Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00389/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 12 August 2013	**On 7th October 2013**

Before
UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE JORDAN

Between

Dumisani Makwanya

Appellant

and

The Secretary Of State For The Home Department

Respondent

Representation:
For the Appellant: Mr D. Sills, Counsel instructed by Turpin & Miller, Solicitors
For the Respondent: Mr P. Deller, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The appellant is a citizen of Zimbabwe who was born on March 1989. He is 24 years old. He appealed against the decision of the respondent made on 17 February 2013 to make a deportation order against him. His appeal came before the First-tier Tribunal (First-tier Tribunal Judge Jackson and Mr A P Richardson JP). In its determination promulgated on 12 June 2013, the panel dismissed his appeal, concluding that the appellant's history of offending was such as to render his removal proportionate and that the public interest in favour of his removal outweighed the preservation of the private and family life that the appellant had developed in the United Kingdom.

The issue - paragraph 75 of *Maslov*

2. The appellant has appealed to the Upper Tribunal. The principal ground of appeal is that, as a result of the appellant's lawful presence in the United Kingdom since his arrival as a visitor on 26 January 2002, he is settled in the United Kingdom and is, therefore, subject to the stringent requirements contained within paragraph 75 of the decision of the European Court of Human Rights in *Maslov v Austria* 1638/03 [2008] ECHR 546, [2009] INLR 47, expressed in these terms:

> "In short, the Court considers that for a settled migrant who was lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion."

3. In the First-tier Tribunal, the panel rejected the appellant's submission that the test set out in *Maslov* had any application.

4. Although there is a secondary challenge to the panel's determination asserting that the panel erred in law in concluding that it was disproportionate to remove the appellant, no detailed submissions were made before us in relation to this element of the appeal and, for the reasons that will follow, we reject it. Accordingly, the focus of the appeal before us was directed towards whether the appellant's case fell to be determined on the basis that he was a settled migrant who had lawfully spent all or the major part of his childhood and youth in the United Kingdom thereby requiring '*very serious reasons*' to justify his expulsion.

5. It is common ground that, were there such a requirement, neither the respondent nor the First-tier Tribunal approached the appeal in this manner and the appellant was therefore entitled to have its decision set aside for error on a point of law and to be able to re-argue his appeal, including the production of additional evidence.

Immigration history and the letter of 5 February 2002

6. The appellant entered the United Kingdom on 26 January 2002 with his brother and was granted leave to enter as a visitor until 9 February 2002. He was then aged 13. On 5 February 2002, during the subsistence of his leave to remain as a visitor, his mother wrote a letter to the Home Office (misdated 5 February 2001). The letter is found at A1 of the respondent's bundle. The letter is date-stamped as received on 13 February 2002 which is *after* the appellant's leave to remain as a visitor had expired. However, throughout these proceedings the respondent has treated this letter as having been served on 5 February 2002 and, therefore, within the period of extant leave. It was not argued by Mr Deller that we should depart from that position. The letter, where material, stated:

> Ref: Application for Extension to Stay in the UK
>
> I hereby apply for the extension of stay for my sons. I [am] the mother of the above named children and I am on a student visa. My sons came into the country on 26 January [2002] and were given two weeks to stay in the UK - up to 9 February [2002]. The immigration officer who attended to them went by the date that was on their tickets. The uncle who purchased tickets had requested for open tickets because they were not so sure when they would be able to have them back since their aunt, who has been looking after them, is not well - she has got cancer of the cervix and I am told that her condition has since deteriorated. My husband died and presently there is no one else, back home, to look after them. So I would be looking after them until the aunt is well."

7. Nothing was done by the respondent in relation to that letter. It is, however, as well to point out that, according to its contents, the appellant's mother was a student and the Immigration Rules then in force permitted entry clearance to be granted to children of students in accordance with paragraphs 79 to 81 of the Rules.

