Upper Tribunal
(Immigration and Asylum Chamber)

MK (deportation – foreign criminal – public interest) Gambia

[2010] UKUT 281 (IAC)

THE IMMIGRATION ACTS

Heard at Field House

On 14 July 2010

Before

LORD JUSTICE SEDLEY

SENIOR IMMIGRATION JUDGE LATTER

SENIOR IMMIGRATION JUDGE WARD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MK

Respondent

Representation :

For the Appellant: Mr P Deller, Home Office Presenting Officer

For the Respondent: Mr M Shamin, Counsel, instructed by Rock, Solicitors

(1) In automatic deportations made under s.32 (5) of the UK Borders Act 2007 the respondent's executive responsibility for the public interest in determining whether deportation is conducive to the public good has been superseded by Parliament's assessment of where the public interest lies in relation to those deemed to be foreign criminals within s.32(1)-(3). In consequence the respondent's view of the public interest has no relevance to an automatic deportation.

(2) In such cases by virtue of s32(4) it is not open to an appellant to argue that his deportation is not conducive to the public good nor is it necessary for the respondent to argue that it is.

(3) The seriousness of an offence and the public interest are factors of considerable importance when carrying out the balancing exercise in article 8. As Parliament has now determined where the public interest lies in cases of automatic deportation, that factor must be taken into account together with the Tribunal's own assessment of the seriousness of the offence. The gravity of criminal offending will normally be clear from the facts and nature of the offence, the views expressed by the sentencing judge and, importantly, the actual sentence.

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing MK's appeal against the decision made on 3 February 2010 to make a deportation order against him as a foreign criminal within s.32(1) of the UK Borders Act 2007. In this determination we will refer to the parties as before the First-tier Tribunal, MK as the appellant and the Secretary of State as the respondent.

Background

2. The appellant is a citizen of the Gambia born on 18 August 1983. He came to the UK in 1986 with his mother to join his father who had been studying here since September 1985. Further periods of leave to remain were granted until April 1991. The family overstayed and then made an out of time application on 10 August 1994. This was refused and on 11 October 1995 the respondent decided to make a deportation order but in the light of the ill-health of the appellant's father, the family were granted indefinite leave to remain on 6 November 1997.

3. The appellant has continued to live in the United Kingdom and in 2004 he formed a relationship with his current partner and a son was born on 12 November 2005. The appellant's father has died but his mother and sister still live in this country.

4. The appellant had a number of criminal convictions before the conviction which gave rise to the decision to make a deportation order. On 6 August 2002 he was convicted at Inner London Crown Court of offences of damaging property, affray and failing to surrender to custody and sentenced to placement in a Young Offender's Institution for a total of twelve months. On 23 July 2004 he was convicted at Tower Bridge Magistrates' Court of possession of cannabis and fined £30 and on 12 September 2008 at Cardiff Magistrates' Court of possessing cannabis and resisting a police officer, being fined for both offences.

5. On 31 March 2009 the appellant was convicted at Kingston Crown Court of two offences of possessing Class A drugs with intent to supply. When passing sentence, Saunders J said:

"[MK], would you like to stand up please? The court as I am sure you are aware take an extremely serious view of people involved in the supply of Class A drugs. It is peddling in misery and those who are caught doing it I am afraid suffer serious penalties. You are a small scale dealer but you are a street dealer and the number of wraps which were found indicated the level on which you are actually dealing.

You are to an extent at the bottom of the pile of dealers, but nevertheless it is still serious. The tariff for people who deal in Class A drugs and who plead not guilty and get convicted after trial are some six years' imprisonment, in your case, because you pleaded guilty at the very first opportunity – and I give you full credit for that – the sentence is therefore one of four years' imprisonment."

