Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00425/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
on 24th July 2013	**on 29th August 2013**

Before

UPPER TRIBUNAL JUDGE HANSON
UPPER TRIBUNAL JUDGE MACLEMAN

Between

ANGE MBAKI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Lagunju, instructed by Dorcas Funmi & Co Solicitors.
For the Respondent: Mr Norton, Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. In a determination promulgated on 5th February 2013 a panel of the First-tier Tribunal ('the Panel') sitting at Taylor House dismissed the appellant's appeal against an order to deport him from the United Kingdom made pursuant to section 32 (5) UK Borders Act 2007.

2. The appellant's application for permission to appeal against that decision was initially refused by another judge of the First-tier Tribunal, but granted, on a renewed application, by Upper Tribunal Judge Chalkley on 11th March 2013.

3. On 30th May 2013 Deputy Upper Tribunal Judge Appleyard found, on the basis of the challenge alleging that the Panel reached flawed and erroneous conclusions in relation to Article 8 ECHR, that the Panel had erred. The determination was set aside and directions given for the matter to be heard afresh.

4. Although Deputy Judge Appleyard directed that there should be no preserved findings much of the evidence is not in dispute between the parties - in particular the appellant's immigration history, time in the United Kingdom, childhood experiences, and family connections in the UK and Angola.

Background

5. The appellant was born on the 23rd June 1991 and is a citizen of Angola. He is the subject of the deportation order as a result of his conviction at Woolwich Crown Court for false imprisonment and blackmail. Although there was some dispute regarding the appellant's culpability for the offence we have no reason to go behind sentencing remarks of HHJ Shorrock:

> Would you stand up please, Ange Mbaki and James McGowan. You were both the victim of a confidence trick as a result of which a fairly substantial sum of money, £2000 was lost. So it was that you turned to Mboso Ncube, who was an associate of the fraudsters but not it seems actually involved.
>
> In the early hours of the morning you arrived at an address in Westgate on Sea where you, James McGowan, had the use of a room. There, the victim was detained against his will for a period of about eight hours.
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> I accept that he was threatened and I accept that for some of the time he was tied up with a piece of woolly rope which came from the address.
>
> I am also satisfied that threats were made to him in more or less the way in which he describes. I draw that conclusion principally because the purpose of the false imprisonment was to bully him into making good the losses via his mother.
>
> Accordingly, I find that this was not a case of false imprisonment for ransom. He was actually intimidated to ringing her up and attempting to persuade her to pay money into his account but in fact no money actually changed hands.
>
> I treat both the offences as being part and parcel of the same incident and I will pass concurrent sentences in relation to them in due course.
>
> I do not accept that the victim was punched and kicked in the way he alleged, nor do I accept that he was assaulted with a dog lead. The reason for that is that the medical evidence, in my view, contradicts what he says happened.

> I found Mbuso Ncube in many ways to be an unimpressive witness. I am not sure that attempts were made to set a dog upon him and that he was, for a short while, gagged with a sponge and hooded with a pillow case. Equally, I am not sure that James McGowan was armed with a knife when the visit to the nearby shop was made. It seems to me that by then the victim had formed the view that cooperation or apparent cooperation was the appropriate way to react to his circumstances.
>
> Nevertheless, false imprisonment and blackmail are serious offences for the reasons given, in my judgment the starting point in both cases is one of three and a half years in prison.

6. HHJ Shorrock sentenced the appellant to three years in a Young Offenders Institute, concurrent on each count, having allowed a six-month discount to reflect a late guilty plea. He also stated that in his opinion he saw no reason to distinguish between the two accused in terms of their role or overall responsibility.

7. This is not the appellant's first offence.

8. The appellant entered the United Kingdom on 24th January 1995, aged three, with his maternal uncle and two minor aunts. An application for asylum was submitted with the appellant as a dependent of his uncle although at that time he was described as his son rather than a nephew. The application for asylum was refused on 22nd May 1997. Further representations were made and the decision appealed as a result of which the original decision to refuse asylum was withdrawn and Exceptional Leave to Enter granted until 17th July 1999. The appellant's siblings arrived in the United Kingdom on 10th June 1999, accompanied by their aunt who was also a minor at the time. They too were included as dependents of the uncle.

9. On 15th July 2002 the appellant applied for Exceptional Leave to Remain as a dependent of his maternal uncle which was granted to the family on 18th December 2002.

10. On 25th July 2003 Oxfordshire Social Services were contacted in relation to the appellant's welfare and that of his siblings and his minor aunt. It was alleged the children had been left alone and there were concerns of neglect. The police were called and served a Child Protection Order. The children were taken into care and on 27th July 2003 placed in foster care.

11. The appellant's mother arrived in the United Kingdom on 26th October 2003 accompanied by her daughter in order to participate in the Family Court proceedings. She was subsequently granted leave to remain until 31st August 2004. She was refused indefinite leave to remain on 13th November 2006 but was granted discretionary leave to remain.

