



IAC-FH-NL-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/02326/2013

THE IMMIGRATION ACTS

Heard at Field House

On 15 October 2014

Prepared 22 October 2014

Determination

Promulgated

On 6 November 2014

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

FRANK BYAMUKAMA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O Oke, of Counsel instructed by Freemans Solicitors

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Uganda, born on 2 December 1986 appealed against a decision of the Secretary of State to deport him to Uganda made on 11 November 2013 under the provisions of Section 32 (5) of the UK Borders Act 2007.

2. His appeal was heard by the First-tier Tribunal who in a determination dated 22 April 2014 allowed his appeal. The Secretary of State then appealed to the Upper Tribunal. Permission was granted and on 28 July 2014 I heard the Secretary of State's appeal. Following that hearing I set aside the determination of the First-tier Tribunal and directed that the appeal proceed to a hearing afresh.
3. In my decision I set out the appellant's immigration history in paragraph 3, his various convictions in paragraph 4 and having noted that the First-tier Tribunal had accepted that the appellant could not succeed within the provisions of the Rules I found that they had erred in their approach to the issue of the rights of the appellant under Article 8 of the ECHR.
4. I wrote as follows:-
 - "1. The Secretary of State appeals, with permission, against a decision of the First-tier Tribunal (Judge of the First-tier Tribunal Munro and Mr D R Bremmer JP (non legal member)) who in a determination dated 22 April 2014 allowed the appeal of Mr Frank Byamukama against a decision of the Secretary of State to deport the appellant made on 11 November 2013.
 2. Although the Secretary of State is the appellant before me I will for ease of reference refer to her as the respondent as she was the respondent in the First-tier. Similarly I will refer to Mr Frank Byamukama as the appellant as he was the appellant in the First-tier Tribunal.
 3. The appellant is a citizen of Uganda, born on 2 December 1986, who arrived in Britain on 18 February 1994 and was granted indefinite leave to remain in September 2000. He married a South Korean national on 27 February 2008: that marriage is effectively over. He has a daughter, Briyanna Florence by another woman, Rita Awaulira. The appellant stated to the Tribunal that his daughter did not know who he is as he went to prison soon after her birth.
 4. The appellant has a number of convictions for possession of cocaine and cannabis and has also been found guilty of shoplifting and of inflicting grievous bodily harm. In September 2011 he was convicted for the supply of cocaine and was given twelve months sentence suspended for 24 months and required to undertake 200 hours of unpaid work. The following year he was cautioned by London Transport Police for having a counterfeit note. On 9 May 2012 he was sentenced to three years' imprisonment for grievous bodily harm and received consecutive sentences of four months for possession of cannabis and eight months for commission of a crime during a suspended sentence. The notice of liability to deportation was served on 24 August 2012.
 5. The Tribunal having heard evidence from the appellant and his mother stated that the relevant Immigration Rules were paragraphs 396, 397 and 398 62 and referred to the judgments of the European Court of Human Rights in **Uner [2007] 45 EHRR 14** and the judgments of the

Court of Appeal in **OH (Serbia) [2008] EWCA Civ 694** and **DS (India) [2009] EWCA Civ 544**, the decision of the European Court of Human Rights in **Maslov [2009] INLR 47** and that of the Tribunal in **Masih (Deportation - Public Interest - Basic Principles) Pakistan [2012] UKUT 00046 (IAC)** as well as the judgment of the Court of Appeal in **MF (Nigeria) v SSHD [2013] EWCA Civ 1192**.

