Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/18887/2016**

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 17 July 2017	**On 04 August 2017**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DAVENAND JAIPAUL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr E Fripp instructed by Fadiga & Co

DETERMINATION AND REASONS

1. The appellant, to whom I shall refer hereafter as the respondent as she was before the First-tier judge, appeals against the decision of the First-tier judge allowing the appeal of the respondent (to whom I shall refer hereafter as the appellant) against a decision of 26 July 2016 refusing his human rights claim and refusing to revoke a deportation order.

2. The judge noted the appellant's unchallenged immigration history which is that he came to the United Kingdom aged around 7 years and 10 months, in 2002. His

mother had come to the United Kingdom and obtained a five year EEA family permit. Subsequent to his arrival he sought an EEA residence document which he was granted and which was valid to 7 September 2006. A number of subsequent applications were made and either rejected or refused but later the appellant was awarded a residence card valid until 19 November 2012. He made an application on 19 October 2012 for an EEA permanent residence card and that was refused. A subsequent application made in July 2014 was also refused.

3. A deportation order was signed against him on 28 July 2016. His criminal record was set out by the judge. I do not propose to repeat the list in full. It begins on 7 September 2011 and concludes on 17 July 2015. There are eleven convictions including most recently a conviction on 30 April 2014 of battery and assaulting a police officer for which he was sentenced to a community order and a curfew requirement, a conviction for affray on 9 January 2015 for which he was sentenced to 36 weeks' imprisonment, a conviction on 5 February 2015 of wounding and inflicting grievous bodily harm and a conviction on 17 July 2015 of robbery and possession of drugs. He was sentenced to nine months for the grievous bodily harm conviction and two years and six months for the robbery and possession of drugs conviction. It was that last offence and conviction which triggered the decision to make a deportation order against him.

4. In addition, at paragraph 46 of his decision, the judge noted that there were numerous additional accusations made against the appellant, some of them serious, and encounters with the police, between 2011 and 2014. The appellant did not deny their occurrence before the judge and they clearly occurred as they were documented in records attached to a police constable's statement. In the circumstances the judge was satisfied that the appellant had been involved in criminality and undesirable behaviour during that period of time over and above the offences for which he was convicted.

5. The judge noted that the appellant took full responsibility for the crimes he had committed. He had attended Croydon College between 2011 and 2013. He had first got into trouble in August 2011 when he was aged 17 after he began to take drugs. Alcohol or drugs had always been a contributing factor to his offending. If permitted to remain in the United Kingdom he wished to resume his studies in order to acquire skills to work. He had studied general construction and IT when at college. He would keep away from his old acquaintances and would live at his parents' home. He had kept in touch with school friends who would be a sobering influence on him. He wished to return to the mosque regularly and intended to adhere to the terms of his licence. He did not know what he would do if returned to Guyana.

6. The judge noted the relevant legal principles, and also relevant case law authorities, in particular NA (Pakistan) [2016] EWCA Civ 662 and Hesham Ali v SSHD [2016] UKSC 60.

7. The judge considered in particular the application of paragraph 399A of HC 395. This paragraph applies where paragraph 398(b) or (c) applies if:

> "(a) the person has been lawfully resident in the UK for most of his life;

(b) he is socially and culturally integrated into the United Kingdom; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

8. In effect, if those three criteria are made out, a person may succeed in showing that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the European Convention on Human Rights.

9. It was common ground that the appellant satisfied the requirement of paragraph 399A(a), in that he had been lawfully resident in the United Kingdom for most of his life. The other two subparagraphs were however at issue.

