Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01230/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 February 2014	**On 19 February 2014**

Before

MR JUSTICE JAY
UPPER TRIBUNAL JUDGE PERKINS

Between

PRINCE ZACHARY KUDAKWASHE MUNANGATIRE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr V Jagadesham, Counsel, instructed by TRP Solicitors
For the Respondent: Mr S Walker, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against the determination of the First-tier Tribunal, Judge Parkes and Mr H G Jones, MBE, JP, which was promulgated on 4 November 2013 dismissing

the appellant's appeal against the Secretary of State's decision to make a deportation order. That order was made on 4 June 2013 and the notice and grounds of appeal are dated 19 June 2013. The appellant remains in the United Kingdom.

2. The appellant was born on 8 April 1990 in Zimbabwe. He came with his family to join his father in the United Kingdom on 9 September 2001 when he was aged 11 and he has not returned to Zimbabwe since then. On 2 March 2006 the appellant was granted indefinite leave to remain. His daughter Saskia was born on 11 March 2009. The appellant's relationship with Saskia's mother has ended and his current partner is a woman called Hayley. She gave birth to their son in December 2013.

3. The appellant has a lengthy criminal record. His convictions are set out in the First-tier Tribunal's determination and it is only necessary to mention the highlights. On 2 June 2005 at the Luton Crown Court he was sentenced to 30 months' detention in a young offender's institution for offences of robbery and attempted robbery. On 29 May 2006 he was warned that he would be considered for deportation in the event that he should reoffend. Further custodial sentences were imposed in March 2007, July 2007 and January 2009. On 24 April 2009, when the appellant was just 19, he was sentenced to four years' detention in a young offenders institution in relation to offences committed when he was 18. Even after his release from detention the appellant continued to reoffend but he has not since April 2009 received further sentences of detention.

4. At paragraph 29 of its determination the First-tier Tribunal said this:

> "The appellant's offending is deeply troubling. His record contains numerous examples of his failure to comply with sentences that have been passed on him and the warning that he may be liable to deportation did not act as a brake on his behaviour, neither did the impending birth of his first child. Following his release he has committed offences than present a danger to members of the public and the use of vehicles when over the limit of alcohol and then when disqualified and uninsured."

5. The appeal against the notice of intention to deport was brought on asylum, humanitarian protection and Article 8 grounds. As for the asylum claim, the First-tier Tribunal concluded that the appellant had not rebutted the presumption under Section 72(9) of the Nationality, Immigration and Asylum Act 2002 that he is a danger to the community. The panel noted that the Circuit Judge sitting at the Luton Crown Court in April 2009 had not imposed an IPP, that is to say a sentence of imprisonment for public protection on the ground of dangerousness. That fact alone did not serve to rebut the presumption. However the length and seriousness of the appellant's criminal record was such that he could not rebut the presumption under Section 72(9). It followed that he remained a danger to the community and refugee status could not be considered.

6. That said, the appellant was still entitled to run a case based on humanitarian protection considerations and Article 3 of the ECHR. However the First-tier Tribunal concluded on the available evidence that the appellant would not be at risk if he returned to Zimbabwe. Next, the First-tier Tribunal considered the application of the decision of the Grand Chamber of the European Court of Hunan Rights in **Maslov v Austria [2008] ECHR 546**. The panel appears to have considered this separately from Article 8 of the Convention, see paragraphs 38 to 39 of its determination. At those paragraphs the First-tier Tribunal said this:

> "38. The appellant came to the UK when he was only 11 and has spent more than half his life in the UK. He has also spent a large part of that time involved with the courts and the criminal justice system. Warnings that he may face deportation and the various sentences passed on him have not obviously act as a brake on his behaviour which has been seriously anti-social and with his recent driving offences continues to present a danger to members of the public. His offending continued as an adult and he has not demonstrated much maturity with reoffending after the offence that has led to these proceedings.
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> 39. From the evidence in the social worker's report and the appellant's mother's witness statement it is clear that the appellant still has relatives in Zimbabwe. We do not believe that the appellant would be left without support if he was to return there and while we do not minimise the considerable readjustment he would have to make on his return we find that he cannot be said to have no connections with the country of his birth."