12. The appellant first came to the attention of the Police on 19th October 2005 when he received a reprimand for theft. He was fourteen years of age at that time. He has the following history of criminal behaviour:

19 October 2005	Reprimanded by Thames Valley Police for theft of cycle.
30 May 2006	Convicted at Thames Juvenile Court of robbery and theft from person. He was made subject to a 12 month Referral Order for each offence which was later revoked and varied on 15 May 2007.
15 May 2007	Convicted at Thames Juvenile Court of Common Assault. The previous referral orders were revoked and varied to a Supervision Order for a period of 18 months. In addition the appellant was made subject to a curfew order for two months with electronic tagging between 20:00 – 06:00 hrs and ordered to pay £100 compensation.
31 May 2007	Convicted at Thames Juvenile Court of possessing a Class C drug (Cannabis). Appellant ordered to pay £20 costs and given a conditional discharge for six months.
3 October 2007	Convicted at Brent Juvenile Court of possessing a Class C drug (Cannabis) and for breaching his conditional discharge. Conditional discharge for 12 months for both offences.
30 January 2008	Convicted at Oxford Juvenile Court of possessing a Class C drug (Cannabis resin). He was given a three month Supervision Order (Young Offenders) and was made subject to a six hours Community Rehabilitation Order. He was also convicted at Oxford Juvenile Court of breaching a previous conditional discharge. No further action was taken in this regard.
16 April 2008	Convicted at Oxford Juvenile Court of common assault. He was made subject to a supervision order for three months and a repatriation order for six hours.

10 September 2008	Convicted at Oxford Juvenile Court of making false representations to make gain for self or another or cause loss to other/expose other to risk and breaching a previous conditional discharge. He was fined £15.
22 October 2008	Convicted at Oxford Magistrates Court of possessing a Class A drug (heroin) and for breaching a previous conditional discharge. The drugs were fortified. Conditional discharge for 12 months.
20 December 2010	Convicted at Basildon Crown Court for assault occasioning actual bodily harm and theft from person. He was sentenced to six months and three months imprisonment respectively to run consecutively at a Young Offenders Institute.
12 August 2011	Convicted at Woolwich Crown Court of false imprisonment and blackmail. Appellant sentenced to three years imprisonment for each offence to run concurrently in a Young Offenders Institution.

13. On 10th March 2008 an application for registration of the appellant as a British citizen was received but refused on 23rd April 2008 on character grounds and as a result of his criminal record.

14. On 6th March 2009 his mother gave birth to another child in the United Kingdom and on 15th December 2009 she applied for further leave to remain for herself and her two youngest daughters.

15. The liability for deportation letter was issued on 14th October 2011 which resulted in further representations and material being submitted to the Secretary of State. The deportation order was signed on 27th June 2012 and forwarded to HMP Rochester on the same date for service.

16. We have also had the opportunity of considering an Offender Assessment Report (OASys) prepared by the National Probation Service on 8th June 2012 whilst the appellant was at HMP Rochester. The concerns the author of the report has regarding the appellants future conduct are reflected in the section of the document setting out any licence requirements, if he was to be released, in the following terms:

> To permanently reside at Thames Valley Approved Premise and must not leave to reside elsewhere, even for one night, without obtaining the prior approval of your supervising officer; thereafter must reside as directed by your supervising officer.

> Report to staff at a Thames Valley Approved Premise at 09.00, 12.00, 15.00 and 17.00, unless otherwise authorised by your supervising officer. This condition will be reviewed by your supervising officer on a fortnightly basis and may be amended or removed if it is felt the level of risk you present has reduced appropriately.
>
> Confine yourself to an address approved by your supervising officer between the hours of 21.00 and 07.00 daily unless otherwise authorised by your supervising officer. This condition will be reviewed by your supervising officer on a fortnightly basis and may be amended or removed if it is felt that the level of risk that you present has reduced appropriately.
>
> Not to contact or associate with James McGowan, Graeme McGowan, Andre Dunkley and John Flateau without the prior approval of your supervising officer.
>
> To comply with any requirements specified by your supervising officer for the purpose of ensuring that you address your offending behaviour problems at the Thinking Skills Programme.

17. The appellant's automatic release date was 29th June 2012 although he remains in detention. His facility licence expiry eligibility date is 8th December 2013.

18. In relation to the offence it is recorded that it does not appear the appellant was the lead, nor that he was easily influenced by others. He admits he was jointly involved and jointly made a decision to offend although it is recorded that he stated to the Probation Officer that Mr Flateau "took it too far" when he used a knife to injure the victim [2.7]. In relation to the extent that the appellant accepted responsibility for the offence it is recorded that he accepts he is guilty of false imprisonment in that although he claimed the door to the accommodation was unlocked the victim was threatened with violence and was too scared to leave the property. The appellant is stated to have admitted in interview "I gave him a couple of slaps …. I wasn't gonna let him leave" [2.11]

19. In relation to his conduct in detention the author of the report notes:

> "Information from the prison shows that there have been concerns regarding Mr Mbaki's affiliation with gangs and that he has received three adjudications for fighting and threatening behaviour related to gang rivalry. The most recent adjudication on 04/04/12 for fighting resulted in 21 days custody being added, delaying his release date to 29/06/12. Mr Mbaki has been recommended for deportation therefore he may be detained further after this date"

20. In section 7 of the report, in which the author deals with lifestyle and associates, the issue of the appellant's involvement in gangs is further mentioned in the following terms:

> "There have been previous concerns that Mr Mbaki was involved with gangs in London as a teenager and there have been periods of his childhood where his

whereabouts have been unknown. In 2007, Mr Mbaki was stabbed following an incident at a party, which was perceived to be a gang related incident. Reports from the prison suggest that he is affiliated with the " London Fields " gang and he has been involved in gang related violence whilst in custody, which also necessitated a prison transfer and restricted movements around HMP Rochester where he is currently held. Mr Mbaki has had at least three proven adjudications for fighting and threatening behaviour linked to gang rivalry including threatening to place a tin of tuna in a sock and use this to assault the first rival gang member he saw. He also told staff that he would have no problem gouging out the eyes of someone from a rival gang. In September 2011 Mr Mbaki was assaulted by 10 other prisoners in the exercise yard.