6. They noted that the appellant “cannot bring himself within the Rules for the purpose of Article 8.” They stated that he was separated from his wife and although he had stated that he hoped to get back together with her there was no indication that that was a possibility. He did however have the possibility of an “ongoing relationship with his daughter” but they stated that she lived with her mother.
7. They then went on to state that they were considering the rights of the appellant under Article 8 “in accordance with the principles laid down in **MF**.”
8. Having referred to case law including that of **Razgar [2004] INLR 349**, **Ghising (Family Life - Adults - Ghurkha Policy) Nepal [2012] UKUT 160 (IAC)** and **AG (Eritrea) [2009] EWCA Civ 801** the Tribunal went on to note the sentencing remarks of the judge stating that the judge had noted:-

‘... that there was no evidence to support the appellant’s claim that his wallet had been stolen and that he had met up with the victim to accuse him of stealing it; when they met the appellant was with two other men and he struck the victim on the head with a baseball bat, causing multiple fractures to cheek and around his right eye; he required an operation and had metal plates inserted in his cheek and face; fortunately he had made a good recovery. The appellant was 25 years old with previous convictions for drug offences’.
9. They noted the terms of the OASys assessment which had referred to the appellant’s “scant regard for the law and the consequences of his actions.” They noted that the risk of serious harm was assessed as medium to the public and high to a known adult. Moreover they noted the appellant had not chosen to express remorse at the hearing before them. Although they had not seen a birth certificate for the appellant’s claimed daughter they accepted that she was his daughter. He said that the amount of contact between the appellant and his daughter in the future “must be uncertain.”
10. In paragraph 56 they stated the public interest in the case required the deportation of the appellant unless there were circumstances “which are sufficiently compelling to outweigh the public interests in the deportation.”
11. They noted the appellant had lived in Britain since the age of 7 and that his education had taken place here and that although he had visited Uganda for holidays on two occasions he would be totally unfamiliar with the way of life there and did not have any close family members on whom he could rely for support during the initial stages of

finding his way around. They stated that he appeared to have shown motivation in prison to change his lifestyle and he had a supportive family and went on to say “he has managed to avoid a term in prison on previous occasions and gives the impression that he intends to avoid individuals from his past and keep on the straight and narrow in the future.”

12. In paragraph 57 they went on to say that this was a finely balanced decision and quoted from the judgment in Maslov that “for a settled migrant that has lawfully spent all of the major part of his or her childhood and youth in this country very serious reasons are required to justify expulsion.”
13. They concluded that there are circumstances which were sufficiently compelling to outweigh the public interests in the deportation of the appellant.
14. The Secretary of State appealed on the basis that the panel had failed to engage with the pressing nature of the public interest. The grounds of appeal refer to the judgment of Laws LJ in **SS (Nigeria) v SSHD [2013] EWCA Civ 550** which made it clear that only a very strong claim in respect of Article 8 would be sufficient to overcome the public interest. The grounds went on to refer to the “exceptional circumstances” on which the Tribunal had relied pointing out that they had placed weight on the appellant’s relationship with his daughter although they found that he did not have a meaningful relationship with her and they had not considered the possibility of the appellant’s mother negotiating contact with the appellant and his daughter via “modern communicational means” and visits. Moreover they had failed to consider the best interests of the child and stated that the Tribunal had failed to engage with the appellant’s ties to Uganda. Having referred to the European Court of Human Rights decision in **Balogun v UK - 60286/09 [2012] ECHR 614** they stated that it was clear that the appellant did have ties with Uganda. Moreover they stated that it was evident that interference with family life could be justified where the factors in favour of deportation were sufficiently strong and in this the grounds referred to the judgment of the Court of Appeal in **JO (Uganda) [2010] EWCA Civ 10**.
15. They referred to the fact that the OASys Report had stated that there were “limited grounds for optimism in the future.”
16. At the hearing of the appeal before me Mr Tufan relied on the grounds of appeal. His principal argument was that the Tribunal had effectively looked at the rights of the appellant under Article 8 as if it was a freestanding right rather than in the properly structured approach as set out in the judgment of the Court of Appeal in **MF (Nigeria)**. Indeed he argued that the cases on which they had relied such as **Ghising** and **AG Eritrea** and indeed **Razgar** were not deportation cases. He referred to the judgment of the Court of Appeal in **Gurung** and said that in this case as in **Gurung** the Tribunal had been looking for ways to allow the appeal.