6. Following his sentence the appellant was notified of his liability to automatic deportation on 11 June 2009 and given the opportunity of making representations on why he should not be deported. On 3 February 2010 the respondent made a deportation order under the provisions of s.32(5) of the UK Borders Act 2007 (the 2007 Act) in the following terms:

" [MK] is a foreign criminal as defined by Section 32(1) of the UK Borders Act 2007:

The removal of [MK] is, under s.32(4) of that Act, conducive to the public good for the purposes of s. 3(5)(a) of the Immigration Act 1971;

The Secretary of State must make a deportation order in respect of a foreign criminal under s.32(5) of the UK Borders Act 2007 (subject to s.32)

Therefore in pursuance of s.5(1) of the Immigration 1971, once any right of appeal under s.82(1) of the Nationality, Immigration and Asylum Act is exhausted, and the said appeal is dismissed, the Secretary of State, by this order, requires [MK] to leave and prohibits him from entering the United Kingdom so long as this order is in force."

The Findings of the First-tier Tribunal

7. The appellant appealed against this decision on the basis that removal would be in breach of article 8. The Tribunal heard oral evidence from the appellant, his mother and his partner. In his evidence the appellant confirmed that he had been continuously resident in the UK since arriving as a child and had attended primary and secondary school. He then went to Bromley College and Borough College but only for very short periods, dropping out of his courses there. After he completed his time in the Youth Offender's Institution he was not working but signing on. His relationship with his partner began in 2004 and they moved into temporary and then permanent accommodation. He said that he had spent about three months in Cardiff staying with friends in 2008 although his permanent place of residence was with his partner in West London.

8. It was argued on his behalf that he had spent 23 of his 26 years in the UK and could not reasonably be expected to return to the Gambia, a country with which he had no affiliation save that he and his parents had been born there. He had taken various courses in prison and when asked why he considered he would be unlikely to re-offend, the appellant explained that he wanted to have the chance to live with his partner and he had gone through a difficult phase following the loss of his father.

9. In her evidence the appellant's mother confirmed that the appellant now had no relatives in the Gambia. Her own mother had died in January 2009 as had the appellant's uncle on 25 December 2009. She said that in effect she had had to bring up her three children single handedly, one was a lawyer and the youngest training to be a social worker. She expressed regrets about the appellant's conviction. The Tribunal finally heard evidence from the appellant's partner who confirmed that she and the appellant had lived together since 2004 and their son had been born in November 2005. She was finding it difficult to cope with her son on her own whilst the appellant was in prison and she said that she would be unable to live in the Gambia. She had been diagnosed as an epileptic shortly after their son was born and had been on medication since then. She had visited the appellant twice in prison but he had discouraged her from visiting more frequently.

10. The Tribunal found that the appellant had made little of his life in the UK so far. It said that the appellant had drifted after leaving school and did not actively seek employment. It accepted that he had a continuing relationship with his partner and their son but found that there were concerns about the strength of that relationship in the light of the fact that his partner had only visited him in prison on two occasions. It took the view that the appellant and his mother had played down the strength of their remaining connections in the Gambia and that there were extended family members there with whom contact was maintained. So far as the appellant's convictions were concerned, the Tribunal concluded that he had been more active in drug dealing than he had been prepared to admit.

11. The Tribunal went on to comment that one difficulty it faced was the fact that there was no evidence of any risk assessment of the likelihood of the appellant re-offending or of the risk he might present to the public. It was the appellant's case that the presence of his partner and child would be

an inducement for him not to reoffend and that he had now obtained qualifications whilst in prison. The Tribunal found that there was inevitably a likelihood of reoffending but there was no sufficient evidence to determine whether that risk was low, medium or high.

12. It summarised its findings as follows in paras 44-46 of the determination:

“ 44. The length of time the appellant has been in the United Kingdom is an important factor in this case. He has spent his formative years here despite our reservation that he has made little of them. He has a relationship although not a particularly strong one. He has a child here. We have concluded there is a likelihood of reoffending but as to the level or risk of this, we are unable to inform ourselves. It was reasonably open to the Home Office to defer making a deportation order until a probation report had been obtained. The respondent needs to take the consequences of making a decision earlier than he should have.