The application of 23 May 2005

8. A further application was made for leave to remain on 23 May 2005. This was at a time when the appellant was aged 16 and was made under cover of a letter from Circle 5 Ancillary Services Ltd in which it was said that the applicant's husband and father of the children had died in Botswana in 1995 where he had worked as a security consultant.

9. The applications made by the appellant's mother and his brother were granted on 22 April 2009, each being provided with indefinite leave to remain. However, the application of the appellant was not decided as a result of the appellant's history of offending. The letter dated 13 November 2009 [I1 of the respondent's bundle] stated:

> "Unfortunately, as you have not been granted Leave in line with your mother, you should not be attending college as you have no Leave in the United Kingdom at this moment in time. A decision has yet been made on your case."

The appellant's criminal offending

10. On 8 February 2008, the appellant was convicted at Kingston upon Thames Crown Court on six counts of robbery, attempted robbery and assault with intent to rob. He was sentenced to 3 years and 8 months imprisonment. The sentencing judge commented as follows:

> "The robberies to which you three have pleaded guilty were numerous and serious and they share a number of aggravating features but in essence you are all part of a gang of predators roaming the streets of south and south-west London from Croydon through Wallington, right round to Twickenham and many points in between, looking

for vulnerable victims and when you found them stopping your car and then robbing them using, if they resisted you, violence and doing that at night.
In each case, as I have just said, they were committed at night and you, the only inference one can draw obviously, went out with the express purpose of robbery in mind; accordingly, they were planned. You chose victims who were alone, they were not women, they were not elderly, they were men, they were not unduly young, but they were alone and, if possible, you chose victims who had been drinking. You were habitually in a group when the attacks took place, no doubt one of you remaining in the car while the others approached, surrounded and attacked the victim, by your group behaviour adding greatly to the sense of intimidation of the victim you had chosen.
Sometimes one of you implied that a weapon was present.
On one occasion those who did the robbing did actually use violence…
The offences went on over a period of nearly 4 weeks throughout, therefore, August of last year, more or less. In the result you each committed at least seven offences. In the case of you [the appellant], there were eight…
[In dealing with whether there was a significant risk of serious harm to the public caused by the appellant committing further offences] In the case of you [the appellant], I am bound to make the assumption that there is such a risk unless I regard that as unreasonable and I do not regard it as unreasonable. In other words, the assumption is displaced and the principal reason for that is that as a matter of fact, it might even be luck, but as a matter of fact these activities and your previous convictions did not result in serious physical harm to any member of the public and nor did any of the other previous convictions or those offences achieve that.
[In relation to the appellant], it cannot be said that you have no relevant previous convictions because you have two convictions for robbery, actually one attempt and one robbery in 2005 and 2006. I, nonetheless, bear in mind in your favour your pleas of guilty… I bear in mind, as in the other cases, that no weapons were used and that no serious injuries were done, although there were injuries to some people. You are still only 18…"

11. The appellant was released on licence. He was subsequently notified that he was liable to automatic deportation on 1 February 2010. The licence was revoked on 12 April 2010 as a result of further offending which was committed on 14 March 2010 and 12 April 2010.

12. On 21 October 2010, the appellant was convicted at Inner London Crown Court of robbery, committed on 10 April 2010 (aged 21) for which offence he was sentenced to 3 years and 6 months imprisonment. In his sentencing remarks, HH Judge Chapple said:

This was a dreadful robbery. The victim has been described as old. She was in fact only 56 years of age but she has certainly become old as a result of this incident. This innocent, vulnerable victim was walking home after a pleasant night out with friends in a suburban part of London in Streatham. On the doorway of her own house she was set upon by three men, one or more of them wearing hoods. She was manhandled in a violent and abusive way in her own house and there she was robbed. Somebody, who has got away, was kicking her and hitting her aggressively and ferociously. That...certainly was not you, [the appellant]. There was no evidence that you struck her at all but this was a joint enterprise and you must all accept responsibility for the fact

> that she is never going to be fully recovered from that incident. She is now scared to go out. She has changed the locks of her house. She still doesn't feel safe at home. It was a dreadful offence and you [the appellant] have a very bad record for robberies. However, I accept that those occurred when you were a juvenile and you have been responding and there is a lot that can be said in your favour…. Bearing in mind that you pleaded guilty at the first opportunity and your genuine remorse…[t]he sentence on you is one of 3½ years."