17. Miss Manyarara dealt in detail with the grounds of appeal. She argued that the Tribunal had taken into account the public interest in deportation and had properly quoted relevant case law. Moreover she claimed that it was the will of Parliament that where the rights of an individual would be infringed by deportation the appeal should be allowed and that in putting in place an appeal system Parliament was placing in the hands of the Tribunal the task of making a proper assessment of those rights. The facts that the First-tier Tribunal had reached conclusions which were in no way perverse and were fully open to them meant that it would not be appropriate to overturn their decision merely because I took the view that I would have reached a different decision.
18. She argued that the Tribunal had referred to the two-stage test as set out in **MF (Nigeria)** and had dealt properly with the issue of proportionality. They had taken into account public interest – the reason was that the determination in the Tribunal in **Gurung** had been overturned was that it had made no reference to the public interest in deportation.
19. She argued moreover that the Tribunal had made a properly detailed fact-finding exercise and that they had been correct to find that the appellant had no ties with Uganda. She emphasised that it had been the appellant’s mother’s evidence that when she went to Uganda her relationship with her family was such that she had had to stay in a hotel.
20. Moreover she asked me to find that the Tribunal had taken into account the sentencing remarks of the judge and had properly considered the risk of re-offending and the OASys Report.
21. She emphasised the interests of the child and the importance that should be placed thereon – she referred to the judgment of the House of Lords in **ZH (Tanzania) [2004] UKSC 11**. It was her argument that the terms of Section 32 of the 2007 Borders Act was not a “trump card” which meant that when the Secretary of State decided that it was conducive to the public good to deport an individual that the appellant should be so deported.
22. She referred to the courses the appellant had taken in detention and the fact that he might have been able to take a victim awareness course but that did not start because of the prison in which he was held. She emphasised the length the appellant had been here and referred to the judgment in **Maslov** and the lack of ties in Uganda. She stated this was clearly a case where exceptional circumstances existed and the Tribunal were therefore correct to allow the appeal. The grounds of appeal before me were merely a disagreement with the findings of the Tribunal and did not disclose an error of law.

Discussion

23. I consider that there is a material error of law in the determination. The Tribunal referred to a number of relevant cases at the beginning of their consideration of the merits of this case including the judgment in

MF (Nigeria). However having accepted the appellant could not bring himself within the terms of the Rules (although, surprisingly, they had not referred to paragraphs 398 and 399 of the Rules in their consideration), they then appeared to apply case law which did not relate to Article 8 as considered in deportation cases. They noted a number of factors which were clearly to the detriment of the appellant including the judge's sentencing remarks and the terms of the OASys Report. They noted that he had not expressed remorse. They noted that the appellant did not have contact with his child and that agreed contact in the future was uncertain.

24. They do not however appear to have taken into account that where an appellant has committed a serious crime there is clear case law which indicates that deportation is appropriate. They simply did not weigh up the public interest in the deportation of someone who has committed a serious crime notwithstanding the conclusions of the Court of Appeal in cases such as **AD Lee** [2011] EWCA Civ 348 which dealt with the deportation of a man who had an existing family here or **DS (India)** where the public interest in those who commission serious crimes was emphasised. Although they appear to quote from the judgment in **Maslov** when referring to the rights of a settled migrant who had lawfully spent all or the major part of his childhood here requiring very serious reasons to justify expulsion they did not appear to consider whether the brutality of the appellant's attack on the victim indicated such reasons .
 25. Although Ms Manyarara stated that the Tribunal had considered the public interest in deportation the reality is that apart from a passing reference thereto they have simply not taken on board the serious nature of the appellant's crime let alone directed themselves to a consideration of the issue of whether or not there were compelling circumstances which should mean that this appellant should be allowed to remain.
 26. Their reference to the expectation of contact is again misguided. It was their duty to consider the circumstances as they were at the date of the hearing and indeed the reality is that they themselves considered that the chances of contact between the appellant and his daughter whom the appellant had said did not know who he was would be unlikely. Moreover they had not taken into account the appellant as an adult who has visited Uganda in the past and indeed as a Ugandan citizen.
 27. In all I consider that they did not properly take into account the public interest in the deportation of the appellant and that therefore they erred in law.
 28. Accordingly I set aside the decision of the First-tier Tribunal and direct that the appeal proceed to a hearing afresh on all issues."
5. At the hearing before me the appellant gave evidence adopting his various statements. He confirmed that he was no longer in a relationship with the mother of his daughter, but said that although he had had no contact with his daughter at the time of the hearing in the First-tier as he had gone to