The current offences demonstrate manipulative and reckless behaviour in that Mr Mbaki blackmailed the victim and held him against his will. Mr Mbaki admits that he has in the past associated with criminal peers and that he has become easily distracted by crime when he is not in employment. He describes himself as "troublesome" when he was younger but states that he is now motivated to lead a pro-social lifestyle and refrain from associating with negative peers. However, given the information above regarding gang-related violence this does not appear to the case and he is continuing to associate with criminal peers and gang members in custody"

21. The report accepts there is no indication that drug or alcohol misuse is linked to offending and no adverse reports relating to the appellant's emotional well-being or suicide or self harm attempts. In section 10.8 the author notes the appellant states he is anxious about the prospects of deportation although is coping well.

22. In relation to thinking/behavioural issues, at section 11 of the report, the author records the following:

"Mr Mbaki claims that he becomes easily distracted when he is not in employment or has free time and he accepts that he has in the past spent most of his time with offending peers. He used the threat of violence during the commission of this offence in an attempt to get back money that he had lost in a "dodgy deal". Mr Mbaki has previous convictions for violence against others and accepts that he has shown a tendency to confront people when feeling threatened or provoked, however, he states that he can let some things go without feeling the need to use violence. Whilst in custody he has continued to use violence, mainly against those he perceives to be from a rival gang. He has made threats to rival gang members via members of staff and does not appear to acknowledge the consequences of this, in terms of adjudications for himself and harm caused to other prisoners. His cell sharing risk assessment is high.

Mr Mbaki displays no empathy for the victim of this offence, stating that the victim lied and showed no sympathy for him and the other people who had lost out due to the jewellery deal. He states that it is the victim's fault that he was initially classified as a category A prisoner due to the victim mentioning seeing guns in his Police statement. Mr Mbaki also justified his behaviour by stating that "other people would have done the same". It is my assessment is that Mr

> Mbaki would benefit from completing the Thinking Skills Programme during his licence period to improve his thinking skills."

23. The propensity to blame others for his conviction and his description of violence appearing to indicate that he views this as being fairly commonplace is noted in section 12 relating to "attitudes". It is also noted that the appellant continues to engage in criminal activity whilst in custody and does not adhere to that regime which is of concern when he is released on licence. It is also noted he has previously breached conditional discharges by the commission of further offences and has demonstrated a reluctance to work with professionals. The author acknowledges that the appellant has stated he will adhere to his licence because he has to, but he has not demonstrated any commitment further than this.

24. In the section of the report in which the author assesses the risk of harm posed by the appellant concerns are recorded in relation to escape/absconding based upon his past history of remaining out of touch with professionals and moving between locations without informing relevant agencies. It is said that if he is granted immigration bail he may abscond due to the threat of deportation and previous transient lifestyle. Concerns are also recorded in relation to control issues/disruptive behaviour and in respect of breach of trust. He is assessed as posing a risk to other prisoners and his risk of reoffending is assessed as "high" [R4.4].

25. In section R10, there is a summary of the risk of serious harm as follows:

> Who is at risk: Members of the public and prisoners – mainly rival gang members or those perceived to be such by Mr Mbaki. These are usually young adult/teens males. Known adult – the victim, Mbusio Ncube – Mr Mbaki continues to display anger towards the victim.
>
> What is the nature of the risk: physical violence/threat of violence/ false imprisonment – could result in physical harm and long term emotional trauma. Possible use of an improvised weapon.
>
> When is the risk likely to be greatest: the risk continues to be imminent whether in custody or on release – Mr Mbaki has continued to behave violently to other prisoners and had made threats about harming members of rival gangs. He is affiliated with the "London Fields" gang and even when transferred to another prison he soon established links and became involved in gang violence. In the community it is likely that Mr Mbaki would try to establish further links, particularly in London, although he may do this in other cities.

26. We have referred to the above in some detail as it relates to an issue that arose during the course of the hearing. Mr Norton produced an addition bundle containing evidence from Detective Constable O'Donnell and Police Constable

Thornton of Operation Nexus which is a partnership between the Metropolitan Police and UKBA. In accordance with the guidance given by the Upper Tribunal case of Farquhason [2013] UKUT 146 both officers prepared witness statements and corroborated the information contained in the same, relating to the appellant's alleged conduct and his associates, with copies of crime reports and printouts from the Police National Computer (PNC).

27. The statement of D.C. O'Donnell also refers to the Crime Reporting Information System (CRIS) and to crime reports including those from two Constabularies outside London, namely Thames Valley and Essex Police, which summarise ten convictions for seventeen offences for the appellant, as detailed above, and also ten non-convictions for ten offences as follows:

Assault occasioning actual bodily harm	2006
Rape of female	2008
Aggravated burglary	2009
Possession of cannabis (Class B controlled drug)	2009
Theft from person; False imprisonment	2009
Burglary and theft dwelling; false imprisonment	2010
Robbery	2010
Robbery	2010.

