facts: s33 (2)(a), that his deportation would breach his Convention rights, that is to say his rights under the European Convention on Human Rights. In this regard the Appellant placed reliance on Article 8, submitting that his deportation would be a disproportionate interference with his long-standing private life in the United Kingdom, and with his close and meaningful relationships with his mother and young sister. Because he sought to rely on Article 8 the First-tier Tribunal was obliged to have regard to the provisions in respect of the public interest set out in s117C of the Nationality, Immigration and Asylum Act 2002:

> '(1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (4) Exception 1 applies where—
>
> (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.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.'

7. It was not contended that the Appellant could hope to meet 'exception 1' set out at s117C(4). Although he has lived in the United Kingdom since he was a little boy he has never had leave to do so. He had not therefore been lawfully resident here for most of his life. Nor could he meet 'exception 2', which relates to family members, since he had neither a qualifying partner nor minor children in the United Kingdom. By operation of sub-section (3) it would therefore seem that his claim was *prima facie* defeated: if he cannot meet those exceptions the public interest required his deportation. The wording of the statute notwithstanding the parties agreed that the dicta in NA (Pakistan) & Another v Secretary of State for the Home Department [2016] EWCA Civ 662 should be applied. In that case the Court of Appeal noted the apparent lacuna in s117C in respect of persons who receive a sentence of less than 4 years, but like the Appellant, cannot bring themselves within one of the exceptions. Unlike criminals sentenced to four years, whose position is covered by s117C(6), the statute does not set out any framework for consideration of their Article 8 claims. From paragraph 24 of NA Lord Justice Jackson puts it like this:

> 24. A curious feature of section 117C(3) is that it does not make any provision for medium offenders who fall outside Exceptions 1 and 2. One would have expected that sub-section to say that they too can escape deportation if "there are very compelling circumstances, over and above Exceptions 1 and 2". It would be bizarre in the extreme if the statute gave this right to serious offenders, but not to medium offenders. Furthermore, the new rule 398 (which came into force on the same day as section 117C) proceeds on the basis that medium offenders do have this right.
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> 25. Something has obviously gone amiss with the drafting of section 117C(3). In *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586, HL, at 592-593, Lord Nicholls (with whom the other members of the Appellate Committee agreed) explained the circumstances in which the courts in interpreting statutes can correct obvious drafting errors. In our view the lacuna in section 117C(3) is an obvious drafting error. Parliament must have intended medium offenders to have the same fall back protection as serious offenders. Mr Tam invited us so to rule.

> 26. In reaching this conclusion it is important to bear in mind that the new Part 5A of the 2002 Act is framed in such a way as to provide a structured basis for application of and compliance with Article 8, rather than to disapply it: see the title of Part 5A, the general scheme of the provisions in that Part and, in particular, section 117A(1). If section 117C barred medium offenders from asserting any Article 8 claim other than provided for in subsections (4) and (5), that would plainly be incompatible with Article 8 rights (either their own or Convention rights of individuals in their family) in some cases. Equally plainly, it was not Parliament's intention in enacting Part 5A to disapply or require violation of Article 8 in any case. We also place reliance on section 3(1) of the Human Rights Act 1998. That provision requires courts to construe legislation in a way which is compatible with Convention rights, if it is possible to do so. It is possible to do so here. In accordance with the guidance given by Lord Nicholls, the words which need to be read into section 117C(3) so as properly to reflect Parliament's true meaning are clear, namely the same words as appear in sub-section (6) and in para. 398 of the 2014 rules, which came into effect at the same time as part of an integrated and coherent code in primary legislation and the Immigration Rules for dealing with deportation cases.
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> 27. For all these reasons we shall proceed on the basis that fall back protection of the kind stated in section 117C(6) avails both (a) serious offenders and (b) medium offenders who fall outside Exceptions 1 and 2. On a proper construction of section 117C(3), it provides that for medium offenders "the public interest requires C's deportation unless Exception 1 or Exception 2 applies or unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2."

8. The First-tier Tribunal was therefore to proceed on the basis that the Appellant could only succeed if he could demonstrate that there were "very compelling circumstances, over and above those described in exceptions 1 and 2". In NA Lord Justice Jackson underlined the high threshold to be met when he said this:

> "33. Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient."