13. On 25 March 2011, the appellant was convicted at Blackfriars Crown Court of conspiracy to commit robbery on 14 March 2010 (also aged 21), the month before the offences for which he received a sentence of 3 years and 6 months imprisonment. He was sentenced to 5 years imprisonment on 21 October 2010. On 14 March 2010, a family jewellery business in Green Lanes was entered just after 6.30 in the evening by at least two robbers. It was likely that the gang of robbers numbered somewhere in the region of six. The appellant was acting as a lookout. None of the robbers was armed. Two members of the business were hit and rings were stolen. The sentencing judge made the following comments as to the appellant:

> "I want to make it abundantly clear that I accept that you did not go into the shop. I accept that you were in the vicinity acting as a lookout and no more than that. However, your record is for someone of your age almost as bad as one could imagine. I suspect that the sentence Judge Chapple would have passed at the end of last year at Inner London would have been obviously in excess of the 44 months that he passed if he was sentencing you for this matter as well. I am going to put myself as it were in the position that Judge Chapple might have been. I am going to pass a sentence, in other words the sentence I am about to pass will start today but it has to be and will be greater than the 44 months that was imposed on you by Judge Chapple."

14. This is truly heinous offending in relation to which there is an almost overwhelming public interest in removing its author, the appellant, notwithstanding his presence in the United Kingdom since 2002 when he was aged 13. The appellant's record since his arrival in the United Kingdom in 2002 involves offences which resulted in convictions in 2005 and 2006, in 2008, 2010 and 2011.

The appellant's claim to settled status

15. Bearing in mind the fact that the appellant, since his arrival 11 years ago on 26 January 2002, has only been granted leave to enter as a visitor for a fortnight, it is perhaps surprising that the Upper Tribunal is now invited to treat the appellant as one who is a settled migrant who has lawfully spent all or the major part of his childhood and youth in the host country and, for that reason alone, entitled to the more favourable treatment associated with a requirement that very serious reasons are required to justify expulsion.

16. The basis for this submission is said to be the legal consequences that flow from the letter written by the appellant's mother on 5 February 2002 which we have set

out above. It is said that this letter amounted to a lawful application for a variation of leave to which the respondent has never provided a response; that the application made for indefinite leave to remain in 2005 was a variation of it which has not yet been decided and that the combined effect of the applications made in 2002 and 2005 has been to extend the appellant's lawful presence by the operation of s.3C of the Immigration Act 1971 (as initially amended and subsequently re-amended) so as to render the appellant's presence both lawful and, (by the judicious application of the principles contained in the decision of *ED v SSHD* [2012] EWCA Civ 39), settled.

Continuation of leave pending decision

17. When the February 2002 letter was written, the Immigration Act 1971 had been amended by the insertion of s.3C:

> **"Continuation of leave pending decision**
>
> (1) This section applies if –
> (a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State, before his leave expires, for it to be varied ; and
> (b) when it expires, no decision has been taken on the application.
>
> (2) His leave is to be treated as continuing until the end of the period allowed under rules made under…the Immigration and Asylum Act 1999 for bringing an appeal against a decision on the application.
>
> (3) An application for a variation of a person's leave to enter or remain in the United Kingdom may not be made while the leave is treated as continuing as a result of this section.
>
> (4) But subsection (3) does not prevent the variation of an application mentioned in subsection (1).

18. Hence, if the letter of 5 February 2002 amounted to a lawful application it had been made prior to the expiration of the appellant's visitor's leave, due to expire on 9 February 2002 and which had not been decided by then. Accordingly, leave would continue until an appealable decision had been made and would then continue until the time for appealing had expired. Further, by operation of Part II of Schedule 4 to the Immigration and Asylum Act 1999, during the pendency of any appeal, there would have been a further continuation of leave pursuant to paragraph 17 (1).