45. The offence of which the appellant was convicted is a serious one. We are not satisfied that he accepts full responsibility for that offence or satisfactorily acknowledges his role.

46. We find this case a difficult one. With no real enthusiasm we find the scales just tip in the appellant's favour by virtue of the length of time that he has been in the United Kingdom, the absence of any immediate connections in Gambia, particularly in the light of the appellant not having been there since the age of 6, and the presence here of a partner and child. Although the offence of which the appellant was convicted is serious, given the absence of any persuasive evidence otherwise, although there remains a risk of reoffending, it is not enough for us to be satisfied that in all the circumstances of this case removal would be proportionate. It is not reasonable to expect the appellant's partner to accompany him together with their son in the light of the fact that she has never been out of the United Kingdom and all her connections were born and live in this country. The public are entitled to be protected from individuals such as the appellant but returning to the absence of evidence of the risk of reoffending, our conclusion is that the respondent has not made out a case for proportionate removal.”

The Grounds and Submissions

13. Mr Deller's principal submission was that the Tribunal had erred in law by failing when striking the balance under article 8 to take into account the respondent's view of the seriousness of the offence. He submitted that the guidance set out by the Court of Appeal in N (Kenya) v Secretary of State for the Home Department [2004] EWCA Civ 1094 repeated in OH (Serbia) v Secretary of State for the Home Department [2008] EWCA Civ 694 and OP (Jamaica) v Secretary of State for the Home Department [2008] EWCA Civ 440 had not been followed. These cases confirmed that the Secretary of State's deportation policy was a matter to be weighed under article 8(2) as an important element of the public interest in deportation.

14. Mr Deller sought to resile from the concession which had been made by the Presenting Officer before the First-tier Tribunal that an evidential burden lay on the decision-maker to demonstrate a propensity to reoffend before it could be weighed as a relevant factor but he accepted that a propensity to reoffend was not determinative of the appeal but was only one factor.

15. He also argued that the Tribunal appeared not to have made a proper distinction between “deportation” and “removal” cases and this led to a real doubt as to whether the proper factors had been taken into account. In this context he referred to the comments of Richards LJ in JO (Uganda) and JT (Ivory Coast) [2010] EWCA Civ 10 at paras 28 and 29 where he emphasised that there was a

material difference between an appeal involving deportation following a criminal conviction and removal following a breach of immigration control.

16. Mr Shamin submitted that the Tribunal had not made any error of law. When carrying out the assessment of proportionality it had followed the guidance of the ECHR in Uner v Netherlands [2007] INLR 273 and had reached a decision properly open to it on the evidence.

Assessment of whether there is an Error of Law

17. In support of his first argument Mr Deller has relied on the judgments of the Court of Appeal in N (Kenya), OH (Serbia) and OP (Jamaica). These authorities have established that when assessing whether deportation is conducive to the public good proper account should be taken of the respondent's view of the public interest. In N (Kenya), May LJ said in para 64 of his judgment:

"... It is for the Adjudicator in the exercise of his discretion to weigh all relevant factors, but an individual Adjudicator is no better able to judge the critical public interest factor than is the court. In the first instance, that is a matter for the Secretary of State. The Adjudicator should then take proper account of the Secretary of State's public interest view."

18. In OH (Serbia) the law was summarised by Wilson J at para15 of his judgment as follows:

" From the above passages in N (Kenya) I collect the following propositions:

(a) The risk of reoffending is one facet of the public interest but, in the case of very serious crimes, not the most important facet.

(b) Another important facet is the need to deter foreign criminals from committing serious crimes by leading them to understand that, whatever the other circumstances, one consequence of them may well be deportation.

(c) A further important facet is the role of a deportation order as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes.

(d) Primary responsibility for the public interest, whose view of it is likely to be wider and better informed than that of a Tribunal, resides in the respondent and accordingly a Tribunal hearing an appeal against the decision to deport should not only consider for itself all the facets of the public interest but should weigh, as a linked but independent feature, the approach to them adopted by the respondent in the context of the facts of the case. Speaking for myself, I would not however describe the Tribunal's duty in this regard as being higher than 'to weigh' this feature."