The record shows that the appellant has not guilty disposals for five offences including assault occasioning actual bodily harm in 2007, kidnapping, wounding with intent to do grievous bodily harm, having an imitation firearm with intent to commit indictable offence and having an imitation firearm with intent to commit an indictable offence in 2010.

28. Before we can accept the same as establishing the appellant's conduct we have to be satisfied that the allegations are supported by evidence to which we can give due weight. In relation to the 11th November 2008 rape allegation the statement indicates the victim, who was 16 years of age, stayed overnight with the appellant and fell asleep on a bed in the premises fully clothed. She had been drinking. She told the police that when she woke from sleep she discovered that her tracksuit bottoms and underwear had been removed without her consent and that she felt that intercourse had occurred, again to which she did not consent. The appellant admitted during interview being with the victim on that evening and that he digitally penetrated the victim and also inserted a part of his penis into her vagina, but stated that it was consensual. He denied rape. The

CPS decided not to charge due to the fact it was one person's word against the other. The case was reviewed by a Detective Chief Inspector who conducted a full case review resulting in Thames Valley Police appealing the decision of the CPS stating it was in the public interest to proceed and that their belief that was the case should go before a jury and not be decided by the CPS prior to charge. The CPS decision noted that it was accepted there was enough to grant the appeal but they did not believe that it was in the public interest and so no further action was taken.

29. In relation to the aggravated burglary on 27th February 2009, this occurred in Oxford when the appellant and others are said to have approached a residential address and forced entry. One of the accomplices entered the property with a knife having forced the door open. The occupants were all asleep in bed. An altercation occurred with the occupant during which the intruder received several wounds; three lacerations to shoulder, and one to his stomach. The group fled and the intruder was treated at John Radcliffe Hospital for stab wounds. The appellant was arrested together with four others at the hospital; but on 31st April 2009 Oxford Police made a decision that no further action will be taken against him or his associates on the basis that the injury sustained by the intruder was as a result of self defence by the house occupier. On 5th May 2009 the intruder was sentenced to three years imprisonment at Oxford Crown Court for conspiracy to commit robbery as the intruder in the incident.

30. On 2nd September 2009 for criminal damage the appellant received a fixed penalty notice as a result of throwing stones and rubble at a window of a house occupied by an individual that he had argued with, causing it to smash, and a further fixed penalty notice on 28th October 2009 for criminal damage as a result of his causing damage to a letter box which the appellant claimed he did whilst attempting to ascertain whether the resident was at home.

31. It can therefore be seen that the appellant admitted some of those incidents referred to in the police report which are supported by the existence of cautions or credible police records. He admitted penetration of the young girl in the early offence although claimed it was consensual which was denied. The fact the Police sought to appeal the CPS decision regarding whether charges should be brought indicates that they considered there was strong evidence worthy of putting before a jury that the action was not consensual and may have been opportunistic.

32. There is also evidence of named individuals being charged with offences in their own right and evidence of individuals with whom the appellant has associated. The appellant was asked about such associations by his barrister during the course of his oral evidence. He claimed not to know an individual by the name of Damien Dean, Jonathan Kindoki he claimed he knew from college and, although he was arrested with him at the John Radcliffe Hospital, he alleged that he only accompanied him to the hospital and had no knowledge of him

prior to going to the hospital. Dalgo Mosa the appellant claimed he did not know personally but admitted he was there when he was arrested for aggravated burglary. He claims to have been at school with his brother.

33. Various other names were put to the appellant, which we do not need to set out in detail in relation to whom the appellant either claimed they were friends or school associates. Some he admitted were involved in the false imprisonment offence which led to the deportation order. In relation to the ten non-convictions he also admitted that some of them were familiar although he had not been charged or convicted for those offences.

34. In relation to Damien Dean the appellant, in cross-examination, was referred to an incident of fraud by false representation following the removal of high-value jacket and the replacing of the price-tag with one of lower value at a shopping centre when he was charged with the offence with Damien Dean. The appellant acknowledged that this had occurred, which resulted in the 10th September 2008 conviction at Oxford Juvenile Court, and that he was with another person but claimed he did not know who this person was. We do not find this plausible.

35. In relation to Jonathan Kindoki the appellant claimed not to know why this person was at the hospital that evening and then stated that another person may have mentioned that it was as a result of the aggravated burglary. The appellant claimed he was not at the property when the person who was taken to hospital was stabbed but admitted being arrested at the hospital. We are not satisfied that his evidence provided a credible explanation for why he was at the hospital with a group of individuals following the aggravated burglary which resulted in one of them requiring urgent medical treatment if he had nothing to do with the events of that night or with the named individuals. We find on balance it was more likely, as the police statement implies, that the appellant was a member of the group that went to the property and who committed, as a joint enterprise, the burglary although we accept there is no evidence that the appellant used a knife or had any weapon on him.

36. The appellant confirmed that he studied French at school and accepted there have been adjudications in custody for fighting but denied any gang membership. His denial of any gang involvement was consistent throughout his evidence, but we do not find this credible, which casts doubt upon the reliability of his evidence as a whole as a result of the clear statements in the OASys report relating to gang associates both within the community and in the prison environment and also in part based upon the appellant's own evidence. Although it was submitted by Ms Lagunju that there was no evidence of gang membership at page 53 of his own bundle is a copy of a report from the Early Years and Family Support Team noting a number of concerns having been brought to the author's attention in relation to the risk of significant harm being posed to the appellant as a result of:

i. Him stating he is involved in a gang.

ii. Stating he has been threatened.

iii. Him being excluded from school as he was found in possession of a knife - which it is suspected he carries for protection although he will not admit this.