7. Finally, the First-tier Tribunal turned its attention to Article 8 and Section 55 considerations. Although the appellant was now in a relationship with Hayley, she was not called to give evidence before the panel. The appellant told the First-tier Tribunal that Hayley was unaware of these deportation proceedings and of the hearing. The First-tier Tribunal drew the inference that this betokened secrecy and deceit on his part and we do not disagree. It was also clear from the evidence he gave that the appellant did not live with Hayley. The First-tier Tribunal found that "the evidence does not suggest that claims of a shared future can be relied on or are realistic".

8. At paragraph 44 the First-tier Tribunal said this:

> "We are under no illusions that if the appellant is deported then that will have the effect of splitting the families involved. Given the nature of the contact that he has with his daughter that will be less of an interference than if he lived with her and her mother and had daily contact. With regard to his son he does not live with the baby's mother and has a less than honest or open relationship with her, the evidence does not suggest that claims of a shared future can be relied on or are realistic. If deported the appellant will be deprived of the opportunity

of forming a relationship with his son that would happen if sent to prison, and begs the question of forming a relationship with his son that would happen if sent to prison, and begs the question of what sort of relationship would be formed anyway. The fact that he got his girlfriend pregnant when facing deportation was either a calculated act to bolster his case or shows a callous disregard for the consequences of his actions and the effects they have on others. At the time he was aware that his situation was and remains precarious and his failure to be honest with her severely undermines the claims that he has made and detracts from the case that is put on his behalf."

9. The First-tier Tribunal noted that the appellant has regular contact with his mother and his siblings. He also has half-siblings but his relationship with them is not particularly close. The First-tier Tribunal stated that the appellant had been beaten by his father who is now deceased and that his relationship with his mother "was not good either and that is partly reflected in his offending over the years". As for Saskia, the appellant's daughter by Kelly, the evidence was that the child went to the appellant's mother's house at weekends, not to the appellant's. The First-tier Tribunal said that the appellant was not the main carer and that his mother enjoys the role of alternative carer, not the appellant.

10. At paragraph 43 the First-tier Tribunal said this:

> "We accept that it is preferable for a child to maintain a relationship with both parents even if they do not or cannot live together. If would be in the best interests of the daughter and his son if such a relationship could be maintained and we do not pretend that if the appellant is deported the effect would be anything other than to effectively destroy the relationship that he has or may have with either or both of them. In that context it is clear that the appellant's relationship with his daughter is limited and when apart from her mother it is the appellant's mother who is the main carer and that relationship will continue wherever the appellant is."

11. The panel considered the strength of the appellant's relationship with his siblings but concluded that this was limited in nature. The First-tier Tribunal's conclusion on the issue was as follows:

> "46. The best interests of all the children are a primary considerations but not *the* primary consideration or the paramount consideration. The nature of the relationship they have has to be balanced against the public interest in deporting a person whose removal would be conducive to the public good and who is presumed to be a danger to the community
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> 47. Do their best interests override the public interest in this case? Taking into account the appellant's personal history and appalling record, along with the danger that we find he still presents, and taking into account the considerations under the Immigration Rules and **Maslov**, we are satisfied

that the appellant's deportation is a justified and proportionate measure for the Secretary of State to take.

48. The appellant has adult siblings in the UK but his relationship with them is limited and there is nothing in them that suggests that his contact or his relations with them are unusually strong or durable. It appears that he has had a fractious relationship with his mother in the past but that has been repaired to some extent. He does not live at home and there is no suggestion that will change in the future although he relies on his mother to maintain contact with his daughter. While it is clear that Article 8 is engaged in this case in relation to the appellant, his family, children and to a very limited extent with his partner Hayley we are satisfied that his deportation is justified by the need to prevent crime and to protect the public and that there is nothing in his circumstances that would make it disproportionate."