19. It was, of course, conceded by Mr Sills, on behalf of the appellant, that the application made for indefinite leave to remain on 24 May 2005 could not have the effect, in itself, of continuing the appellant's leave because this application was made some years after the appellant's leave had expired on 9 February 2002. Further, he accepted that s.3C (either as amended or as re-amended) prevented the appellant making a further application during the pendency of the application

made on 5 February 2002. However, by virtue of the re-amended s.3C, this did not prevent, he submitted, the appellant varying the 2002 application. Accordingly, he asserted the application for indefinite leave to remain of 24 May 2005 should properly be classified as a variation of the 2002 application. In this way, the appellant could rely upon an unbroken chain of lawful continuation leave commencing on 5 February 2002. Thus, he submits that the appellant has enjoyed the status of a lawful visitor since 2002.

20. Section 3C of the Immigration Act 1971 was substituted by operation of s.118 of the Nationality, Immigration and Asylum Act, 2002 with effect from 1 April 2003:

> **Continuation of leave pending variation decision**
>
> 3C (1) This section applies if—
>
> (a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,
>
> (b) the application for variation is made before the leave expires, and
>
> (c) the leave expires without the application for variation having been decided.
>
> (2)The leave is extended by virtue of this section during any period when—
>
> (a) the application for variation is neither decided nor withdrawn,
>
> (b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought **[**while the appellant is in the United Kingdom**]** against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission), or
>
> (c) an appeal under that section against that decision **[**brought while the appellant is in the United Kingdom,**]** is pending (within the meaning of section 104 of that Act).
>
> (4)A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.
>
> (5)But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a).

21. However the substitution does not significantly alter the basis of the appellant's contentions or the process by which continuation of leave arises by operation of law. There were transitional provisions set out in SI 2003/754. The words in brackets in subsection (2)(b) and (c) were substituted by s. 11 of the Immigration, Nationality and Asylum Act 2006 with effect from 31 August 2006 (SI 2006/2226) applying to applications made before that date in respect of which no decision had been made, as it applies to applications made on or after that date.

22. It was accepted by Mr Deller that the outcome of the appeal depends upon what the Upper Tribunal construes to be the effect of the letter of 5 February 2002.

The former paragraph 32 of the Immigration Rules

23. As from 30 July 2000 (HC 704), paragraph 32 of the Immigration Rules provided:

> After admission to the United Kingdom any application for an extension of the time limit on or variation of condition attached to a person's stay in the United Kingdom must be made to the Home Office before the applicant's current leave to enter or remain expires.
> With the exception of applications made under paragraph 31A (applications at the port of entry) and paragraph 33 (work permits), 33A (applications made outside the United Kingdom), paragraphs 255 to 257 (EEA nationals) and Part 11 (asylum), all applications for variation of leave to enter or remain must be made using the form prescribed for the purpose by the Secretary of State, which must be completed in the manner required by the form and to be accompanied by the documents and photographs specified in the form. An application for such a variation made in any other way is not valid.

24. Mr Sills submits that the 5 February 2002 letter was an application for a variation of the appellant's leave made on the basis that its refusal (and the concomitant decision to remove the appellant) would amount to a violation of the appellant's human rights and this application did not require a prescribed form. We reject that submission for two reasons. First, it is accepted by him that this was an application for variation of leave to remain in the United Kingdom. Between January and February 2002, the appellant was a visitor and the letter purports to seek an extension of stay in the United Kingdom. Further, as a student, it was open to the appellant's mother, on the appellant's behalf, to seek entry clearance as the dependant of the holder of a valid student visa, provided the appellant met the requirements of the Immigration Rules. Whilst the appellant's mother was seeking permission for her two children to remain with her in the United Kingdom, this was not a human rights claim. Second, even if it was a human rights claim it did not fall within any of the exceptions contained within paragraph 32 of the Rules as we have set out above and therefore there was a mandatory requirement (it being an application for variation of leave to remain) that it be made using the prescribed form. An application for such a variation made in any other way was invalid.

