Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00251/2013

THE IMMIGRATION ACTS

Heard at : Field House
On : 10 February 2014

Determination Promulgated
On : 19 February 2014

Before

UPPER TRIBUNAL JUDGE KEBEDE
UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SOFIAN MAJERA
(NO ANONYMITY ORDER)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Reynolds, instructed by Birnberg Peirce & Partners
For the Respondent: Ms E Martin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before us following a grant of permission to appeal on 4 September 2013.

2. The appellant is a citizen of Rwanda, born on 10 January 1982. He arrived in the United Kingdom on 14 April 1997, aged 15 years, together with his mother and siblings. His mother claimed asylum but her claim was refused on 25 April 2001. She was nevertheless granted four years of exceptional leave to remain and on 9 November 2005 was given indefinite leave to remain, with the appellant granted leave in line as her dependant.

3. On 16 May 2001 the appellant received his first convictions and went on to commit a further 18 offences, including mainly driving offences but also handling stolen goods and taking vehicles without consent, up until the index offences. On 16 December 2005 he was remanded in custody on charges of robbery and on 12 September 2006 he was convicted at Wood Green Crown Court on ten counts of robbery. On 13 November 2006 he was sentenced to ten terms of life imprisonment (concurrent) with a minimum of seven years to be served and was recommended for deportation. The life sentences were quashed on appeal on 1 April 2007 and were varied to that of 'imprisonment for public protection' with the seven year imprisonment and the recommendation for deportation being upheld.

4. On 22 March 2007 the appellant was served with a notice of liability to deportation to which he responded. A further liability for deportation letter and questionnaire was served on 19 November 2011 to which he again responded, raising Article 8 grounds. A decision was made on 1 November 2012 that section 32(5) of the UK Borders Act 2007 applied and a deportation order was signed against the appellant on 13 November 2012. He appealed against the decision of 1 November 2012.

Deportation Proceedings

5. The respondent, in making the deportation decision, considered that paragraphs 399 and 399A of the immigration rules could not apply to the appellant due to the length of sentence handed down but observed in any event that he did not have children or a partner and that, with regard to private life, he had not lived in the United Kingdom with valid leave for 20 years continuously. The respondent considered, with regard to paragraph 398 of the rules, that there were no exceptional circumstances that would outweigh the public interest in his deportation, taking account of his claim to have no ties to Rwanda and to have mental health problems. With regard to the latter, the respondent noted the lack of evidence to confirm such a claim and considered in any event that the appellant could access treatment in Rwanda. The respondent did not accept that his deportation would breach Article 8 of the ECHR.

6. The appellant's appeal was heard before the First-tier Tribunal, by a panel consisting of First-tier Tribunal Judge Frankish and Mr B D Yates. The panel heard oral evidence from Joanne Lackenby, a chartered psychologist and senior lecturer at Coventry University who had represented the appellant before the Parole Board at the prison. The panel was referred to a grant of indefinite leave to remain in the United Kingdom made to the appellant's mother and to the appellant himself on 9 April 2009, but rejected the submission made that that in effect cancelled out the effect of the convictions arising

before that grant in accordance with the principles in Omojudi v. The United Kingdom - 1820/08 [2009] ECHR 1942. It also rejected Ms Lackenby's assessment of the appellant as posing a low risk of re-offending. The panel concluded that the appellant's deportation would not breach Article 8 and it accordingly dismissed the appeal.

7. Permission to appeal to the Upper Tribunal was sought on the following grounds: that the First-tier Tribunal ("the Tribunal") had erred by failing to attach considerable weight to the grant of indefinite leave to remain made in full awareness of the appellant's offending history including the index offences, in line with the principles in Omojudi; that it had erred in its approach to the appellant's behaviour whilst in prison and in particular in its misunderstanding of the nature of the 32 negative VDTs (voluntary drug tests) that he had received; that it had erred in its understanding of the Secretary of State's discretionary powers to recall the appellant to prison; that it had failed to take account of the risk assessments made by the relevant professional experts; that it had failed to consider and apply the principles in Maslov v Austria - 1638/03 [2008] ECHR 546; and that it had erred in its approach to the appellant's mental health when assessing Article 8.

8. Permission to appeal was initially refused, but was subsequently granted on a renewed application on 4 September 2013.

Appeal hearing

9. The appeal came before us on 10 February 2014. The appellant was not present and Mr Reynolds informed us that that was because he had advised the escort services that his presence was not required since the hearing only concerned the matter of error of law.

10. We heard submissions from both parties. Mr Reynolds expanded upon the grounds of appeal and Ms Martin responded accordingly. We have dealt with their submissions in more detail in our considerations below.

Consideration and findings.

11. In our view the Tribunal did not make any errors of law such that its decision needs to be set aside. Our reasons for so concluding are as follows.