10. With regard to (b), the judge noted the respondent's reasons for concluding that the criteria were not met. He noted that it was of course correct that the appellant had a history of significant criminal offending between 2011 and 2014. He noted however that he had arrived in the United Kingdom when he was aged 7 in 2002, attended primary and secondary schools in the United Kingdom and also commenced college education. He had various qualifications from the time when he was engaged in education and had accomplished a number of sporting achievements in addition. The judge noted that whilst the appellant's behaviour in recent years had been totally unacceptable and antisocial he bore in mind that the appellant would not even fall for consideration under this particular Rule if he were not a foreign criminal liable to deportation. He added that the appellant spoke English and his only close relatives were in the United Kingdom. He considered that it was abundantly clear that he had integrated into United Kingdom society, albeit not in an appropriate manner based upon his behaviour from 2011 onwards. Consequently he found that the requirements of subparagraph (b) were met.

11. With regard to subparagraph (c), the judge bore in mind that the appellant had been in the United Kingdom since he was 7 and was now nearly 23. He had undertaken much of his primary education in the United Kingdom and all of his secondary education. He had no employment history either in the United Kingdom or in Guyana. It was evident that he had undertaken at least one visit back to Guyana, a visit of three weeks in 2010 but that was the last time he had returned there.

12. The judge also bore in mind that the unchallenged evidence that the appellant no longer had any relatives remaining in Ghana to whom he might turn for support and indeed that he did not know anybody in Ghana. The unchallenged evidence was also to the effect that there was no individual to whom he might turn for any kind of support in re-establishing himself in his home country. He bore in mind the fact that the appellant had no employment history although he did have qualifications which might or might not assist him in Guyana. He had no accommodation there and logically would need some form of financial support at least in the early stages but his father's unchallenged evidence was to the effect that he could not provide the appellant with any significant or material financial support in Guyana due to his own financial commitments. The judge also bore in mind that the appellant to date had never lived independently and had never had to support himself. In the circumstances he concluded that the requirements of paragraph 399A(c) were met.

13. The judge went on to note the guidance of the Supreme Court in Hesham Ali and the fact that a mere ability to satisfy the requirements of a relevant deportation order would not necessarily of itself establish that deportation was disproportionate although such ability was illuminating of the respondent's position generally in that regard. The Rules were not necessarily decisive to the exclusion of further or wider considerations. The judge noted the circumstances of the index offence and the rest of the appellant's history. He also noted the evidence of a Police Constable Garland who had some personal knowledge of the appellant and his past criminality and who was of the view that the appellant would continue to commit offences. The judge gave due weight to that consideration. He noted that the appellant had undertaken studies during the period of his incarceration and also courses relevant to drug and alcohol abuse. He also noted a letter from a probation officer who was satisfied that his parents' address was a suitable address to which he might return and indicated that his parents were supportive and concerned about him. She made no comment as to the likelihood or otherwise of him re-offending and there was no evidence from the probation service concerning that. The judge felt unable to make a finding as to whether it was more likely than not that the appellant would re-offend.

14. He bore in mind the guidance in Maslov v Austria [2008] ECHR 546 and attached weight to the fact that the appellant had spent the major part of his childhood and youth in the United Kingdom. He bore in mind the provisions of Section 117A to D of the 2002 Act, bearing in mind that the appellant's status in the United Kingdom had throughout been precarious but it had been lawful for much of the time that he had resided in the United Kingdom. He bore in mind the revulsion which society was entitled to feel in relation to his offending history and conduct, which was a highly relevant and weighty factor in terms of assessing proportionality. He concluded that he was satisfied that the respondent's decision was disproportionate and not in accordance with the law and allowed the appeal on Article 8 grounds.

15. The Secretary of State sought and was granted permission against the decision. The judge who granted permission attached particular weight to what she described as the judge erring and equating the difficulties outlined at paragraph 39 of his decision to "very significant obstacles" to integration at paragraph 399A of the Rules. It was also considered to be arguable that he had failed to give appropriate weight to the public interest. All grounds were said to be arguable. In the grounds themselves weight was attached to the judge's failure to follow the guidance in Bossade [2015] UKUT 415 (IAC) with regard to the issue of integration, and also the decision was said to be flawed by a failure to give adequate reasons as to why the appellant could not reintegrate in Ghana given that English was an official language, he had qualifications, he had visited the country in 2010 and his family originated from there.