25. For these reasons, we are satisfied that there was no valid application made by the appellant during a period of extant leave sufficient to engage the continuation provisions of section 3C of the Immigration Act 1971.

26. There is nothing in the application made in 2005 that assists the appellant in construing the 2002 application. The application itself and the letter under cover of which it was served make no reference to an earlier undecided application or that the 2005 application seeks to vary it. The application in 2005 was an application for indefinite leave to remain on the part of the mother with her two children as her dependants. It cannot reasonably be construed as a variation of the appellant's application contained in a letter of February 2002 which did not seek any variation of the mother's student's leave. We agree with Mr Deller's

submission that those seeking leave to remain do not always understand the nature of the application that they are making and a certain amount of latitude must be provided to applicants in person when considering the nature of the application they are making. However, such latitude cannot alter the nature of an application to one which is unrecognisable. The application of 2002 on the appellant's behalf cannot properly be construed as the same application that the appellant's mother was making in 2005.

Does the appellant enjoy settled status? *Maslov* and *ED (Ghana)*

27. Were we to be wrong, it then becomes necessary for us to consider whether an application that was made in 2002 but has never been decided, notwithstanding the passage of time of some 11 years, places the appellant in a position where he must be treated as "settled" in the United Kingdom within the meaning of that term as used by the Grand Chamber of the ECtHR in *Maslov*. This submission, of course, pays scant regard for the fact that since at least 2009, the Secretary of State has consistently made her position clear, namely, that the appellant's offending was sufficiently serious to differentiate between the position of the appellant and the applications of his mother and brother who were each successful. Furthermore, it pays no regard to the letters that were sent to the appellant indicating that in light of his convictions he was liable to automatic deportation; that he was required to respond to the notice of liability to automatic deportation and submit further evidence relating to his family life.

28. Before considering what was meant by the expression "settled" or "settled migrant" as used in *Maslov,* it is clear that the Grand Chamber did not use the term in the same way as it is defined within United Kingdom immigration law or as being equivalent to having indefinite leave to remain under the Immigration Rules. That does not, of course, necessarily mean, as Mr Sills submitted, that it equates to lawful presence. Nevertheless, its meaning is not entirely clear. Whilst we should not attempt to define what the Grand Chamber meant by it, we can say that it clearly relates to the security of residence of a person present in a country. It is clearly distinct from the presence of an entrant who has been temporarily admitted or subject to a finite limitation in time.

29. In *Maslov v Austria* 1638/03 [2008] ECHR 546, [2009] INLR 47 the ECtHR considered the case of a Bulgarian national, Juri Maslov, born in October 1984 who at the age of 6, lawfully entered Austria together with his parents and two siblings. Subsequently, he became legally resident in Austria. His parents acquired Austrian nationality. The applicant attended school in Austria. On 8 March 1999 he was granted an unlimited settlement permit (indefinite leave to remain). On 7 September 1999 the Vienna Juvenile Court convicted the applicant (aged 14) on 22 counts of aggravated gang burglary and attempted aggravated gang burglary; forming a gang; extortion; assault; and unauthorised use of a vehicle, committed between November 1998 and June 1999. He was sentenced to 18 months' imprisonment, 13 of which were suspended on probation.

30. On 25 May 2000, the applicant was further convicted on 18 counts of aggravated burglary and attempted aggravated burglary and sentenced him to 15 months' imprisonment. The suspension of the prison term imposed by the judgment of 7 September 1999 was revoked and the applicant served his prison term.

31. On 3 January 2001 the Vienna Federal Police Authority imposed a ten-year exclusion order on the applicant on the basis that it was contrary to the public interest to allow him to stay in Austria any longer.