12. The appellant advances four grounds of appeal although in oral argument today Counsel for the appellant reduced those to three headings. But it is convenient to look at the case as formerly pleaded. The first ground has two limbs. First, that the First-tier Tribunal failed to apply the **Maslov** principles properly and secondly, that the First-tier Tribunal failed to grapple with the issue of the appellant's integration and rehabilitation in Zimbabwe in line with the case of **Essa (EEA rehabilitation - integration) [2013] UKUT 00316 (IAC)**.

13. In support of his first limb, Mr Jagadesham submitted that the threshold for a settled migrant who has lawfully spent all or the major part of his childhood in this country is a high one, namely "very serious reasons are required to justify deportation". He referred us to the decision of the Grand Chamber in **Maslov** where at paragraph 71 of its judgment the European Court of Human Rights made clear that the following criteria apply, namely:
(1) the nature and seriousness of the offence committed by the appellant;
(2) the length of the appellant's stay in the United Kingdom;
(3) the time elapsed since the offence was committed and the appellant's conduct during that period; and
(4) the solidity of social, cultural and family ties with the United Kingdom and with Zimbabwe.

14. At paragraph 72 of its decision the Grand Chamber said that it would like to clarify that the age of the person concerned can play a role when applying some of the paragraph 71c criteria. What was decisive on the facts of **Maslov** was the youth of the applicant, he was a juvenile at all material times, and that with one exception the offences were of a non-violent nature.

15. At paragraph 85 of its judgment the Grand Chamber made it clear that very serious violent offences can justify expulsion even if committed by a minor.

16. Mr Jagadesham drew our attention to two domestic decisions. First, the decision of the Court of Appeal, Lord Justice Richards presiding, in the case of **JO (Uganda) and Another v Secretary of State for the Home Department [2010] EWCA Civ 10** and secondly, the more recent case of **MJ (Angola) v Secretary of State for the Home Department [2010] EWCA Civ 557**. In the latter case the appellant, who was born in Angola, came to the United Kingdom when he was 12 and then was granted leave to remain as a member of his father's family on 9 June 1997 when he was just 15. The appellant there had a history of mental illness and committed a number of offences resulting in detention in a young offender's institution. In his judgment in that case Lord Justice Dyson, as he then was, noted that the determination of the AIT was fairly detailed and that obvious care had been taken with the issue of proportionality. Nonetheless it was the view of the Court of Appeal that the determination of the issues of proportionality was flawed.

17. It is necessary to quote directly from paragraphs 40 to 42 of Lord Justice Dyson's judgment:

> "40. The appellant had lawfully entered the United Kingdom when he was 12 years of age. He spent his adolescence and the whole of adult life here. Much of his offending was committed when he was under the age of 21. In these circumstances very serious reasons were required to justify his deportation: see **Maslov** at paragraph 75.
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> 41. Miss Grey does not dispute this. She points out that the AIT set out all the relevant facts, including the appellant's age when he entered the UK, the fact that he has ties with this country and that most of his offending was committed when he was young. She submits that in substance at paragraphs 66, 84 and 85 the AIT did provide the 'very serous reasons' that were necessary to justify the deportation.
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> 42. I do not agree. What the AIT did was to balance the appellant's right to respect for his private life against the rights of others to be protected from the risk of his reoffending and to conclude that the former was outweighed by the latter. In performing the balancing exercise which they found 'very difficult' they undoubtedly took into account the fact that the appellant had resided in the UK for a lengthy period and arrived here as an adolescent: see paragraph 66. But there is nothing to indicate that they appreciated the fact that (i) the appellant had lived in the UK since he was 12 years of age, (ii) most of his offending had been committed when he was under the age of 21, and (iii) he had no links with Angola meant that very serious reasons were required to justify the decision to deport him. I should add that the AIT are not to be criticised for not appreciating that very serious reasons were required. They did not have the benefit of paragraph 75 of **Maslov**, the Grand Chamber had not published their decision at the time of the AIT's determination."