19. In paras 29-31 of his judgment, Pill LJ said:

"29. In making a decision under paragraph 364 the Tribunal must have regard to the 'public interest', the expression used in the opening words of the paragraph. In doing so, a factor to be taken into account is the nature of the offence of which the person has been convicted. That is set out in paragraph 364 as a consideration to be taken into account. It is only one of a number of considerations spelt out in the paragraph but N (Kenya) makes clear that it is an important one. The decision makes it clear that the Tribunal must have regard to the public interest and also must 'take proper account of the Secretary of State's public interest view'.

30. I respectfully agree with both these propositions, the second because of the Secretary of State's responsibilities in the administration of criminal justice. Expertise in that field is with the Secretary of

State and with the members of the judiciary hearing criminal cases. The risk of reoffending is not the only relevant factor when assessing the consequence of a serious offence having been committed, as May LJ stated. Broader considerations were involved. The Tribunal is required to take proper account of the Secretary of State's public interest view and the views expressed by the sentencing judge or judges. The appellant, aged 19 when he committed the offence, was sentenced on a guilty plea to an extended sentence by which he was required to serve four years in a young offender institution with a further four years on licence

31. I see dangers in the Tribunal attempting, when applying paragraph 364, to reassess the gravity of criminal offending and what has caused that offending when views have been expressed by the sentencing judge and by the Secretary of State. In this case the Tribunal may have gone too far in that direction in its reassessment of the situation. The emphasis they place in their determination on the offence and its causation may have distracted them from the overall task to be performed ."

20. These judgments were all concerned with cases where deportation orders had been made under the provisions of s.3(5)(a) of the Immigration Act 1971 and under the provisions of paras 362-364. Para 364 sets out the matters to be taken into account when deciding whether a deportation order should be made and includes a presumption that where a person is liable to deportation the public interest requires deportation. Following an amendment to the Rules in July 2006 it is provided that it will only be in exceptional circumstances that that presumption will be outweighed when it would not be contrary to the Human Rights Convention and the Refugee Convention to deport.

21. However, the provisions of s.32-34 of the 2007 Act now provide for the automatic deportation of foreign criminals as defined in s.32(1). A foreign criminal is a person who is not a British citizen, who has been convicted in the UK of an offence and to whom either Condition 1 or 2 applies as defined in s.32(2) and (3). Condition 1 is that the person has been sentenced to a period of imprisonment of at least 12 months. There is no dispute in the present appeal that the appellant is a foreign criminal within the meaning of s.32(1).

22. The consequences are set out in s.32(4) and (5) which provide as follows:

"4. For the purpose of s.3(5)(a) of the Immigration Act 1971 (c.77) the deportation of a foreign criminal is conducive to the public good.

5. The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33)."

23. Parliament has therefore provided that if the relevant conditions in s.32(1)-(3) are met, the respondent has no discretion but must, subject to s.33, make a deportation order and that the deportation of the foreign criminal is conducive to the public good. Thus, as it seems to us, legislative policy has occupied what was formerly the field of executive policy.

24. S.33 then set outs out a number of exceptions to the making of an automatic deportation order. These include as exception 1 in s.33(2)a where the removal of a foreign criminal in pursuance of the deportation order would breach that person's Convention rights. This too now represents legislative policy. None of the other exceptions are relevant to the present appeal. It follows in the light of these statutory provisions that it is not open to the appellant to argue that his deportation is not conducive to the public good; nor is it necessary for the respondent to argue that it is. But the appellant may resist it on the basis that it would nevertheless be in breach of article 8.