32. The applicant submitted that the exclusion order violated his rights under Article 8 of the Convention. He also referred to s.38(1)(4) of a 1997 Aliens Act, pursuant to which an exclusion order could not be issued against an alien who had been lawfully residing in Austria from an early age.

33. Using proceedings akin to judicial review, the applicant unsuccessfully challenged the decision. The applicant was released from prison on 24 May 2002 and deported to Sofia in December 2003. The applicant did not commit any further offences in Bulgaria and had found employment there.

34. In the Grand Chamber judgment, the Court referred to the United Nations Convention on the Rights of the Child of 20 November 1989 and the fact that the applicant was a Union citizen exercising Treaty rights and subject to the limitations imposed by Directive 2004/38 as informing the proportionality on removal.

35. Neither of these considerations applies to the appellant in the present appeal as the appellant is not a Union citizen and the appellant was not a minor when he committed the later, more serious, offences.

36. In applying the established Article 8 case-law, including *Üner v. the Netherlands* (no. 46410/99) criteria, the Chamber emphasised the fact that the applicant had come to Austria with his family at the age of 6, spoke German and had received his entire schooling in Austria, that the offences committed by him, although of a certain gravity, were rather typical examples of juvenile delinquency and, with one exception, did not involve any acts of violence. The Chamber attached weight to the period of good conduct between the applicant's release from prison in May 2002 and his deportation in December 2003, the solidity of his social, cultural and family ties in Austria and the lack of ties with Bulgaria, his country of origin. As regards his knowledge of Bulgarian, the applicant asserted at the hearing that his family belonged to the Turkish minority in Bulgaria. He therefore had no knowledge of Bulgarian. It found that there had been a violation of Article 8 of the Convention. These criteria cannot assist the appellant in the appeal before us. The appellant in the present appeal is not able to draw upon these factors as Maslov was.

37. The Grand Chamber referred to *Boultif* (Appn no 54273/2000) in which the Court elaborated the relevant criteria which it would use in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued as set out in para 40 of the Chamber judgment, as well as further elaborating the criteria to include:

    (i) the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled. When assessing the nature and seriousness of the offences committed by an applicant, it has to be taken into account whether he or she committed them as a juvenile or as an adult
    (ii) the solidity of social, cultural and family ties with the host country and with the country of destination.

38. The Court concluded:

    73. In turn, when assessing the length of the applicant's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it evidently makes a difference whether the person concerned had already come to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult. This tendency is also reflected in various Council of Europe instruments, in particular in Committee of Ministers Recommendations Rec (2001)15 and Rec (2002)4 (see paragraphs 34-35 above).
    74. Although Article 8 provides no absolute protection against expulsion for any category of aliens (see *Üner*, cited above, § 55), including those who were born in the host country or moved there in their early childhood, the Court has already found that regard is to be had to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there (see *Üner*, § 58 *in fine*).
    75. In short, the Court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile.
    76. Finally, the Court reiterates that national authorities enjoy a certain margin of appreciation when assessing whether an interference with a right protected by Article 8 was necessary in a democratic society and proportionate to the legitimate aim pursued.

39. It is within this context that we have to assess the words of the Grand Chamber that *for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion*. It is not a rule of law but a factor to be taken into account in the proportionality balance, along with such other factors (as they applied in Maslov's case) as the fact that he was a juvenile and that the offences were '*typical examples of juvenile delinquency and, with one exception, did not involve any acts of violence*'. The term is not a legal term and is not to be confused with the definition of that term within the Immigration Act 1971.

40. Importantly, however, in the context of our appeal is the fact that Maslov had been granted an unlimited settlement permit which we take to equate with the grant of indefinite leave to remain. It thus becomes clear why the Strasbourg Court was able to classify the appellant as a *settled* migrant who had also lawfully spent all or the major part of his childhood and youth in Austria. There is nothing in this expression to support the contention that lawful periods of residence in the host country in themselves amount to being settled there. All the more so since Maslov was settled there by reason of the grant of indefinite leave to remain in his favour. This is not, of course, to say that periods of lawful residence in the host country are not material in the proportionality balance. What it does do, however, is to make it plain that lawful residence and settled status are not synonymous.