12. The first and second grounds challenge the Tribunal's findings on the effect of the grant of indefinite leave to remain to the appellant. They rely on the decision of the European Court of Human Rights in the case of Omojudi as establishing a principle following which considerable weight was to be given to a grant of indefinite leave to remain subsequent to the index offences. Mr Reynolds submitted that the Tribunal had erred by seeking to distinguish the appellant's case from that of Omojudi on the basis that in the latter case there was a long period of no offending. However it is plain that that was not the principle basis upon which the Tribunal had distinguished the appellant's case. Although that was one reason given, at paragraph 27, for so doing, the more significant reasons were given by the Tribunal in the subsequent paragraphs, from paragraph 28 to 32. Those reasons were that in the appellant's case the actual grant of indefinite leave to

remain had been made on 9 November 2005 at which time the respondent would not have known about the index offences and that what had occurred on 9 April 2009 was a replacement of the appellant's mother's immigration status documentation and, in error, that of the appellant as her dependant, after she had lost the original papers.

13. As recorded from the summary of the pre-sentence report of 7 November 2006, at paragraph 6 of the Tribunal's determination, the index offences took place between 24 October and 15 November 2005. It was not until 16 December 2005 that the appellant was remanded in custody as a result of those offences and it was not until 12 September 2006 that he was convicted. Thus, at the time he was granted indefinite leave to remain in line with the grant made to his mother, on 9 November 2005, the respondent could not have been aware of that offending history and indeed it continued past that date. Although the appellant's history of offending extended back to May 2001, it appears that the respondent did not consider the relatively minor offending during that earlier period to be a reason to refuse to grant indefinite leave to remain. Clearly the appellant's offending from 24 October 2005 was in a significantly more serious category and it was on the basis of that period of offending that the deportation proceedings were initiated.

14. The Tribunal went on, at paragraphs 29 to 32, to consider the "grant" of indefinite leave to remain on 9 April 2009, at a time when the respondent had already initiated deportation proceedings. It was on that basis that the grounds particularly relied upon the observations made in Omojudi. However the Tribunal properly concluded that that was not a "grant" of leave so much as a duplication of an earlier grant and that the papers had been issued to the appellant, as the dependant of his mother, in ignorance of the deportation proceedings. It was simply an administrative error. It was Mr Reynolds' submission that it was not open to the Tribunal to reach such a conclusion, given the inadequate evidential basis for such a claim. However, it is clear from the Tribunal's findings at paragraph 30 to 32 that it reached its conclusion not only on the basis of instructions from the relevant senior caseworker to the Home Office Presenting Officer, but also upon a careful consideration of the further documentary evidence relating to the appellant's mother's lost immigration status documentation. We find no reason why the Tribunal was not entitled to rely upon the oral instructions of the senior caseworker, but in any event consider that it was entirely open to the Tribunal to conclude, on the basis of the documentary evidence before it, that the "grant" of indefinite leave to remain on 9 April 2009 was simply a duplication of status papers previous issued and was no more than an administrative error. Indeed Mr Reynolds agreed before us that the issue of the status papers in April 2009 was not an actual "grant" of leave, but a confirmation of the earlier grant of leave. He nevertheless submitted that the point was the same. We do not agree and we find, as the Tribunal did, that there is no proper basis upon which to conclude that the observations made in Omojudi apply in the appellant's case and that the Tribunal was accordingly entitled to attach the limited weight that it did to the grant of indefinite leave to remain.

15. The grounds go on to challenge the Tribunal's findings at paragraph 37 in regard to the appellant's conduct during his imprisonment, as relevant to the question of rehabilitation and, in turn, future risk. We agree that it appears the Tribunal

misunderstood the effect of negative VDTs when concluding that the appellant's period of imprisonment was not devoid of incident. However, contrary to the assertion made in the grounds, we do not consider that to be material to the assessment of risk. We find merit in Ms Martin's submission that the outcome of the drugs test was a neutral factor and did not materially assist the appellant, given that there had never been a question of him having ever taken drugs and that was not relevant to his criminal offending. There is no doubt that the Tribunal was fully aware of the positive comments made by the Parole Board with respect to the appellant's conduct in prison and the absence of any adjudications and that that was a matter which it took into account - that is apparent from the references to their report at paragraph 9 and to the evidence at paragraph 37. However the Tribunal was nevertheless entitled also to take into account other matters such as the incidents arising from his employment, indicating a lack of motivation and engagement, and an unresolved adjudication on transfer to a different prison, as referred to at paragraphs 13 and 14.

16. It is not in dispute that the assessments made with respect to the risk of re-offending and harm to the public identified as the relevant factor the appellant's re-association with his criminal friends. It was the view of the chartered forensic psychologist, Ms Lackenby, that that risk could be managed by the conditions of his licence, given that warning signs of re-association with criminal peers would be picked up by his offender manager leading to him being recalled into prison. The Tribunal, at paragraph 38, did not accept that that was realistic and considered that the appellant would have to commit a further crime in order to be recalled. It is asserted in the grounds that that was an error of fact, made in ignorance of the Secretary of State's broad discretionary powers to revoke a licence or recall to prison, and that the Tribunal thereby made a material error of law. However the Tribunal was, in our view, entitled to be circumspect about the management of that risk factor, but in any event took a wider view of the relevant factors impacting on the question of risk at paragraph 38 and gave full and proper reasons for reaching the conclusion that it did.