9. Before the Tribunal the Appellant argued that the following cumulative factors were sufficient to meet that high threshold:

   i) The fact that he has lived in the United Kingdom since he was 8: Maslov v Austria (application 1638/03) applied.

   ii) As he was a minor at all relevant times he cannot be held responsible for the fact that he did not have leave. He has lived in the United Kingdom for most of his life, is integrated here and would face very significant obstacles re-integrating into Nigerian society. Although there is no 'near miss principle' these facts were plainly relevant to the overall balancing

exercise: Secretary of State for the Home Department v JZ (Zambia) [2016] EWCA Civ 116.

iii) The Appellant's deportation was likely to have a very severe impact upon his sister, to whom he was very close.

iv) There was some mitigation for the Appellant's offending behaviour. As a minor he, his mother and sister were facing extreme poverty, homelessness and destitution.

v) The Appellant has undertaken several courses in prison and has shown genuine remorse and insight into his offending behaviour.

vi) The fact that he was actually a minor when he committed the index offence. He had immediately admitted his guilt when apprehended, but due to delays in the criminal justice system had not been sentenced until he had turned 18. Had the case been called on before his 18th birthday, he would not be facing deportation at all, since the exception at s33 (3) of the Borders Act would have been applied: "Exception 2 is where the Secretary of State thinks that the foreign criminal was under the age of 18 on the date of conviction".

10. The First-tier Tribunal accepted that a number of these factors weighed in the Appellant's favour but determined that the public interest prevailed, and dismissed the appeal.

The Appeal

11. It is convenient if I present the First-tier Tribunal's findings, the challenge to them and my conclusions, thematically.

Ground (i): Best Interests

12. It is submitted that the decision of the First-tier Tribunal was flawed for a failure to take into account the best interests of the Appellant's sister, still only 13 years old at the date of the hearing. It had been submitted that it was strongly in her best interests for her brother to remain in this country, and that such a finding should have been a primary consideration for the First-tier Tribunal. Both she and the Appellant had suffered a prolonged period of instability in childhood and it was submitted that she was already suffering a detriment by the Appellant's absence from the family home whilst he was in prison.

13. Before me Ms Jaquiss argued eloquently that this young lady would be materially and negatively affected by the deportation of her brother. Whilst it was correct to say that the Appellant has never been her primary carer, the evidence was to the effect that the two share a strong bond and that he has given her significant support.

14. I accept that the best interests of the Appellant's sister were a relevant factor in this case. I further accept that the determination nowhere reaches a firm conclusion about whether or not it would be in this child's best interests for the Appellant to be

deported. I am not, however, persuaded that this omission is such that the determination should be set aside. It is plain from his reasoning that the Judge expressly weighs in the balance the matters relied upon by Ms Jaquiss. At paragraph 41 the determination notes that the Appellant has had a "difficult life", and at paragraph 62 it says this:

> "I have considered the impact of the appellant's deportation on his relationship with his mother and sister. I accept that prior to his imprisonment, this family lived together. Sadly, that is a situation which has already been fractured because of the appellant's actions which led to his being removed from his family and imprisoned. It is said that the appellant's sister has been adversely affected by the separation. I have read her letter in which she sets out her feelings about this in terms I found to be heartfelt and moving. I recognise that the situation cannot have been easy for any of them. The reality is that no one is to blame for that other than the appellant himself whose actions brought it about."

15. It is not therefore correct to say that the Tribunal ignored the wishes and feelings of the Appellant's little sister. Given the terms in which the Tribunal expresses itself, it is manifestly unlikely that a more formal 'best interests' conclusion could, in these circumstances, outweigh the public interest.

Ground (ii): Re-offending

16. Ground (ii) is that the First-tier Tribunal failed to have regard to material evidence in relation to the risk of reoffending, and further that the Tribunal erred in failing to make a finding as to whether the Appellant would reoffend. The grounds acknowledge that the Tribunal did weigh some material evidence in the balance, specifically the OASYS report, the supporting statements from family and a letter from Ms Cain, the headteacher of the 'Boxing Academy' in Hackney, an alternative free school previously attended by the Appellant. It is submitted however that the determination nowhere addresses the specific evidence before it relating to the courses that the Appellant has undertaken in prison. These courses including victim awareness, 'motivation to change' workshops and the study of the effects of crack and cocaine on their users.