25. It follows that the argument advanced on the respondent's behalf that the Tribunal erred in law by failing to take account of the respondent's view of the public interest or of the seriousness of the offence has no relevance to an automatic deportation prescribed by the 2007Act. If the conditions set out in s.32(1)-(3) are met, deportation is conducive to the public good and the respondent must make a deportation order pursuant to s.3(5)(a) of the 1971 Act. Thus the respondent's responsibility for the public interest which was the basis of N (Kenya) and OH (Serbia) has been superseded by Parliament's determination of where the public interest lies in relation to those deemed to be foreign criminals. Correspondingly, as the decision of the Tribunal in the present case illustrates, there is no longer a need in such cases to carry out the always difficult task of according weight but not deference to the respondent's policy judgment.

26. This is recognised by the amendment to the Rules in para 364A that para 364 does not apply where the respondent must make an order under s.32(5). The Tribunal did not therefore err in law by failing to take the respondent's view of the public interest into account albeit that view remains a relevant factor in deportation cases not falling within the provisions of the 2007Act. On the contrary, the Tribunal began by recognising (para 1) that the appellant ranked as a foreign criminal within s.32 of the 2007 Act and that in consequence (para 8) the propriety of the deportation order was not challenged. The sole question was whether removal pursuant to it would breach Article 8.

27. This is not to say that the seriousness of the offence and the public interest are not matters to be taken into account when assessing proportionality within article 8. Far from it, they are matters of considerable importance. The starting point is that Parliament has determined that provided the relevant conditions set out in the 2007 Act are fulfilled, deportation is conducive to the public good. When carrying out the balancing exercise in article 8 it will be for the Tribunal to take that factor into account together with its own assessment of the seriousness of the offence. The gravity of criminal offending will normally be clear from the facts and nature of the offence, the views expressed by the sentencing judge and, importantly, the actual sentence.

28. The second point raised by Mr Deller was to resile from the concession made at the hearing that the burden was on the respondent to prove that the appellant was at risk of reoffending. In the grounds it is argued that although the Presenting Officer conceded that the burden of showing a propensity to re-offend fell upon the respondent, the panel materially erred in law in accepting this concession. Important though the burden and standard of proof can be in their proper context, the concession made in this case had no material bearing on the Tribunal's findings. In para 41 the Tribunal made the point that there was no evidence before it of any risk assessment being undertaken on the likelihood of the appellant reoffending and the risk he presented to the public. In these circumstances the Tribunal had to do the best it could when assessing those issues on the evidence available. The appellant had a number of convictions before his conviction for the offence leading to the automatic deportation order. The Tribunal's conclusion that there was inevitably a likelihood of reoffending was properly open to it on the evidence even though it did not have enough evidence to determine whether the risk was low, medium or high (para 42). Indeed the respondent was fortunate that the Tribunal was prepared to form the view it did in the absence of any professional risk assessment.

29. The third point taken by Mr Deller was that when the Tribunal referred to "removal" in para 46 it gave rise to a concern about whether the correct test had been applied in assessing proportionality in a deportation case. There is nothing in the determination to indicate or any reason to believe that the Tribunal made any such error. In any event, there was nothing wrong in referring to "removal" in this context as those liable to deportation are in fact removed: see schedule 3 of the Immigration Act 1971

and s.33 of the 2007 Act which, when setting out the exceptions to automatic deportation, refers to “the removal” of a foreign criminal in pursuance of the deportation order. There is therefore no substance in this argument.

30. The respondent was obliged to make a deportation order against the appellant by virtue of the provisions of s.32(2) and by s.32(4) his deportation was deemed to be conducive to the public good. This was the starting point for the Tribunal. It then had to assess whether his removal would lead to a breach of article 8. We are satisfied that when assessing this issue the Tribunal took all relevant matters into account and was entitled to find that the scales tipped in the appellant's favour, particularly in the light of the fact that he had been in the UK for practically his entire life, the absence of any continuing connections with the Gambia, and more particularly the presence in this country of his partner and young child who could not reasonably be expected to return to the Gambia with him.

Decision

31. The Tribunal did not err in law. Accordingly the respondent’s appeal is dismissed and the decision of the original tribunal stands.

Signed

Senior Immigration Judge Latter

(Judge of the Upper Tribunal)