18. Mr Jagadesham submits, applying the principles laid down by Lord Justice Dyson in **MJ (Angola)**, that the analysis of **Maslov** was similarly deficient in the present case. He refers to the fact that paragraphs 38 and 39 of the determination which are the only paragraphs directly concerned with **Maslov** are scantily reasoned. He submits that the evidence demonstrated that his client had no real ties in Zimbabwe. Moreover in this case as in the case of **MJ (Angola)** all of the appellant's offending was committed when he was a juvenile. In all those circumstances, he contends that there is no indication that this First-tier Tribunal applied the test laid down in paragraph 75 of **Maslov**, namely very serious reasons were required to justify the decision to deport. Instead what happened here was that the FTT carried out a general balancing exercise under the rubric of proportionality.

19. The Secretary of State submits that **Maslov** does not really apply to this situation since this appellant is not a settled migrant who has spent all or most of his childhood in the United Kingdom as required by the Grand Chamber's decision. In any event, he says, **Maslov** was concerned with the deportation of an EU resident. The Secretary of State submits that it is relevant that this appellant only became a settled migrant when he was nearly 16. Those factors, he says, takes this case outside the Maslov principle.

20. I cannot accept the Secretary of State's argument when I look again at **MJ (Angola)**. In that case the appellant was born in Angola and was not an EEA national or someone claiming rights in that capacity or through the EEA rights of a parent. Moreover in that case the appellant had not acquired indefinite leave to remain until he was nearly 15. In other words, the circumstances of the appellant in **MJ (Angola)** were very similar to the circumstances of the appellant in the present case. Furthermore, when I look at the whole of the relevant part of the determination, and in our judgment it does not stop at paragraph 39, one has to read through to the end of paragraph 48, I fail to see any application of the very serious reasons test. In paragraph 47 of the determination express reference is made to **Maslov** which indicates that the First-tier Tribunal clearly had in mind the relevance of that case to Article 8 considerations. But what the First-tier Tribunal said was that they were satisfied that the appellant's deportation is a justified and proportionate measure for the Secretary of State to take. What the First-tier Tribunal did not say is that they were satisfied that very serious reasons existed justifying deportation.

21. In our judgment the First-tier Tribunal did not apply the right test. Had that been the only issue in the present appeal, however, it would not have been sufficient to bring the appellant home. We say that for this reason: that if it were the only issue in this appeal we would have been in the position to carry out the balancing exercise for ourselves applying paragraph 75 of **Maslov** and the very serious reasons criterion. And if it were the only issue in the case we would have been able to conclude, indeed would have concluded, that there were very serious reasons justifying deportation in the light of this appellant's extremely serious criminal record. It is to be emphasised that this appellant's criminal record is far more serious than the record of Mr Maslov in the Grand Chamber's decision.

22. Moreover as we have already pointed out, at paragraph 85 of its judgment the Grand Chamber made it clear that very serious violent offences can justify expulsion even if committed by a minor. But the difficulty is the inter-relationship between the **Maslov** ground and the appellant's other main ground which concerns the best interests of the children since it is clear from paragraph 42 of Lord Justice Dyson's judgment that everything must be placed in the metaphorical mix and one needs to consider the circumstances of the appellant in the United Kingdom including relationships with children as well as the circumstances that would obtain if he were removed to Zimbabwe.

23. In other words, the best interests point or the Article 8 and Section 55 considerations point does mesh inextricably with the **Maslov** point and as will be made clear in due course, the appeal does have merit in relation to the best interests point. However before that point is addressed, we need to consider Mr Jagadesham's second point as advanced to us today, namely that dangerousness has not been properly assessed within the context of the Section 72 presumption. On our understanding Mr Jagadesham effectively took three points under this rubric. First, that there was no mention of a forensic psychologist's report which indicated that the prospects for rehabilitation were good for this appellant. Secondly, that proper regard was not had to His Honour Judge Bevan QC's application of the dangerousness provisions then applicable in 2009, and in particular that at the Luton Crown Court in April 2009 an IPP was not imposed. Thirdly, that the Section 72 presumption seems to have applied equally to the Article 8 assessment as it did to the Refugee Convention assessment which is said to be impermissible.

