Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10823/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 April 2014	**On 15 July 2014**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

NICHOLAS ORLANZO PATRICK

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K. Cronin, Counsel instructed by Birnberg Pierce Solicitors
For the Respondent: Mr C. Avery, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The appellant is a citizen of Jamaica, born on 23 October 1989. He arrived in the UK in April 2002 with two of his siblings in order to live with his aunt, after the murder of his mother by his father. He was granted indefinite leave to remain on 4 August 2003.

2. On 9 December 2011, in the Crown Court at Southend, he was convicted of an offence of assault occasioning actual bodily harm and possession of cannabis and sentenced to a term of 14 months imprisonment. He received a further 4 weeks imprisonment to run consecutively for breach of a suspended sentence, making a total of 15 months' imprisonment. The sentence was reduced on appeal to one of 10 months imprisonment for the offence of assault with the four weeks imposed for breach of the suspended sentence left intact, resulting in a total sentence of 11 months' imprisonment.

3. On 30 April 2012 a decision was made to make a deportation order against the appellant, ostensibly with reference to paragraph 364 of HC 395 (as amended). His appeal against the decision was dismissed by a Panel of the First-tier Tribunal consisting of First-tier Tribunal Judge Cooper and Mr B.D. Yates, a non-legal member, after a hearing on 4 November 2013.

4. An earlier appeal against the respondent's deportation decision was allowed by the First-tier Tribunal, but that decision was set aside for error of law.

Submissions

5. Ms Cronin relied on the grounds of appeal to the Upper Tribunal. She submitted that there was no reference in the determination to the appellant's documents, or at least what the content of those documents was.

6. It was submitted that this was a case which was governed by paragraph 364 of the immigration rules but the Panel had only referred to it at [142] and had elided that paragraph of the rules with the 'new' Article 8 rules. Ms Cronin relied on the decision in MF (Article 8 – new rules) Nigeria [2012] UKUT 00393(IAC) in terms of retrospectivity in relation to the new Article 8 deportation rules. It was submitted that the Panel did not engage with paragraph 364.

7. It was further submitted that the Panel did not give sufficient consideration to the appellant's relationship with his aunt and siblings with reference to the decision in Beoku-Betts [2008] UKHL 39, seeming to conclude that the appellant could only have 'one' family life, with his partner Ms McKay. The Panel had failed to take into account the bond that exists between family members having regard to the traumatic events that the family experienced. The appellant's sister has quite serious mental health problems, and there was nothing to contradict that evidence. The Panel had given insufficient weight to the circumstances of all interested parties.

8. In addition, it was submitted that no account was taken of the effect on Ms McKay of the appellant's removal and the assessment of the reasonableness of her returning to Jamaica with the appellant was

flawed. The Panel stated that she would have the 'option' of returning with the appellant but that is not the same thing as 'reasonableness'.

9. There was evidence that the appellant needed a particular form of treatment (to deal with the trauma he had suffered), and the evidence from Mr McDonald was that that treatment had finally been found for him. Dr Bell also gave [written] evidence to the same effect. That evidence had not been evaluated when the assessment was made of the seriousness of the offences.

10. As regards the issue of self-harm, it was irrational of the Tribunal to be sceptical of the risk in this respect. There was disclosure of such a risk to his GP, before any question of deportation arose. It was incorrect for the Panel to have concluded that there was no evidence other than from Dr Bell as to the risk of self-harm; there was evidence from Mr McDonald. Furthermore, the temporary help that might be available to the appellant on return to Jamaica would be totally inadequate to deal with the risk of self-harm.

11. Lastly, it was submitted that the Panel was wrong in [157] to state that there was a need to find "exceptional circumstances", and there was no consideration of the decision in Maslov v Austria [2008] ECHR 546.

12. On behalf of the respondent Mr Avery submitted that the Panel did have regard to paragraph 364 of the immigration rules, albeit that they did not refer to all of it. In any event, given the findings of fact, it is debatable whether this is an issue which could have had any effect on the outcome of the proceedings.

13. As regards family life, the Panel accepted that the appellant and his sister had always been close. It properly considered all the evidence and the factual situation as it is now. It had also considered his relationships as an aspect of private life, and it is evident therefore that the relationships had not been ignored. As regards Ms McKay's pregnancy, the evidence in that respect was rather limited and it is a matter that is referred to in the determination.