17. Contrary to the assertion made in the grounds and to Mr Reynolds' submissions, it seems to us that the Tribunal gave a detailed and careful consideration to the reports from all relevant professionals involved in the appellant's risk assessment, from the pre-sentence report in 2006, to the OASys report in September 2009 and up until the most recent reports from the Parole Board and the forensic psychologist Ms Lackenby. There was plainly no failure to consider the views of the offender manager and offender supervisor. Indeed, paragraph 17 specifically refers to the report from the offender supervisor (albeit mistakenly referred to as the offender manager), as found at page 59 of Tab B of the appellant's appeal bundle and the views of the offender manager and the offender supervisor are referred to within the consideration of the Parole Board's report at paragraphs 8 and 9 of the determination. It is of some relevance to note, as the Tribunal did at paragraph 17, that Ms Wallace, the offender supervisor, had, at the time of her report in December 2012 only spent an hour with the appellant and that the offender manager had not even met him. It is also relevant to note that Ms Lackenby, at paragraph 13.4 of her report, referred to the appellant having had very little contact with his offender manager at the time of her report. Furthermore, the parole panel mentioned at paragraph 7 of their assessment the fact that the offender manager had not prepared a full and

detailed risk management plan. The updated offender manager report referred to at paragraph 2 of the Parole Board report does not appear to have been included in the appeal bundle before the Tribunal. Mr Reynolds made much of the Tribunal's confusion between the offender manager and the offender supervisor but we do not consider anything to turn on that and what is relevant is that consideration was clearly given to their views.

18. In the circumstances we consider that the Tribunal gave detailed consideration to the evidence before it in assessing risk, taking account of the views of the various professionals and professional bodies involved and taking into account the appellant's conduct in prison and (contrary to the assertion made in the grounds) including the completion of various courses. Having considered all that evidence, the Tribunal was entitled to form the view that it did as to the risk posed by the appellant and was entitled to accord the limited weight that it did to the more generous risk assessment made by Ms Lackenby. In any event, the Tribunal properly recognised the weight to be attached to the seriousness of the appellant's crimes as a significant factor in the overall proportionality assessment.

19. We find no merit in the assertion in the grounds that the Tribunal failed to apply the principles in Maslov, when it is clear from its findings at paragraph 41 that full and proper reasons were given for distinguishing the appellant's circumstances from those in that case and in the case of MJ (Angola) v SSHD [2010] EWCA Civ 557. In any event we do not consider that the principles in those cases assist the appellant, in particular considering that his offending can plainly not be explained simply as juvenile delinquency, given that the index offences were committed when he was an adult of 23 years of age. The Tribunal, furthermore, gave careful consideration to the appellant's ties to the United Kingdom, finding that his family and other ties were limited and considering, for reasons cogently given at paragraph 46, that he would be able to re-establish himself in his home country.

20. Contrary to the assertion made in the grounds, we consider that the Tribunal adequately addressed the issue of the appellant's mental health. It was Mr Reynolds' submission that the appellant's condition was not given separate consideration under Article 8 as part of the proportionality assessment. Whilst the Tribunal could perhaps have made a clearer distinction between its findings under Article 3 and Article 8, it nevertheless took account of all relevant issues including the assessment made by Ms Lackenby, noting in particular her conclusions at section 16.5 of her report as to relevant treatment and support, the effect on the appellant of his mental condition and the impact of deportation on the appellant's mental health. As Ms Martin submitted, the conclusion at paragraph 16.5iv in regard to the latter was speculative and it was open to the Tribunal to attach to it the weight that it did.

21. The Tribunal properly found, at paragraph 42, that the appellant was not able to meet the requirements of the immigration rules relating to deportation, given the length of his sentence and of his residence in the United Kingdom. Although not expressly stated by the Tribunal, it was for the appellant to show, pursuant to paragraph 398 of the immigration rules, that there were exceptional circumstances such that the public interest

in deportation was outweighed by other factors. The Tribunal plainly found that such circumstances did not exist in the appellant's case and its findings are summed up in the conclusions at paragraph 45 and 46. In our view, the Tribunal took account of all relevant factors and gave full and detailed consideration to the evidence in reaching the conclusions that it did. Those conclusions were entirely open to the Tribunal on the basis of the evidence before it. We find nothing in the grounds of appeal or the submissions most ably made by Mr Reynolds which would lead us to conclude that the Tribunal erred in law.

DECISION

22. The making of the decision of the First-tier Tribunal did not involve an error on a point of law, such that the decision has to be set aside. We do not set aside the decision. The decision to dismiss the appellant's deportation appeal therefore stands.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

We find no reason to continue that order and accordingly lift the order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed Date

Upper Tribunal Judge Kebede