prison shortly after her birth since his release from prison he had built up a relationship with her. She would spend time with him on a regular basis. He would visit her at her mother's home in Kent and would look after her when she came to visit him in London. He stated that over the summer holidays she had stayed with him for three weeks. He said that they would speak every day on the phone and that his role in her welfare was particularly important because her mother now had a three month old baby who took up most of her time. His relationship with his former girlfriend was now good and they had therefore not needed to make formal arrangements through the courts. He regretted very much what he had done and wanted to remain in Britain to look after his daughter and his family - his sister was currently pregnant and his mother had heart problems. His brother was in Bristol and he was required to look after his daughter because her mother now had another child.

6. He stated that he had been able to speak Luganda before he came to Britain but he no longer could speak it fluently or write it.
7. In cross-examination he stated that he had never lived with his child's mother although he had spent a lot of time in her house. He had not been named on the birth certificate because he had been in prison when she was born and they were on bad terms. She had not seen him in prison and had only seen her very occasionally before she was born.
8. He stated that the language spoken in the schools in Uganda was English and that was the language in which he had been taught when he had been in Uganda.
9. In re-examination he stated that he was not working. He said that if it had been up to him he would have got back together with his wife.
10. The appellant then stated that he wished to make a statement. He said that he had spent twenty years of his 27 years of life in Britain and that in his heart he thought of himself as British - this was the only country he knew. He wanted to get a job and make up for the mistakes which he had made. He said that he had no ties with Uganda and would have no financial backing there. He stated that there was a possibility of civil war in Uganda let alone the possibility of the Ebola virus reaching there. He said that if returned he would suffer and die. He went on to say that his family needed him as did his daughter.
11. In summing up Mr Walker referred to the detailed notice of decision which set out details of the appellant's crimes and the application of the relevant Immigration Rules. It was considered in that letter that there were no exceptional circumstances in this case and he asked me to find that that remained the case. He argued that the interference with the appellant's private life did not outweigh the public interest in his deportation.

12. Mr Oke asked me to allow the appeal on the basis that the appellant's evidence had been truthful and reliant and that he had established that the interference with the appellant's rights under Article 8 of the ECHR would be disproportionate and indeed that there were exceptional factors in this case. He referred to the appellant's relationships with his daughter and members of his family and said that although the appellant had visited Uganda he had stayed in a hotel and that he had no family ties there. Other family members had gone to Sweden and the reason that the appellant had been sent to Sweden in 1993 was because he had been abused by an uncle in Uganda.
13. While he did not wish to diminish the impact of the appellant's offences he asked me to conclude that removal would be disproportionate. He emphasised that although the appellant's mother may have had land in Uganda that was not available for the appellant and it was likely that those living there now had acquired squatters' rights. He stated that the appellant now felt that he was a different person from the man who committed the various crimes and that having a child and his other family responsibilities would ensure that the appellant would not commit further crimes in the future. Given his daughter's age he clearly had a meaningful relationship with her and he had been able to spend quality time with her. He asked me to find that the various factors which meant that the removal of the appellant would be disproportionate were such as to amount to exceptional factors. He therefore asked me to allow the appeal.