16. In his submissions Mr Melvin emphasised the challenge to the findings on integration. He argued that the matters identified by the judge as being positive in this regard were insufficient. The fact that the appellant attended school in the United Kingdom, spoke English and his relatives were in the United Kingdom was not enough, it was argued, when weighed against the numerous convictions and

antisocial behaviour that the judge had noted. The decision in this regard was irrational.

17. He also argued that the findings on very significant obstacles to integration in Guyana were flawed. The matters identified by the judge were no more than obstacles and were not significant, still less very significant. The appellant was a national of Guyana and his parents were from there and he would be culturally aware of the customs and would be entitled to a grant of up to £1,500 to assist with his integration. He had been educated and trained in the United Kingdom. The judge had noted that he was capable of undertaking employment and being self-sufficient: if he could do that in the United Kingdom then he could in Guyana also. Even if he had not lived independently from his parents he had spent many months away from them while in custody and that was of relevance.

18. With regard to the decision concerning matters outside the Rules, numerous authorities before the judge indicated the great weight to be given to the public interest when considering proportionality and it was unclear how the judge had reconciled the appellant's private life in the United Kingdom with that.

19. In his submissions Mr Fripp relied on and developed points made in his Rule 24 response. He argued that the decision was in many ways a model one and followed the guidance set out in Hesham Ali. The judge was clearly aware of the relevant facts and had considered those in the context of the appropriate legal tests. He argued that it had not been shown that the judge's decision was perverse either on the issue of integration or very significant obstacles. The consideration of these matters was rational. Strictly speaking, having concluded as he did, the judge was not required to look at the broader factors as once he had found paragraph 399A was satisfied the further step was formal rather than substantive. He argued that the passage cited in the grounds from Bossade was not part of the primary decision but part of its application to the facts of the particular case. The challenge in that regard was a matter of disagreement only. The appellant had spent a good deal more of his life in the United Kingdom than in Guyana. The findings on integration were fully open to the judge. Likewise the conclusions with regard to very significant obstacles to integration into Guyana were sound. It was artificial to say that his offending history amounted to non-integration. He had come as a young child to the United Kingdom and the offending took place from a period of about nine years after his arrival. The judge had come to clear and sound conclusions on the point. In Bossade there had been a relative in the country of origin and it was relevant that the relative was there and the relationship could be revived but this was not a dormant ties case. The guidance in Hesham Ali at paragraph 38 clearly included the factors indentified in Maslov relating to the age of the person concerned at a time of their life when they committed those offences and such matters as the solidity of the social, cultural and family ties with the host country and the difference it made as to whether the person came to this country during their childhood or youth or whether they only came as an adult.

20. By way of reply Mr Melvin argued the notion of integration was to do with working and making a contribution and being a full member of society. As regards the

Maslov point, most of the appellant's offences had been committed when he was an adult. It was clear from cases subsequent to Hesham Ali that the legislation underpinning the Rules was to be taken into account when considering proportionality and that had not been done in this case.

21. I reserved my determination.

22. In my view the essential issues for consideration in this case are those relating to the judge's findings in respect of paragraph 399A(b) and (c). If his decision is unlawful in respect of either or both of those points then it would not only mean that the decision contained material errors of law with regard to my findings under the Rules but that would also feed into the evaluation of proportionality outside the Rules.