41. As importantly, the nature of continuation leave has to be viewed for what it is. In the case of an entrant who makes a claim for asylum which is found to have no substance in it, the claimant will never have had a right to remain by reason of his claim save a right to remain (perhaps more accurately a right not to be removed) during the period his claim is being considered and during the appeal process, if the claim is refused by the Secretary of State. During this period his presence is lawful only in the limited sense that he must be permitted to remain pending the outcome of his case where the question of lawfulness is determined solely with reference to domestic law, *ST (Eritrea), R (on the application of) v SSHD* [2012] UKSC 12. However, in no sense can his presence be classified as settled. Even if a claimant succeeds or he has the benefit of a successful appeal in this case, he does not, retrospectively as it were, become settled during the decision-appeal process, far less if the claim fails or the appeal does not result in a decision in his favour. Settled migrant status is a matter of fact but is not to be equated with lawful residence, however long the period of residence might be.

42. Notwithstanding this, the appellant relies upon the decision of the Court of Appeal in *ED (Ghana) (sometimes referred to as D) v SSHD* [2012] EWCA Civ 39 (31 January 2012). ED was born on 19 October 1990 and was 21 when his case was considered by the Court of Appeal. He was born in Ghana but arrived in the United Kingdom at the age of 6, in or about May 1997, in the care of his father and together with a number of his siblings. When aged 11, his father abandoned his children when he returned to Ghana. ED lived with foster carers, under the overall supervision of the local authority. His application for indefinite leave to remain was refused on 27 January 2010 when he was aged 20, having spent 14 years in the United Kingdom, because he was not lawfully within the jurisdiction (notwithstanding the fact as a minor this was not under his control) but also because of his criminal conduct. This involved a series of what can only be described as not very serious offences the most serious of which resulted in a 16 week suspended prison sentence and a 12 month community order for possession of an offensive weapon (a knuckle duster) which resulted in a further court appearance for non-compliance. The appellant failed in his appeal in the First-tier

Tribunal and, in the Upper Tribunal, Judge Parkes could find no fault with the determination. In granting permission to appeal to the Court of Appeal Sir Richard Buxton granted permission on a limited basis:

> "The case raises the issue of whether the pattern of offending of moderate seriousness coupled with disobedience to court orders and lack of assurance of future non-offending…can in the case of a near-juvenile meet the criterion of seriousness of offending that is envisaged as required to justify expulsion in, e.g., *Maslov*. This is a question of some importance not to my knowledge previously determined, and therefore suitable for a second appeal."

43. Although it was unclear on the evidence whether the appellant had entered the UK lawfully or unlawfully, for the majority of his time in the UK he had been present unlawfully. Consideration was given to the passage in *Maslov* by reference to what had been said in paragraph 31 of *JO (Uganda) and JT (Ivory Coast)* [2010] EWCA Civ 10:

> 'The first sentence of the *Maslov* judgement ('for a settled immigrant who has lawfully spent all or the major part of his or her childhood and youth in the host country, very serious reasons are required to justify expulsion) does not apply in terms to the removal of a person who has spent his life in the host country unlawfully, but the fact that person has been there since childhood is still weighty consideration in the article 8 balancing exercise'.