17. Although I accept that the risk of reoffending will always be relevant in a deportation appeal, it is in circumstances such as these, of only marginal relevance. That is because the public interest in his deportation turns not on what crimes he might commit in the future, but on the crimes that he has already committed. The Appellant received a sentence of 45 months in prison. It is instructive to note the circumstances of that conviction. In sentencing His Honour Judge Sheridan described the Appellant and his co-defendant as being drug dealers who were "in it up to their necks". He describes how these two young men from London and journeyed into Buckinghamshire in order to sell hard drugs, seeking to take advantage of a vacuum in supply that had resulted from an operation by Thames Valley police. When stopped, the Appellant and his co-defendant had on their person heroin and cocaine worth some £4000 at street level: 272 wraps of cocaine, and 74 wraps of heroin. This was, by any estimation, an extremely serious offence, and that is a matter that the

First-tier Tribunal was plainly obliged to give weight to. Nor was this the Appellant's first offence. At paragraph 36 the Tribunal very fairly discounts the relevance of the Appellant's first conviction, for battery, which he received a four-month referral order. It does however place rather more weight on the second offence, which took place when the Appellant was 17: this was his conviction for carrying a knife in a public place. Of this, the Tribunal says: "the dangers of knife crime are so obvious that they do not need to be laboured".

18. At the time of both this offence and his arrest for drug dealing in Buckinghamshire, the Appellant was living at home with his mother and sister. At the age of 17 the First-tier Tribunal considered that he would have been perfectly well aware that what he was doing was illegal, and extremely harmful to society. Given that, it is difficult to see what credit if any the Appellant might have attracted had the Tribunal had specific regard to the fact that he read an in-cell pack on crack and cocaine. I am accordingly not satisfied that the failure to mention this evidence amounted to an error of law. The Tribunal confirmed at paragraph 2 of the determination that it had regard to all of the evidence before it and there is nothing in the reasoning to make me doubt that statement.

Ground (iii) Maslov, Mwesezi and JZ

19. During her submissions before the First-tier Tribunal Ms Jaquiss placed particular reliance on three authorities: Maslov, Mwesezi v Secretary of State for the Home Department [2018] EWCA Civ 1104 and Secretary of State for the Home Department v JZ (Zambia) EWCA Civ 116. She now submits that its failure to address these authorities, or apply the ratios therein, means that its decision is fatally flawed in approach.

20. The principles distilled from these cases were that significant weight should be attached to the fact that the Appellant has lived here since he was a young child; the offences were all committed whilst the Appellant was a minor; he left Nigeria as a young child and as such would face difficulties integrating there today. It was further submitted, in reliance on JZ that reducing his family links to 'modern means of communication' could have a "devastating" impact on the Appellant.

21. It is appropriate that I explore these submissions in greater detail. The facts of Maslov are well known. Maslov was a Bulgarian national who had gone to live in Austria when he was six years old. Between the ages of 14 and 16 he had committed a large number of criminal offences, and the Austrians decided to deport him. When his case came before the European Court of Human Rights it held that considerable weight had to be attached to the finding that Maslov had committed relatively minor and non-violent offences; weight further had to be attached to the fact that he had lived in Austria for most of his life, and that the duty owed by a host state to such a child included an obligation to facilitate his rehabilitation. Mwesezi was a Ugandan national who had come to live in the United Kingdom when he was two years old. He had been found in possession of a gun and live ammunition and sentenced to 6 years imprisonment. In his case, the Court of Appeal accepted that the

considerations in Maslov remained relevant to a consideration of Article 8, notwithstanding the government's attempt to codify the article within the Immigration Rules. The fact that criminal offences were committed whilst the offender was still a child was plainly relevant to whether there were "very compelling circumstances" in play.

22. I do not perceive that the First-tier Tribunal misunderstood this line of authority. Nor do I accept that it ignored it. That reliance was placed on Maslov is expressly recognised at paragraph 19 of the determination; at paragraph 40 the Tribunal states that it has had regard to the fact that the Appellant was a minor when the offences were committed. At paragraph 48 the Tribunal recognises that the Appellant has lived in the United Kingdom since he was eight years old and that he is culturally and socially integrated in this country. I therefore reject the suggestion that the court ignored these factors.