This entry has a date of a meeting on 15th June 2007 when the appellant was fifteen years of age.

37. An entry dated 10th February 2007 from Oxford County Council Emergency Duty Team refers to threats to the appellant's life caused by violent attacks by pupils at his school, one was stabbed and another hit over the head with a hammer and stabbed. The appellant is said to be high on the list as their next target, as he is unpopular with his peers. On the same date is reference to a fax containing essential information to the Emergency Duty Team background details in which it is noted "Ange has been threatened to be killed by youths in London. He is in a gang". A copy of the fax is at page 78 of the appellant's bundle including a note that it is recommended he not be returned to London after the endorsement regarding gang membership. At page 81 is a further form containing information for an Emergency Duty Team again recording the appellant's gang membership.

38. There is also a note dated 18th April 2005 from Oxfordshire County Council recording the appellant being involved in a fight after school, that he hangs around with a gang and is involved in hiding a knife and possibly stealing a knife and passing it on.

39. When we indicated to his representative that there was evidence to corroborate the claim of gang membership we were faced with an interesting submission by Ms Lagunju that we should put little weight on this evidence and in fact ignore it. Whilst we understand that this was the only submission that could be made it was effectively the appellant's own advocate asking us to ignore his own evidence that he had relied upon throughout these proceedings just because it undermined his claim and supported an important element of the Secretary of States case. We do not accede to such request as it is evidence from a professional source and when this is taken together with the evidence provided by the Metropolitan Police, and the evidence contained in the report repaired by the Probation Service, a clear picture emerges of a young man who has been involved in gangs, associated with named individuals, and committed a number of offences involving acts of violence as outlined in the police intelligence and record of his convictions. We find such involvement to be proved.

Discussion

40. In Masih (deportation – public interest – basic principles) Pakistan [2012] UKUT 00046(IAC) the Tribunal said that so long as account is taken of the following basic principles, there is at present no need for further citation of authority on the public interest side of the balancing exercise. The following basic principles can be derived from the present case law concerning the issue of the public interest in relation to the deportation of foreign criminals: (i) In a case of automatic deportation, full account must be taken of the strong public interest in removing foreign citizens convicted of serious offences, which lies not only in the prevention of further offences on the part of the individual concerned, but in deterring others from committing them in the first place. (ii) Deportation of foreign criminals expresses society's condemnation of serious criminal activity and promotes public confidence in the treatment of foreign citizens who have committed them. (iii) The starting-point for assessing the facts of the offence of which an individual has been committed, and their effect on others, and on the public as a whole, must be the view taken by the sentencing judge. (iv) The appeal has to be dealt with on the basis of the situation at the date of the hearing. (v) Full account should also be taken of any developments since sentence was passed, for example the result of any disciplinary adjudications in prison or detention, or any OASys or licence report.

41. Applying the case law to the above factors, including the assessment that the appellant poses a high risk of reoffending, the Secretary of State has a strong case for deporting the appellant based upon the need to protect the public from the commission of future crimes.

42. It is still necessary to consider whether the appellant's deportation is proportionate which we can do only by weighing the factors in his favour against the Secretary of States case. In Boultif v Switzerland [2001] ECHR 54273, as confirmed by Uner v the Netherlands [2007] Imm AR 303, the Court said that in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued, the following criteria had to be considered:

(i) The nature and the seriousness of the offence committed by the Appellant;
(ii) The length of the Appellant's stay in the country from which he or she was to be expelled;
(iii) The time that had elapsed since the offence was committed and the claimant's conduct during that period.
(iv) The nationalities of the various parties concerned;
(v) The Appellant's family situation, such as length of marriage and other factors expressing the effectiveness of the Appellant's family life;
(vi) Whether the spouse knew about the offence at the time he or she entered into the family relationship;
(vii) Whether there are children in the marriage and if so their ages;

(viii) The seriousness and the difficulties which the Spouse is likely to encounter in the country of the Appellant's origin;
(ix) The best interests and well being of any children of the Appellant; and in particular the seriousness of any difficulties that they would be likely to encounter in the country to which the Appellant would be expelled;
(x) The solidity of social, cultural and family ties with the host country and with the country of destination.

43. In Maslov v Austria (Applic. 1638/03) EctHR (First section) the appellant, who had been legally resident in Austria for 11 years with family had a string of convictions. He was served with a ten year ban. The EctHR First Chamber said that in assessing whether the Austrian authorities struck a fair balance between the claimant's right to family and private life and the prevention of disorder and crime, the relevant criteria were (i) the nature and gravity of the claimant's offences (ii) the length of his stay in the host country (iii) the period which elapsed between the commission of the offences and the impugned measure and the claimant's conduct during that period and (iv) the solidity of the social, cultural and family ties with the host country and the country of destination.

44. Although the appellant has been in the United Kingdom since he was very young we note that the offence which led to the deportation order was committed when he was an adult at 18 years of age. When considering the criteria set out above we find as follows:

45. *The nature and the seriousness of the offence committed by the Appellant*: the appellant committed a serious offence which represents an escalation in his criminal behaviour. His conduct outside the offences for which he was convicted illustrates a propensity to offend and cause serious harm to members of the public.