24. In our judgment these points do not carry any particular weight. It is true that there is no mention of the forensic psychologist's report in the First-tier Tribunal's decision but at the end of the day it was not a particularly powerful piece of evidence. It was merely the view of one forensic psychologist, with respect to her.

25. Paragraph 29 of the determination sets out the FTT's overall assessment of the appellant's offending and the likely prognosis, as it were, and in our judgment that was entirely permissible.

26. As for the absence of a finding of dangerousness in relation to what happened at the Luton Crown Court in April 2009, that in our judgment does not carry the appellant's case sufficiently far. The First-tier Tribunal was entitled to conclude that the decision of a circuit judge not to pass an IPP does not discharge the presumption on the appellant. That part of its decision was perfectly correct. Of course what was wrong, if I can put it in those terms, with the decision is that the First-tier Tribunal incorrectly stated that the Crown Court applies a criminal standard of proof, but overall the conclusion on the IPP issue was not flawed.

27. Finally, as for the point that the Section 72(9) finding was impermissibly carried through into the Article 8 finding, it should be recorded that at the beginning of

paragraph 49 of its determination the Tribunal stated that "for the avoidance of doubt we find expressly that the appellant remains a danger to the community". This seems to be a finding which was separate from any application of the presumption and relates back to paragraph 29 of its determination. So at the end of the day we cannot accede to the appellant's submission under that particular heading.

28. This leads really to the third ground, best interests and Article 8, where as has already been intimated there is greater force to be found in the appellant's submissions. Mr Jagadesham first of all drew our attention to the decision of the Supreme Court in **Zoumbas v Secretary of State for the Home Department [2013] UKSC 74** where the court stated that the following principles are applicable were children are concerned:

> "(5) It is important to have a clear idea of a child's circumstances and of what is in the child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations.
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> (6) To that extent there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an Article 8 assessment."

29. Mr Jagadesham's submission is that there has not been a careful examination of all the evidence here. For example, there is no mention of an independent social welfare report which states amongst other things that the appellant and his daughter Saskia have developed a "very genuine and loving relationship" through regular contact and interaction, that "Saskia trusts him and has faith in him and very clearly loves him", and that the appellant's removal will lead to "anger and resentment on Saskia's part". That does not feature in the determination nor does the appellant's mother's evidence which was along similar lines. That evidence could or should have carried weight given that we are told in paragraph 41 of the determination that the appellant's mother is a social worker. It follows that she has experience of these matters although of course could not have been regarded as an entirely independent witness. But what is not mentioned is any of that evidence, and in our judgment that is a significant failing. The exercise conducted under paragraphs 40 to 48 of the determination is otherwise satisfactory but it seems to us that this evidence should have been placed in the melting pot before a final conclusion was reached, and such a conclusion would have had to have taken into account with regard to the paragraph 75 **Maslov** very serious reasons criterion.

30. In our judgment that represents a flaw in the First-tier Tribunal's conclusion which cannot be allowed to stand and which in the circumstances of this case merits a remission to the First-tier Tribunal for consideration of all issues in this case.

31. Mr Jagadesham advanced a subsidiary submission in relation to the fact that the First-tier Tribunal was operating on a false premise in relation to social services

interest in the mother's ability to look after the daughter Saskia. That in itself, in our judgment, would not have founded a proper ground of appeal but given that we are remitting the case for overall reconsideration of all relevant matters that factor will have to be considered too.

32. So we allow the appeal on the grounds we have identified and it follows from that that the matter will be remitted as we have indicated to the First-tier Tribunal for reconsideration on all issues and that is the order we make in this case.

Signed Date

Mr Justice Jay