14. The Panel took into account the evidence of the risk of self-harm and referred to the most significant aspects of that evidence. Although the appellant had claimed to have self-harmed, there was no medical evidence in that respect. It is a matter that relied on what the appellant had said to various people.

15. A proper assessment had been made in relation to the claimed risk from the appellant's father. It was not clear that the appellant's father was going to be released (from Broadmoor) or that he would come into contact with the appellant if he was.

16. Even if [157] could have been more detailed, there is sufficient reasoning in the determination as a whole.

17. In reply Ms Cronin submitted that it was a serious error of law not to apply paragraph 364 which governed this appeal. The finding that he does not have family life with his sister and brother, Kristeria and David, is irrational. The conclusion that they could maintain contact by modern means of communication belies the closeness of their relationship and ignores how important that relationship is for the appellant's continuing stability. There was no reference by the Panel to Ms McKay's pregnancy, albeit that it was unusual to have evidence in the way it was given of that very recent event. Her pregnancy was not taken into account in relation to her ability to relocate.

18. It was further submitted that there was an inadequate assessment of the evidence in terms of the risk of suicide in the event of the appellant's deportation. It was in any event not clear from [156] what conclusion the Panel came to as to the risk of suicide.

My assessment

19. I deal firstly with the complaint about the First-tier Tribunal's consideration, or what is said to be a lack of consideration, of paragraph 364 of the rules. It is argued that because of the date of the immigration decision in this case, it was paragraph 364 which applied, rather than the 'new' deportation rules contained in paragraphs 398 and 399.

20. The decision to make a deportation order was made on 30 April 2012. The 'new' deportation rules came into force on 9 July 2013. The grounds at [4] contend that the appellant "did not seek to have his claim determined under the post-July rules." Reference is made to the decision of the Upper Tribunal in MF (Nigeria) in which it was decided that the new deportation rules did not have retrospective effect. On that point the Court of Appeal (MF Nigeria [2012] EWCA Civ 1192) expressed no disagreement.

21. I note that the grounds of appeal before the Upper Tribunal, and indeed as initially advanced before the First-tier Tribunal, seeking permission to appeal, whilst asserting what rules governed the appeal, do not actually raise a distinct complaint about the First-tier Tribunal's approach in this respect. This is in contrast to the submissions made before me, namely that it was a "serious error of law" not to have considered the appeal under paragraph 364.

22. The reason for what is evidently a shift in emphasis between the grounds and the submissions in this respect can, it seems to me, be deduced from what is recorded in the determination of the First-tier Tribunal and in the appellant's skeleton argument. In the determination the Panel was plainly aware that the application of the correct rule was an issue, stating at [57] that "It is not entirely clear" whether paragraph 364 or paragraphs 398-399B apply. At [127] it was stated that it was

common ground that the substantive appeal was to be considered with reference to Article 8 of the ECHR. At [128] it was stated as follows:

> "Ms Cronin correctly pointed out in her skeleton argument that the Upper Tribunal in *MF Nigeria* concluded that the Immigration Rules brought into effect in July 2012 did not apply to deportation decisions made before that date. She also noted that the Court of Appeal in the same case did not specifically address that issue…She nevertheless sought to address the criteria imposed by the new paragraphs 398-399B…arguing that they were in any event met in this case."

In the next paragraph the Panel stated that:

> "Out of abundant caution, we shall adopt the same approach, considering whether the Appellant can meet the requirements of the new Rules and, if not, whether his appeal succeeds under the broader principles of established Article 8 jurisprudence."

23. At [142] the Tribunal referred to paragraph 364 stating that it establishes a presumption that where a person is liable to deportation the public interest requires deportation, and that it will only be in exceptional circumstances that the public interest will be outweighed in a case where removal would not be contrary to the refugee and human rights conventions. There is then reference to the provisions of paragraphs 398 and 399. There is further reference at [145] to the appellant's skeleton argument on the application of the 'new' deportation rules. It is as well to turn at this point to that skeleton argument.