46. *The length of the Appellant's stay in the country from which he or she was to be expelled*: we accept that the appellant has been in the United Kingdom from a very early age and that he has grown up within his uncle's family and the care system, been educated in the United Kingdom, and is to all effects the same as his peers who are British citizens in terms of his experiences and how he has developed both in a physical and emotional sense and integrated into society in the United Kingdom. The OASys report notes that during 2002 he spent some of his time in care before being placed on a full care order in 2005 which expired when he turned 18 years of age. He is said to have absconded from a number of foster placements between 2004 and 2007 when he returned to Oxford to be with his mother. He thereafter obtained Key 2 supported accommodation but soon began staying at family and friends houses and allowed others to use his supported accommodation at a result of which this was closed in April 2009. In June 2009 he moved to Wembley in London due to harassment and threats being made against him by associates due to an alleged burglary, a move

supported by Thames Valley Police. The appellant did not stay at the property and did not provide paperwork needed or attend necessary housing appointments and gave various 'care of' addresses in London before returning to live with his mother in Oxford in August 2009.

The appellant sought advice from his Leaving Care Worker who arranged for him to move to Brent in London as he claimed to be in fear of associates in Oxford and perceived himself to be at risk. He was granted temporary accommodation in a flat but did not spend any time there, did not pay service charges and failed to meet support sessions as a result which he lost that tenancy. He claimed to have been staying with friends and then with a girlfriend in Southend-on-Sea. He then lost contact with his Leaving Care Worker who later discovered he had been arrested and remanded in custody which led to his conviction for the current offence.

47. *The time that had elapsed since the offence was committed and the claimant's conduct during that period*: the dates of the convictions are set out above as are the adjudications for fighting in prison, the threats made, and the concerns regarding the appellant's conduct both in prison and in the wider community.

48. *The nationalities of the various parties concerned*: the appellant is an Angolan citizen.

49. *The Appellant's family situation, such as length of marriage and other factors expressing the effectiveness of the Appellant's family life*: we do not find it proved that the appellant has family life recognised by Article 8 with his uncle or any other family members in the United Kingdom, although they form part of his private life. We heard oral evidence from two members of his family who clearly support him in his attempt to remain in the United Kingdom. Whilst we accept such family support exists we do not find it has been shown that the appellant retains the degree of dependency upon his family members to allow us to find that family life recognised by Article 8 exists. The appellant has in effect been living an independent life for some time as evidence of his conduct and accommodation provision in and outside the care system indicates. He is not married and there is no evidence of family life with a girlfriend or any other individual sufficient to engage Article 8.

50. Whether the spouse knew about the offence at the time he or she entered into the family relationship: not relevant as there is no spouse.

51. Whether there are children in the marriage and if so their ages: the appellant has no children.

52. *The seriousness and the difficulties which the Spouse is likely to encounter in the country of the Appellant's origin*: The appellant is a single man.

53. *The best interests and well being of any children of the Appellant; and in particular the seriousness of any difficulties that they would be likely to encounter in the country to which the Appellant would be expelled*: there are no children.

54. *The solidity of social, cultural and family ties with the host country and with the country of destination*: we accept the appellant has strong cultural, social, and family ties to the United Kingdom as this is the country he has grown up in and he is not likely to have realistic memories of Angola or any experience of that country. It is a country with which he is not familiar as he did not grow up there, although he has his mother and other family members there.

55. It is on this aspect of the criteria that Ms Lagunju concentrated her submissions. It is accepted that when the appellant entered the care system his mother travelled from Angola to be involved in the family proceedings and provided support for him and, when she had accommodation, to offer a home as an alternative to his having to go into care. The appellant's uncle Mr Zeta stated that she encountered difficulties in the form of language as she did not speak English, the unfamiliar environment and culture, which had an adverse effect on her ability to resume the care of her children. Although the appellant returned to live with his mother it is stated their relationship broke down which culminated in a number of changes to the appellant's placement.

56. Mr Zeta claims that the appellant has no family connections in Angola as the entire family are in the UK and that they have not returned to the country due to persecution they suffered in the past, as a result of which it would be highly unlikely they will be able to visit the appellant if he was returned. He claims that it is unlikely there will be anybody to support and guide the appellant back in Angola and that he would find it difficult as he cannot speak Portuguese and will struggle to survive upon the streets of Luanda without assistance from the government and may be at risk of harming himself.

57. The appellant's aunt, Mrs Templer, also stated that in 2003 her sister, the appellant's mother, arrived from Angola with the intention of taking custody of the children, including the appellant, which resulted in a shared parental responsibility order with the local authority and a placement with her in 2004. The children were separated us a result of placements and the appellant's mother was frustrated as she found the appellant to be unruly and stubborn which led to an estrangement and eventually to her returning to Angola. Mrs Templer also claims she would be worried as the appellant will suffer a lot of hardship in Angola as life is difficult there and he will have nobody to support him or a system for adapting to the strange life he will meet. In her oral evidence she repeated the claim there has been no contact with the appellant's mother since she returned, claiming in addition, not to know where the appellant's mother was and that she had not contacted family members herself since her return.

58. In relation to the claim that the appellant will find it difficult to adapt to life in Angola we accept that he will experience problems in an alien environment and that some of these may be very difficult for him to overcome. He states he does not speak Portuguese, the language of Angola, and that as a result of the time he has spent in the United Kingdom he has no experience of growing up in that country, which will make it more difficult for him. We note he studied French at school although even if he has the ability to learn Portuguese it is unlikely he will develop a practical working knowledge of Portuguese within the timescale the Secretary of State would allow him to remain in the United Kingdom if his appeal is dismissed.