Discussion

14. In considering this appeal I have taken into account the appellant's statements, his oral evidence and the letters from his mother, sister and the mother of his daughter. I have also considered the length of time which the appellant has lived in Britain.
15. It was accepted before the First-tier Tribunal that the appellant could not qualify under the Rules. Paragraphs 398 and 399 of the Rules set out the relevant framework in which to consider a deportation case. The rules were altered in July this year. The relevant rules at the date of the decision stated:

“398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

- (a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
- (b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

- (c) the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

399. This paragraph applies where paragraph 398 (b) or (c) applies if -

- (a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or
- (b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK."

16. It is accepted that the appellant cannot qualify under the provisions of paragraph 398, with the exception of whether or not there are relevant factors which make his removal exceptional. I therefore consider it relevant to consider all factors in this case. I accept that the appellant was married to Ms Ahreum Han here but it is not claimed that that marriage is subsisting. The appellant clearly has relationships with his sister and his mother both of whom value his support but the reality is that the appellant's behaviour in the past has not assisted his other family members and indeed they were able to live their lives without any assistance from him when he was in prison. I do not consider that his relationship with his own family members can be considered to be a factor of any particular weight.
17. Turning to the relationship between the appellant and his daughter the reality is that he has only recently had any contact with her. While I accept that he is of use to her mother her mother appears to be in a new relationship and indeed, of course, the appellant never lived with her. If the appellant is deported his relationship with his daughter will effectively end but the reality is that his daughter is young, the relationship which he has with her is not of any length and her primary carer is her mother. She does not live near the appellant. A relationship, of sorts, can continue albeit in a much weaker form from Uganda.
18. I now turn to the appellant's criminal activity. It is relevant that he has not committed just one offence. He received a caution in July 2007 for possession of a class A drug - cocaine and also for possession of a class C drug - cannabis. He was again charged with possessing a class C drug in

October 2008 and was cautioned by the Metropolitan police on 29 May 2009 for “attempting or making false representation to make gain for self or other or to cause loss to other or exposed other to risk”. In 2009 he was found guilty of shoplifting and possessing class C controlled drugs and was fined and ordered to pay costs. In May 2010 he was again convicted of drug offences, receiving substantial fines and did not surrender to custody at the appointed time.

19. On 15 September 2011 he was convicted at Lewes Crown Court for being concerned in the offence of supplying a class A drug – cocaine and given a twelve month suspended sentence that was wholly suspended for 24 months. He was required to undertake 200 hours of unpaid work. He was also being charged with supplying class B drugs and for that received a further suspended sentence.
20. In October 2011 he was cautioned by the British Transport Police for having a counterfeit note. On 9 May 2012 he was convicted of grievous bodily harm and sentenced to three years’ imprisonment. He was also convicted for possession of a class B controlled drug, namely cannabis, and received four months’ imprisonment. He also received a sentence of eight months’ imprisonment because of the commission of a further offence during “an operational period of a suspended sentence”. On 24 August 2012 he was given the opportunity to make representations as to why he should not be deported on completion of his sentence.
21. In his sentencing remarks His Honour Judge Ader set out details of the appellant’s offence. It appears that the appellant claimed that he believed another man had taken his wallet and he made arrangements to meet that man in an alleyway, taking with him two others. He used a baseball bat to strike the victim who was knocked to the ground and when the police came to see him he refused to talk to them. The injuries to the victim were severe in that he had had to have titanium plates inserted in his cheek and face and others to hold together the fractures and sutures that were being inserted.
22. The judge stated that he had read the two pre-sentence reports which he stated did “not make very encouraging reading”. He stated that the optimism of the original Lewes Crown Court report was not repeated in the further pre-sentence report. He referred to the various aggravating factors and the use of a weapon. Having taken three and a half years as the starting point he gave credit for the appellant’s plea of guilty on the first day of trial.
23. I have also taken into account the OASys assessment which is dated 29 October 2013. I note that the writer of the report stated that the appellant expressed a positive view regarding employment and “subsequently does contribute to society at times”. The writer went on to say “however by involving himself in the sale of drugs, he is also contributing to problems which illegal drugs bring upon communities, families and individuals. I did

not gain the impression that he strongly holds pro-offending attitudes. As previously stated he impresses more as a risk taker, probably to support his income”.