24. When one looks at the skeleton argument dated 3 November 2013 it is clear that reliance was placed on the 'new' deportation rules as per paragraphs 398 and 399. Paragraph 2 of the skeleton argument refers to a supplementary reasons for deportation letter dated 28 November 2012, and stating that this letter did not explicitly address or apply the new rules. At [12] and [13] of the skeleton argument it is asserted that paragraph 364 applies. However, at [14] it is argued that the new, post July 2012 rules, are "indicative of R's view as to how the balance should be struck between the public interest and the individual right" and going on to state that the appellant's case "meets some of the criteria and all of the public policy assumptions under these Rules-as noted in the **bold annotation** to the rules cited below" (emphasis as in original).

25. There then follows a rehearsal of the post-July 2012 rules with interspersed arguments or comments as to the extent to which the appellant is able to bring himself within those Rules.

26. Whilst I am satisfied that this appeal is governed by paragraph 364, the First-tier Tribunal can hardly be criticised for dealing with the appeal on the basis advanced on behalf of the appellant. The Panel was evidently encouraged to consider the extent to which the appellant was able to

meet the post-July 2012 rules. Regardless of that, in the grounds before me at [4], it is said that the appeal fell to be considered under Article 8 case law, which is what the Panel did.

27. It is also worth noting that at [142] the Panel compared the provisions of paragraph 364 and the new paragraph 398, observing a certain symmetry between the provisions.

28. Aside from the observations I have made in terms of the way that the appeal was advanced before the First-tier Tribunal, even if there was an error of law on the part of the First-tier Tribunal in relation to paragraph 364, I cannot see how, in the circumstances of this case, that error of law could have affected the outcome of the appeal. The Tribunal was in any event going to be driven towards a consideration of Article 8 proper, and such a consideration was undertaken. Whilst it could be said that the post-July 2012 rules heralded a more rigorous or more restrictive approach to Article 8 appeals, it has not been argued that the Panel's assessment under Article 8 took into account in its proportionality assessment the public interest as expressed in those rules in terms of the legislature's view of where the public interest lies. In other words, the Panel did not emphasise, or over emphasise, or even expressly take into account, the appellant's failure to meet the post-July 2012 rules.

29. I have set out above the submissions made on behalf of the appellant which fleshed out the written grounds. The first of those grounds contends that there were errors in fact-finding made by the First-tier Tribunal. I can summarise the first aspect of this ground as being an assertion that the First-tier Tribunal erred in its assessment of the extent to which the appellant has family life with his aunt and siblings. Reference is made in the grounds, and was made in submissions, to the appellant's background and history, to expert evidence, and to the evidence of the witnesses.

30. In relation to this, and other grounds, it is necessary to point out that the Panel plainly had well in mind the appellant's background and history, which most significantly included the fact that within days of the appellant's mother's arrival in the UK the appellant's father murdered her when the appellant was aged about 12 or 13 years. The Panel referred to that event at, for example, [130] and [154]. It also referred to the appellant's father having been detained in a secure hospital with a restriction (under the Mental Health Act 1983). It was accepted that the appellant had experienced traumatic events as a child ([156]).

31. The Panel gave detailed consideration to the question of whether the appellant had family life with his aunt and siblings, and approached this question taking into account the findings of the First-tier Tribunal which heard a previous deportation appeal in respect of this appellant, in December 2012. The Panel accepted that, applying the Devaseelan

principles (Devaseelan [2002] UKIAT 00702) the starting point in the fact-finding exercise was the findings of fact made by the previous Tribunal. The Panel then went on to evaluate the relationships that the appellant now had and the extent to which the situation had moved on since that hearing in 2012. There was consideration of the appellant's relationship with Jasmine McKay, with whom he was living prior to the offence which prompted the deportation decision. It was noted that although he was living with his aunt at the time of the hearing before them, this was primarily because it was a condition of his bail, and that it was made clear by the appellant and Ms McKay that once restrictions were lifted they intended to live together in their own independent household.

32. It was accepted that the appellant and his sister Kristeria have always felt very close to each other, but the Panel noted that she now lives an independent life in Walsall and that she had two young children and mainly communicates with the appellant by phone.

33. At [136] there was consideration of his relationship with his younger brother David, noting the evidence of the strength of their relationship. David did not attend the hearing and there was no witness statement from him. Although it was accepted that they are very close, the fact that the appellant intended to set up home with Ms McKay was a factor that was taken into account in assessing whether he and his brother have family life together.