59. The First-tier Panel did not accept that the appellant will be abandoned by his mother if he is returned to Angola based on the fact that she was willing to travel to the United Kingdom to take part in the care proceedings and to offer him a home previously. Based upon her past conduct this is not a perverse or irrational conclusion. It is claimed the mother has now returned to Angola and that she and the appellant have become estranged but this does not mean that she would abandon him in her own country where issues such as language and the cultural surroundings are things that she is familiar with. It is claimed there is no contact with the mother although the evidence did not suggest that any real efforts have been made to contact her, either directly through established means of communication, through individuals within her home village which must be known to the family, or through the International Red Cross or other non-government organisations. Similarly, there is no evidence that if the appellant was returned he would be completely abandoned by the family.

60. If the appellant's mother was to be located and willing to provide him with support and guidance in Angola he will have a family member there to support him. We have, however, considered the alternative on the basis that no such family support will be available; but we do not find that this element and any related difficulties the appellant may face is determinative. There are established cases where individuals have lived in the United Kingdom for considerable periods of their lives and been removed to their countries of origin and where the European Court of Human Rights has accepted that such action is proportionate. The issue is fact specific.

61. The submission that if returned the appellant will suffer difficulties sufficient to make his deportation unlawful in effect amounts to an Article 3 issue, as accepted by Ms Lagunju in the course of her submissions.

62. In Bosnja [2002] UKIAT 07605 the Tribunal said that the conditions which an appellant faced on return to her home country, such as a lack or inadequacy of medical facilities, could constitute inhuman or degrading treatment. *In principle*, Article 3 is not confined to treatment at the hands of the authorities in the receiving country although in N (Burundi) [2003] UKIAT 00065 the Tribunal said that where the humanitarian situation is poor in the country to which a

failed asylum seeker is to be returned that in itself will not generally reach the high threshold needed for a breach of Article 3. The Tribunal was guided by the approach in SK* [2002] UKIAT 05613 (Collins J) in which the Tribunal acknowledged that an individual's personal circumstances could be relevant (eg if he had a physical or mental disability) but, nonetheless, "there must be a threshold which is of general application. Croatia has suffered the ravages of a fierce and bitter civil war. Thus the mere fact that there will be a return to hardship resulting from that cannot produce a breach of human rights."

63. The general situation must be taken into account as must what is generally accepted in the society in question. In Ibrahim v SSHD [2005] EWCA Civ 1816 the Adjudicator found that a highly vulnerable Somali with very poor cognitive skills who could not in consequence fend for herself or avail herself of protection was at risk under Article 3 and the Court of Appeal upheld this.

64. A more recent decision is MB and others [2013] EWHC 123 (Admin): where Mr Justice Mitting held:

> 24. Strasbourg applies different tests to applications brought in respect of treatment by a member state against that state from those which it applies to "foreign cases" – those in which a member state proposing to remove a person to another state may be in breach of its obligations to that person by reason of circumstances which will arise in that other state. In Article 3 cases about conditions in a member state, an applicant is required to prove to a high standard that he will be subjected to inhuman or degrading treatment. It must be proved "beyond reasonable doubt": *Ireland v. UK* [1978] 2EHRR 25 § 161. Presumptions may aid proof: a breach may be established by the "existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact": *Jasar v. Macedonia* 69908/1 15 February 2007 § 48. Attainment of the minimum level of severity to establish a breach of Article 3 may, however, be easier to establish in a contracting state than in a non-contracting state: *Babar Ahmad v. UK* 24027/07 *& Others* 10 April 2012 § 177:
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> "However in reaching this conclusion, the court would underline that it agrees with Lord Browne's observation in *Wellington* that the absolute nature of Article 3 does not mean that any form of ill-treatment will act as a bar to removal from a contracting state. As Lord Browne observed, this court has repeatedly stated that the Convention does not purport to be a means of requiring the contracting states to impose Convention standards on other states…This being so, treatment which might violate Article 3 because of an act or omission of a contracting state might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case. For example, a contracting state's negligence in providing appropriate medical care within its jurisdiction has, on occasion, led the court to find a violation of Article 3 but such violations have not been so readily established in the extra-territorial context (compare the denial of prompt and appropriate medical treatment for HIV/Aids in *Aleksanyan v. Russia*…with *N v. UK*…"
>
> In a "foreign" case, the burden of proof is lower. An applicant is required to establish substantial grounds for believing that if removed to another state he faces a real risk of being subjected to treatment contrary to Article 3. If he does so, the removing state is prohibited from deporting him there: *Saadi v. Italy* 37201/06 [2008] ECHR 179 § 125. However,

> "Article 3 principally applies to prevent a deportation or expulsion where the risk of ill-treatment in the receiving country emanates from intentionally inflicted acts of the public authorities there or from non-state bodies when the authorities are unable to afford the applicant appropriate protection…"