23. It is relevant to note as referred to in the grounds what was said by the Upper Tribunal in Bossade. Mr Fripp is right to point out that the passage quoted in the Secretary of State's grounds is not part of the head note. A factual comparison can be of assistance, however. In paragraph 54 the Tribunal noted that in the case of the claimant he had been in the United Kingdom since the age of 4 and had been in the United Kingdom lawfully for most of his life. His history of offending was said to betoken a serious discontinuity in his integration in the United Kingdom especially because it showed blatant disregard for fellow citizens. The significant period of time he had spent in prison as a consequence of his offending had excluded him from outside society for that period. It was also considered that even when not in prison his lifestyle over the period when he was committing offences was manifestly antisocial. His lifestyle and his period in prison had contributed to him not being able to show he was financially independent. His recent acceptance of the reprehensible nature of his criminal conduct was an important factor, but the Tribunal considered the negative factors it had just mentioned indicated that his history of criminal offending broke the continuity of his social and cultural integration in the United Kingdom and he had not regained it. That meant that he had currently not shown he was socially and culturally integrated.

24. That set of factors is not at all dissimilar from the situation in the instant case. The appellant has a history of significant criminal offending between 2011 and 2014. The judge noted his earlier education and training in the United Kingdom prior to that and his sporting achievements. He bore in mind also the fact that the appellant speaks English and his only close relatives are in the United Kingdom. He considered it to be abundantly clear that the appellant had integrated into United Kingdom society albeit not in an appropriate manner based upon his behaviour from 2011 onwards.

25. In my view what this passage in the judge's decision fails to take into account is the point made in Bossade of breaking the continuity of the social and cultural integration in the United Kingdom. Before the appellant started offending it would have been difficult indeed to deny that he was socially and culturally integrated into the United Kingdom. However I consider that the judge erred in not considering whether there had been a breach in the social and cultural integration of the appellant into the United Kingdom by his sustained period of offending, bearing in

mind also that the level of seriousness increased, and also bearing in mind the other criminality and undesirable behaviour in which the appellant was involved during that period of time over and above the offences for which he was convicted. Accordingly I find the judge erred in law in his assessment of social and cultural integration.

26. With regard to the question of whether there were very significant obstacles to the integration of the appellant into Guyana, I consider that in essence Mr Melvin is right on this point and that there is little to show anything beyond obstacles. The appellant would be returning to a country with which he has clear cultural links although no family members still present. He was back there as recently as 2010. Although he has no employment history that is as true of the United Kingdom as Guyana, and as the judge pointed out at paragraph 34 he is capable of undertaking employment and being self-sufficient should he have the opportunity to do so. The judge also noted that the appellant has no accommodation in Guyana and logically would need some form of financial support at least in the early stages and his father said he could not assist him with any significant or material financial support and the judge also bore in mind that the appellant has never lived independently and has never had to support himself.

27. These mattes to my mind cannot rationally be described as going beyond obstacles or at the highest significant obstacles. The test of very significant obstacles is a high one indeed. It is again a matter of simply comparing fact situations rather than a point of law, but again the facts in Bossade are not without relevance here. There the Tribunal was not persuaded there would be very significant obstacles to the integration into the Democratic Republic of Congo of a man who did not speak Lingala and had no experience of living in that country as an adult or even as a young person. It seems that he had no family there either. It was thought to be reasonable to infer that his family would seek to help him financially and that he had grown up in a household where French was spoken and the DRC is a Francophile country.

28. It is not simply a matter of making comparisons of course. Judges may legitimately differ as to the outcome of the determination of a point such as this on identical facts but this in my view goes beyond simply a matter of disagreement. I do not consider it could rationally be concluded that on the facts as presented to the judge the appellant would face very significant obstacles to integration into Guyana, if removed. Accordingly I find an error of law in that regard also.

29. As I submitted earlier, this clearly has relevance for the findings on proportionality outside the Rules. The judge came to his conclusions in that regard on the basis that the paragraph 399A criteria had been met, as a consequence I find that he erred in law in that regard also.

30. In conclusion therefore the judge's decision is set aside for material errors of law and there will have to be a re-hearing. I do not know at this stage whether there are any issues of further evidence which will need to be considered, but it seems clear to me that the matter will have to be re-determined in the Upper Tribunal.

Notice of Decision

The appeal is allowed.

No anonymity direction is made.

Signed Date 04/08/2017

Upper Tribunal Judge Allen