34. Although complaint is made in the grounds that the Panel assumed, without evidence, that the appellant's brother would soon be going to university, that in my view is a minor issue in the context of the family life assessment as a whole. The evidence that his brother was studying for his A levels was what prompted the Panel to make the assumption about university, but as I have indicated, I do not consider this to be a significant matter in their assessment.

35. I do not consider that the Panel adopted the approach of concluding that because the appellant has family life with Ms McKay he could not have family life with his aunt and siblings. The Panel’s conclusion was based on an assessment of those other relationships.

36. I do not accept that the Panel left out of account the evidence of the appellant's aunt and siblings as to their attachment to him, and even dependency. Nor do I accept that the Panel was in error in failing to consider the evidence, for example of Dr Bell, in relation to the extent to which the appellant is dependent on family support. At [137] the Panel stated that it recognised that the appellant still looks to his aunt for moral and emotional support, but concluded that the relationship no longer amounted to family life. At [138] there is reference to the support that the appellant has had from various professionals, including Dr Bell. There is further reference to Dr Bell’s evidence at [156] in the specific context of what is said to be a risk of self-harm or suicide.

37. The First-tier Tribunal was not required to refer in detail to every aspect of the evidence. I am satisfied that its conclusions in relation to family life are free from any error of law.

38. Similarly, I am not satisfied that there is any error of law in the terms expressed in the grounds under the heading “A’s Trauma”. The First-tier Tribunal was plainly aware of the fact that the appellant had been provided with significant support because of his history and background. There is reference in the determination to the support that he has had, for example at [151] where “counselling and support” is referred to. It is evident that in considering the findings made by the earlier Tribunal, this Panel was aware that those findings were made in the context of the appellant's account of the events of his childhood, which are referred to in that earlier determination. I do not consider that it could be said that the finding of this Panel failed to take into account the professional and medical evidence in the observation at [152] that in committing the serious assault which prompted these deportation proceedings there was nothing to suggest that the appellant could not have ‘walked away’, “just as he promised Ms Jones he would when she was preparing her report [in] 2008”.

39. At [138] the Panel concluded that the appellant had “woefully failed to live up to the expectations expressed by the Tribunal”. That was a reference to the decision of the Tribunal which allowed the appellant’s previous deportation appeal after a hearing on 17 December 2008.

40. The Panel in the appeal before me went on to state at [138] that it acknowledged the “extraordinary tenacity and goodwill of the “team” who have been supporting [the appellant] throughout this time, including his aunt, Dr Bell and in particular Mr McDonald and Mr Walsh, who have clearly gone to great lengths on his behalf…Ms Cronin herself seems to have been almost equally dedicated, representing him, as far as we can see, at every substantive hearing since and including the one in 2008”.

41. The Tribunal’s assessment of the facts of the appeal included a consideration of the appellant's offending history. At [139] it was stated that everyone, including the appellant, had high hopes in 2008 that he would change for the better. The Panel referred to a report from Judith Jones at that time whereby the appellant said that he was ashamed of his criminal behaviour, that his aunt and sister’s crying when he went to prison is something that he never wanted to see again, that he wanted to sort out his life, and get a job and look after his aunt.

42. However, at [140] the Panel noted that within less than a year of the promulgation of the determination of his appeal in January 2009 he had committed an offence of criminal damage in September 2009, threatening behaviour in May 2010 and disorderly behaviour in February 2011. He committed the index offence in August 2011. That offence involved an assault with a five foot fence post.

43. The point advanced in relation to fear of violence from the appellant's father, has no merit. There was no evidence before the Tribunal which indicated that his father had been released. Even accepting that the respondent has indicated that his father would be considered for deportation closer to the expiry of his minimum term, as stated at [10] of the grounds, there was nothing to indicate that his release was expected in the near future. In addition, the question of any potential future risk to the appellant from his father has to be considered in the context of the fact that the appellant is no longer a child who would be under the control of his parent. At the date of the hearing before the First-tier Tribunal the appellant was 24 years of age.