> 29. On the facts, the position under the Convention is no less clear. This is a "foreign" case. If the "foreign" tests established by Strasbourg in Articles 3 and 5 cases apply, the answer is straightforward. Article 3 imposes no general obligation on a contracting state to refrain from removing a person to another state or territory in which he would be destitute. Even in a "domestic" case, "it is not the function of Article 3 to prescribe a minimum standard of social support for those in need….that is a matter for the social legislation of each signatory state", per Lord Scott at § 66 in *Limbuela v. SSHD* [2006] 1AC 396. It is only when deliberate state action is taken, by prohibiting a person from providing for his own sustenance by work and then removing from him the provision of accommodation and the barest necessities of life, that a breach of Article 3 will occur: per Lord Bingham at § 6 and 7 and per Lord Hope at § 56. In a "foreign" case, wholly exceptional circumstances such as those obtaining in *D v. UK* 30240/96 15 October 1996 may engage Article 3 and prohibit removal by a contracting state. Otherwise, "the fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the contracting state is not sufficient in itself to give rise to breach of Article 3": *N v. UK* § 42. The situation of these claimants is plainly not exceptional. They are all fit, young single men. It is common ground that Maltese law does not now prohibit them from working. They may be provided with rudimentary accommodation and very modest financial support, but even if they were not, Article 3 would not be engaged – not even in Malta and certainly not in the UK.

65. Article 3 does not set out any minimum standards that an individual is entitled to enjoy as of right. We do not find that the appellant has discharged the burden of proof upon him to show that any hardship he may experience on return to Angola crosses the threshold necessary to engage Article 3. He is a healthy resourceful individual who has been able to survive in the past and who has not proved his level of suffering or destitution will be such that Article 3 will be engaged. It has not been shown he will be unable to seek the assistance of the various NGO's in Luanda, some of whom work in the international language of English, or church groups to enable him to establish himself and meet his basis needs.

66. As stated, we not accept Article 3 ECHR is engaged or capable of proving an exception to the deportation decision and therefore the appellant is dependent upon Article 8 based predominantly on his private life in the United Kingdom and his settled status in this country. We accept those ties are deep and, as stated above, he is a British citizen in all bar nationality. He is a product of this country with little or no experience of living in his home state. The family members he has here are part of his private life recognised by Article 8 as are his friends, associates, and others with whom he is engaged in the United Kingdom, including those he has met in prison. The question before us is whether his deportation is proportionate in all the circumstances when due weight is given to the appellants claims on the one hand, including the strength of his ties to this

country and lack of ties to Angola, and the legitimate aim relied upon by the Secretary of State.

67. In terms of the weight to be given to the respondent's case we have to take into account the fact the appellant is subject to an automatic deportation order. The inclusion of the exceptions to automatic deportation is an issue noted by the Court of Appeal in SS (Nigeria) [2013] EWCA Civ 550 who, notwithstanding this fact, gave guidance upon the weight to be attached to the fact that once a relevant conviction occurs, absent an ability to prove an applicable exception, an individual must be removed. That Parliament had passed legislation to this effect in the terms referred to by the Court is indicative of the weight that should be given to such a clear public policy statement when undertaking the Article 8 balancing exercise. SS (Nigeria) was followed in CW (Jamaica) [2013] EWCA Civ 915 in which Lord Justice McCombe stated:

> 34. In considering these provisions in the *SS (Nigeria)* case (supra), Laws LJ considered extensively the law relating to the balance between Article 8 rights and the public interest in deporting foreign criminals, the latter being forcibly emphasised by the statutory provisions which I have just quoted. At paragraph [48] Laws LJ said this:
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> "….Where such potential deportees have raised claims under Article 8, seeking to resist deportation by relying on the interests of a child or children having British citizenship, I think with respect that insufficient attention has been paid to the weight to be attached, in virtue of its origin in primary legislation, to the policy of deporting foreign criminals."
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> At paragraph 54, the learned Lord Justice added:
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> "I would draw particular attention to the provision contained in s.33(7): "section 32(4) applies despite the application of Exception 1…", that is to say, a foreign criminal's deportation remains conducive to the public good notwithstanding his successful reliance on Article 8. I said at paragraph 46 that while the authorities demonstrate that there is no rule of exceptionality for Article 8, they also clearly show that the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail. The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgment only be justified by a very strong claim indeed."

68. The question therefore, when balancing the competing interests, is whether the scales fall in favour of the appellant or the Secretary of State. Having very carefully considered all the elements of this appeal relied upon by the appellant, the detailed submissions made on his behalf by Ms Lagunju, and those of Mr Norton for the Secretary of State, we do not find that it has been established that

the case under Article 8 is sufficiently strong to prevail over the pressing public interest in the appellant's deportation. We find the Secretary of State has discharged the burden of proof upon her to the required standard to prove that the appellant's removal from the United Kingdom is proportionate. Borrowing a phrase from the judgment in CW (Jamaica), the Article 8 claim is far from being "very strong". It is impossible to see how, therefore, those claims could outweigh the express declaration of the public interest in the deportation of a foreign criminal, such as this appellant, as expressly stated in the statute. The risk of serious potential harm to the public still remains and there is a very strong deterrent element in this appeal in relation to non-nationals who choose to carry out acts of violence against third parties which is an increasing problem in British society, as is the gang culture in inner cities and elsewhere.

Decision

69. **The First-tier Tribunal Panel has been found to have materially erred in law and its decision has been aside. We remake the decision as follows. This appeal is dismissed.**

Anonymity.

70. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. We make no such order as none was applied for and no basis for making such an order emerges from the facts.

Signed……..
Upper Tribunal Judge Hanson

27th August 2013