24. The writer of the report went on to say that the appellant demonstrated that he could and does lose his temper and that by committing the various offences which he committed he had not considered the consequences of his actions and did not learn by the sentences imposed by the courts on previous offending behaviour.

25. I note that in the risk of serious harm summary, in answer to the question of who would be at risk the reply was –

“(1) any member of the public who comes into contact with Mr Byamakuma whilst he is experiencing a loss of temper control;

(2) whilst he denies his guilt of offending most of the time if it is to be believed he dealt with drugs on occasions so there would be possible harm/financial issues to the victims of his drug sales to consider.”

26. In reply to the question of “what is the nature of the risk” the answer was –

“(1) uncontrolled violence directed at them with no thought to the consequences at the time;

(2) possible health risk to the members of the public who purchased drugs from him and the knock-on effects of taking drugs on their families/friends. It was stated the circumstances likely to increase the risk was when the appellant had been taking drugs himself.”

27. The risks in the community to the public were considered to be medium but to known adults to be high. With regard to his lifestyle it was noted that it appeared that the appellant had associates that might encourage his offending behaviour “for example if you were found to be in possession of a quantity of cannabis when stopped by the police as a passenger in a friend’s car”.

28. I note the judgment of Rix LJ in **DS (India) [2009] EWCA Civ 554** where he stated:-

“In my judgment, when consideration was given to the manifold nature of that public interest (see **N (Kenya)** (at paragraph 87), **E-O (Turkey) [2008] EWCA Civ 671** – (at paragraph 19) and **OH (Serbia) [2008] EWCA Civ 694** (at paragraph 15) it cannot be said the IAT erred in this respect. The public interest in deportation of those who commit serious crimes goes well beyond depriving the

offender in question from the chance to re-offend in this country: it extends to deterring and preventing serious crime generally and upholding public abhorrence of such offending.”

29. In conclusion I take into account the very short time during which the appellant has had contact with his daughter, the fact that he is no longer in a relationship with either her mother or his wife and taking into account his age, and therefore although it may well be that he has close relationships with other members of his family, I conclude that they are ties which are no more than ties between an adult and his parent and other adult siblings. Placing particular weight on the serious nature of the appellant’s crime which led to his deportation and the fact that he had been convicted of a number of other crimes leading up to the index offence I can only conclude that the deportation of this appellant would be a proportionate response to the serious crime which he committed.
30. I have set out above the terms of paragraph 399 of the relevant rules. The appellant was born on 2 December 1986 and arrived in Britain from Sweden on 18 February 1984. I note that the decision to make the deportation order is dated 11 November 2013. At that stage the appellant had been in Britain for nineteen years. He could therefore not have qualified under the twenty year provision. In 2013 he was aged 27. He could not therefore qualify under paragraph 399(b) as he was not under the age of 25. He has lived here since then although he has visited Uganda. He has been out of Uganda since 1986.
31. I consider, that it cannot be said that he has no ties with that country given that he has relatives there and indeed his mother has land in Uganda. I have considered the Rules now in force. While I would accept that the appellant has been lawfully resident in Britain for most of his life and that he is socially integrated in this country – although the lack of a work profile here and his frequent offending indicate a lack of cultural integration, I do not consider that there would be very significant obstacles to his integration into Uganda given the fact that he has relations there, was at school there until the age of 7, has visited the country and his mother has land there.
32. I therefore, conclude that, as was indeed accepted, the appellant would not be able to benefit from the provisions of paragraph 399. While I consider that there is an element of a “near-miss” in this case but I do not find that that leads to the appellant’s case being exceptional and for the reasons set out in paragraphs 16 onwards above I conclude that there is nothing exceptional which would mean that the deportation of this appellant would be disproportionate.
33. I therefore, having set aside the determination of the First-tier Tribunal re-make the decision in this case and dismiss this appeal.

Signed

Date

Upper Tribunal Judge McGeachy

4 November 2014