44. The appellant submitted that *Maslov v Austria* established a test whereby the decision maker must find "very serious reasons" to justify the removal of an individual to whom the test relates. Although it could not be said that ED had been present in the UK "lawfully" in immigration terms, the "very specific" facts of ED's case meant that *Maslov* nevertheless did apply to his case. If the "very special reasons" test applied, then the immigration judge failed to apply it thereby falling into error as a matter of law. This is exactly similar to the point made by Mr Sills before us. However, in *ED* the Court of Appeal raised an issue as to whether the local authority could or should have taken steps during the appellant's minority to regularise his stay in the United Kingdom by seeking leave to remain. Had it done so, the argument appears to have suggested, ED would have been granted leave during his minority thereby rendering his presence lawful. McFarlane LJ acknowledged in paragraph 27 of his judgment that this was an argument generated from the Bench, rather than resulting from the careful preparation of counsel and concluded, on reflection, that it took the matter no further in terms of establishing some additional legal factor which stood separately and alone for consideration amongst the others that fed into '*the ultimate balancing exercise aimed at measuring necessity and proportionality*'. This last expression is telling; it reinforces the view that these cases are all exercises in the conduct of the balance required to assess proportionality. He concluded:

> 31. Once the point generated by the court has been laid to rest, the case for the appellant falls back starkly on the argument raised by [the appellant's counsel] that in some way the very specific facts of this case move ED, as a matter of law, under the "very

special reasons" umbrella of *Maslov* despite the fact that he has been in this jurisdiction "unlawfully".

32. For my part, having looked carefully at the extract from *JO and JT* to which reference has been made, I cannot see any room for manoeuvre that would allow the very specific facts of the case to alter what is a strict and plainly expressed legal structure. Either an individual's presence is "lawful" or "unlawful" in immigration terms. The determination of that status then in turn indicates whether or not the need for "very special reasons" applies to his case. ED cannot claim "lawful" status. Therefore, as a matter of law, *Maslov* does not apply to his case and the judge was entirely correct in the approach that she took.

45. It is apparent from the judgment that McFarlane LJ was not sanctioning the creation of a new legal test in which '*very special reasons*' were required to justify removal but merely stating that the appellant could not raise this factor in aid in a case where, as a matter of fact, the appellant had not been present lawfully, albeit during a period of his minority. The issue of whether the appellant was settled in the United Kingdom was not apparently raised at all as a discrete issue; indeed, it did not need to be since, if the appellant was not present lawfully, no further consideration needed to be given to the passage in *Maslov*. Mr Sills submitted that the Court of Appeal equated lawful presence with being settled. We do not agree with that analysis. Consequently, in the appeal before us, this central plank of the appellant's case collapses.

Conclusions on *Maslov* and *ED (Ghana)*

46. We conclude:

(i) The assessment of proportionality requires the decision-maker to decide the issue on the basis of a consideration of all material factors. In the case of a person who is both lawfully present and settled in the UK, this will inevitably be a material factor in the assessment of proportionality such that particularly good reasons – very special reasons – will be required to justify expulsion in a way that will not arise in the case of a person who is present unlawfully or who is not settled.

(ii) The passage in paragraph 75 of *Maslov* that 'for a settled migrant who was lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion' is not to be construed as a statute or a rigid legal test that a decision-maker is required to address specifically so that, if he fails to do so, the failure will amount to an error on a point of law.

Article 8

47. The grounds of appeal challenge the Judge's assessment of the Article 8 claim but do so [paragraph 4 of the grounds] by reference to the fact that the appellant is

settled in the UK, a point which we have rejected. Accordingly, the Article 8 challenge is predicated on a misconception.

48. Whilst paragraph 5 of the grounds of appeal goes on to make a wider challenge, it is little more than invitation to the Upper Tribunal to attach more weight to the relationship the appellant has with his family in the United Kingdom, a matter which the panel referred to in the determination with some care. There is no error on a point of law.

49. We have already spoken of the extent and gravity of the appellant's offending. There is eloquent enough justification for the respondent's decision to remove the appellant, notwithstanding the time he has spent in the United Kingdom and the presence of his family here. In reaching a conclusion that the respondent's decision properly reflected the balance to be struck between the various competing elements in the assessment of proportionality, there is no prospect whatever of the appellant establishing the First-tier Tribunal's approach and conclusion was unlawful.

DECISION

The Judge made no error on a point of law and the original determination of the appeal shall stand.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
7 October 2013