44. It is contended that there is an error of law in the First-tier Tribunal's assessment of the proportionality of the interference with the appellant's family life with his partner. However, the grounds in this respect amount to little more than a disagreement with the Tribunal's proportionality assessment. At [153] the Tribunal referred to Ms McKay's evidence of not envisaging going to Jamaica with the appellant, that she is a British citizen and that she has lived all her life in the UK. However, the Tribunal also noted that Article 8 does not entail a right for a family to choose where to exercise their family life. It also referred to Ms McKay's age, her good health and the evidence that she does not appear to have particularly strong ties to her immediate family. The Panel was entitled to conclude that going to Jamaica with the appellant was an option that was open to her. It is implicit in that conclusion that the Panel were of the view that it would be reasonable for her to do so, contrary to what is said in the grounds.

45. In submissions before me it was said that the Panel did not take account of the evidence before the First-tier Tribunal that Ms McKay was pregnant, and that this was not considered in terms of the question of her going with the appellant to Jamaica. However, I cannot see how this establishes any error of law on the part of the Tribunal when one considers the evidence that was before it in relation to the pregnancy. This can be seen from [98] of the determination. Ms McKay produced a pregnancy test kit, stating that she had taken the test yesterday and that it was positive. Even accepting that the Panel failed to take that evidence into account, I do not accept that on the basis of that evidence the Panel should have concluded that Ms McKay was in fact pregnant, or that if she was, the pregnancy was viable and would lead to the birth of a child. Notwithstanding that at the hearing before me she was said to be two months away from giving birth, I am not satisfied that the First-tier Tribunal erred in law in failing to take into account the evidence from Ms McKay as to her pregnancy when undertaking the proportionality assessment.

46. In [154] the Panel undertook an evaluation of the appellant's circumstances on return to Jamaica in terms of his ability to re-establish himself and in terms of family support or contact that he could expect

on return. Again, the grounds only amount to a disagreement with that assessment but do not establish any error of law.

47. The grounds at [15(i)] assert that the Panel failed to determine the issue of whether the appellant was at risk of suicide. I do not accept that assertion. At [156] it is evident that the Panel, implicitly at the very least, did not accept that aspect of the claim. Indeed, the submission before me to the effect that it was irrational for the Panel to have been sceptical about this aspect of the claim, undermines that aspect of the grounds.

48. I do not accept that there was any error of law in the Panel's assessment of the evidence in relation to the risk of self-harm or suicide. This issue is considered at [156] of the determination. The Panel was entitled to conclude that although the appellant had "disclosed" previous self-harming attempts, Dr Bell's report is based solely on what the appellant told him and that there is no other medical or psychiatric evidence to support those claims. Although in oral submissions before me reference was made to the evidence of Mr McDonald whose evidence was that self harm had been disclosed to the appellant's GP, the Panel's conclusion in terms of the lack of supporting medical or psychiatric evidence was a conclusion that was based on the evidence.

49. Furthermore, the Panel went on to conclude that even if the appellant was at risk of suicide, appropriate protective measures can be taken in the UK, as set out in the decision letter [dated 28 November 2012]. In addition, the Panel did not ignore evidence of the extent to which family support is said to be significant for this appellant in terms of his mental health. This was expressly referred to at [156]. However, it was concluded that the appellant would not be so alone in Jamaica as had been suggested. The conclusion that the high threshold for a breach of Article 3 of the ECHR had not been reached in this regard is a sustainable one.

50. The grounds do not raise any argument in relation to the decision in Maslov although the matter was raised in submissions before me in terms of the Panel having failed to consider that decision. However, the offence which triggered this latest decision to make a deportation order was an offence that was committed when the appellant was an adult. Putting aside the fact that the Panel did refer Maslov when summarising the respondent's reasons for making the deportation decision, the Panel did refer to the length of time that the appellant had been in the UK and his age when he arrived (see [131] and [148]), and his age of 24 years at the date of the hearing. It is clear from a reading of the Panel's reasons that it was aware that the appellant was a settled migrant, for example at [154] where it was accepted that it would be difficult for the appellant to re-establish himself in Jamaica.

51. Furthermore, even if the Panel did err in not making explicit reference to the decision in Maslov in its reasons, as is clear from [46]-[47] in the respondent's own consideration of that case, there are clear distinctions to be made between that case and that of this appellant. Explicit consideration of the Maslov principles could not have affected the outcome of the appeal.

52. In summary, I am not satisfied that there is any error of law in the decision of the First-tier Tribunal in any of the respects advanced.

Decision

53. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision of the First-tier Tribunal to dismiss the appeal on all grounds therefore stands.

Upper Tribunal Judge Kopieczek

11/07/14