23. The final authority relied upon was the case of JZ (Zambia). JZ was a young man who took part in the rioting of August 2011. He was captured by television cameras engaging in such activities as hurling planks of wood at the police. His mother saw the images on the news and reported her own son to Wood Green police station. He was arrested, and convicted of violent disorder and two counts of arson. He received a sentence of four years detention. His appeal against automatic deportation was allowed by the First-tier Tribunal; that decision was upheld by the Upper Tribunal; JZ eventually gained what I believe to be the unique distinction of being the only foreign criminal who has received a sentence of four years or more to succeed before the Court of Appeal. The fact in his case were however striking. Although he had not arrived in the United Kingdom until he was nine years old, JZ had never in fact lived in his native land of Zambia. He could speak none of the languages used there, and was entirely unfamiliar with the culture. He had no relatives there and the First-tier Tribunal had found that he would face great difficulty in securing employment. He was likely to face hostility in Zambian society, partly because he was a convicted criminal, and partly because he is of mixed race. His family are all British citizens and he was found to have roots and connections to this country. Both of his parents were unwell, and had looked to JZ to undertake parental roles towards his younger siblings. Crucially, for the purpose of Ms Jaquiss' submissions, JZ was sentenced just weeks after his 18th birthday.

24. I fully accept that there are parallels between the Appellant's case and that of JZ. It cannot however be said that the First-tier Tribunal here erred in not replicating that decision. These are always fact sensitive enquiries. Central to the ratio in JZ's case was the finding that he had absolutely no ties or hope of integrating in Zambia. In the Appellant's case the First-tier Tribunal expressly rejected such a submission. Unlike JZ he had lived in the country of his birth until he was about eight years old. The Tribunal found that he would therefore have a familiarity with Nigerian culture and could continue to benefit from the emotional support of his mother, who would of course be able to advise him about how best to make his way. The Tribunal found that the Appellant is of an age where it is reasonable to expect that he could work to accommodate and support himself in Nigeria.

25. The final point arising from these authorities is the alleged injustice arising from the fact that the Appellant committed the index offence when he was 17, but was not sentenced until he was 18. In her submissions Ms Jaquiss said that the Appellant had been stopped by police on 8 February 2017. He had immediately admitted his guilt (I interpolate that in respect of this admission the First-tier Tribunal was quite right to observe that he could have done little else, given the volume of Class A drugs that he had upon his person). The Appellant turned 18 approximately one month later, and so it was that when he was sentenced on 19 June 2017 he was officially an adult. As I have said, this is a factor which the First-tier Tribunal expressly recognises in its decision. It properly gave some weight to the Appellant's young age. I am however quite satisfied that the Tribunal was also entitled to take into account the fact that the Appellant was very nearly an adult when the offence was committed: he clearly knew what he was doing and there can be no suggestion that he lacked capacity in any way. Ms Jaquiss submitted that but for the delay in the criminal justice system the Appellant would not be facing deportation at all. I am afraid that I must reject that argument, as attractive as it initially seems. First, because there is no discernible delay in the administration of justice in this case. There was a period of just one month between the Appellant's arrest and his 18th birthday. I am unable to say that the criminal justice system operated unfairly in not having the Appellant convicted and sentenced within that four-week period. Nor can it be said that a conviction as a minor would necessarily have saved the Appellant from deportation proceedings: whilst the automatic provisions in section 32 would not have been engaged, it would still have been open to the Secretary of State to pursue deportation on 'conducive' grounds.

Ground (iv): Evidential Foundation

26. Ground (iv) is concerned with the finding at paragraph 54 of the determination that the Appellant's memory of Nigeria may well have been kept alive, at least to some extent, by being brought up by a Nigerian mother. I accept the submission that this logic is somewhat tenuous. In the absence of any actual evidence that the Appellant's mother was particularly concerned with preserving Nigerian culture within the family home it can properly be said that this was a finding without evidential foundation. I am not, however, satisfied that this error was in anyway material to the outcome of this appeal. It relates to one very marginal element of the reasoning, and it is clear from the determination read as a whole that the Tribunal's decision would have been the same, even absent this error.

Decisions

27. The determination of the First-tier Tribunal contains no material error of law and it is upheld.

Upper Tribunal Judge Bruce
18th March 2019