Upper Tribunal
(Immigration and Asylum Chamber)

BK (Deportation – s 33 "exception" UKBA 2007 – public interest) Ghana [2010] UKUT 328 (IAC)

THE IMMIGRATION ACTS

Heard at Field House, London **Determination Promulgated**

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

BK

Respondent

Representation :

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

For the Respondent: Ms Jegarajah, of Counsel instructed by Thompson & Co., Solicitors

1. Where an appellant is subject to a decision to make a deportation order following a criminal conviction, is not subject to automatic deportation under s.32 of the UK Borders Act 2007 ("UKBA 2007") because he comes within one of the "exceptions" set out in s.33, relevant case law decided in respect of pre-UKBA 2007 deportations remains applicable.

2. In such a case, in line with the Court of Appeal guidance in N (Kenya) [2004] EWCA Civ 104, the immigration judge must attach weight to the Secretary of State's view of the public interest in arriving at his conclusion.

DETERMINATION AND REASONS

1. The Respondent, a citizen of Ghana, born 8 February 1991, entered the United Kingdom as a visitor, aged 10, in December 2001. His leave expired in June 2002 but he remained unlawfully. In June 2008 he was sentenced to a total of four years' detention in a Young Offenders Institution. The offences of which he had been convicted were violent disorder, possession of cocaine, possession of heroin, possession of a firearm and ammunition, and possession of a firearm with intent to endanger life. He

appealed against his convictions but that was dismissed in November 2008. On 11 February 2009 the Appellant wrote to the governor of the prison in which he was held advising that he was considering making a deportation order. In May 2009 representations were made to the Appellant on behalf of the Respondent. Having considered those representations the Appellant decided to make a deportation order and rejected the Respondent's application for indefinite leave to remain, an application which was pending at that time. The Respondent appealed against that decision and, by a determination dated 7 January 2010, a panel of the former Asylum and Immigration Tribunal consisting of Immigration Judge Bennett and Mr Bremmer (non-legal member) allowed his appeal. The Appellant sought and was granted a reconsideration order. The application came before a senior immigration judge on 22 February 2010 and, following the demise of the Asylum and Immigration Tribunal, the application was considered as an application for leave to appeal to the Upper Tribunal (Immigration and Asylum Chamber). Permission to appeal was granted and thus the matter came before us.

Submissions

2. Both representatives made submissions, a full record of which appears in the Record of Proceedings. A detailed skeleton argument was provided on behalf of the Secretary of State. In summary it was submitted that the panel had failed to give adequate reasons for findings on material matters. It was said that the panel allowed the appeal on Article 8 grounds but did not have due regard to the Secretary of State's position. It was further submitted that the panel did not have sufficient regard to the gravity of the Respondent’s offences. They were of an extremely serious nature involving firearms and two different types of Class A drugs. The panel, it was submitted, failed to give proper consideration to the Secretary of State's view of the serious nature of those crimes. Reference was made to the words of Lord Justice Wall in the case of OP (Jamaica) [2008] EWCA Civ 440. Mr Deller also referred us to the case of N (Kenya) [2004] EWCA Civ 104 where it was said that where an appellant is not a British citizen, the public policy aspect involves the need to deter and express society's revulsion at the seriousness of the criminality and that this can tip the balance against the appellant.

3. It was further submitted that the panel had not grappled with the full circumstances of the Respondent, Mr Kofi, and reference was made to the principles set out in the case of Ü ner v The Netherlands [2006] ECHR 873. Mr Deller also referred to the case of Chair v Germany [2007] ECHR 1053 where the Court placed weight on the fact that the appellant was not a second-generation immigrant, and investigated the level of ties that that applicant had back in Morocco. In this current case, the Tribunal failed to look at the fact that the Respondent had spent the majority of his life in his own country and had failed to consider his ties to that country. Mr Deller further submitted that there had been no findings on whether it would be unreasonable for the Respondent's sister to relocate to Ghana. It was also said that the panel had made a material error of fact regarding the promise of a trial for the Respondent at West Bromwich Albion Football Club; however this was not a point which Mr Deller pursued with any vigour during the hearing.

4. Directing our attention to certain parts of the determination of the panel, Mr Deller argued that there was little engagement by them with the Secretary of State's side of the balancing exercise. The few references were to be found in paragraph 41 where there was a somewhat oblique reference to the judge’s sentencing remarks, but no real consideration of the gravity of the offences.

5. On behalf of the Respondent, Ms Jegarajah provided grounds for resisting the appeal and detailed submissions therein. In summary she submitted that the Respondent, who was aged 18 at the date of the appeal hearing, had entered the United Kingdom when he was 10, and had, in effect, been

abandoned by his parents. He had suffered violence at the hands of his father and been the victim of bullying at college. The offences were committed when the Respondent was only 16. Throughout his residence in the United Kingdom his family had been only his sister, who had been living in the United Kingdom since 1999 and who had been granted indefinite leave to remain in November 2008. The panel had carefully considered the statements presented by the Respondent, his sister, and two family friends. They had also considered the sentencing remarks of the Crown Court judge. The panel had made extensive reference to the judge's remarks at paragraphs 4, 5 and 6, and the rehabilitation of the Respondent in light of what the sentencing judge had referred to as "the unbelievably dreadful, wicked behaviour" which he had engaged in. The panel had carefully directed themselves to the balancing exercise which they had to perform, and there was no allegation from the Appellant that this direction was unlawful.

6. Structurally the determination examined the nature of the offence, the approach of the sentencing court and the sentence itself and the panel had identified the elements of the Appellant's case in favour of deportation. The panel then went on to consider the Respondent's case. It was clear, she submitted, from the determination that the panel had allowed the appeal because the Respondent had been resident in the United Kingdom since he was 10, had no contact with anyone in Ghana, his only family, his sister, had been resident and was still resident in the United Kingdom, and that, despite the serious nature of the offence, the ultimate conclusion of the sentencing judge was that there was another and better side to the Respondent and he should be given the opportunity to make something of his life. The panel had clearly agreed with the sentencing judge and concluded that the Respondent's removal would run counter to that judgement.

7. Ms Jegarajah referred us to the case of JO (Uganda) and JT (Ivory Coast) [2010] EWCA Civ 10 and submitted that the approach of the panel in this current appeal was entirely consistent with the judgement of Lord Justice Richards in that case. For a settled migrant who had lawfully spent all or substantial part of his or her childhood and youth in the host country, very serious reasons needed to be shown to justify expulsion. She further submitted that the panel did pay appropriate regard to the Court of Appeal's words in N (Kenya) . It could not be said, she submitted, that the panel failed to have regard to the public interest, and that, in effect the challenge to the determination was one simply of disagreement with the findings.

8. At the end of the submissions the Tribunal retired to consider its decision and, upon return, announced its decision to dismiss the appeal as no material error of law had been shown. It was announced that reasons would follow in writing, which reasons we now give.

No material error of law

9. This case concerns an appeal against a deportation order made under section 5(1) of the Immigration Act 1971. Notwithstanding the coming into effect of section 32 of the UK Borders Act 2007 ("UKBA 2007"), which provides for the "automatic deportation" of a "foreign criminal" (defined in subsection 1 thereof as a person who is not a British citizen, who is convicted of an offence in the United Kingdom and is sentenced to a period of imprisonment of at least 12 months), the Respondent did not come within that section as he fell within one of the exceptions set out in section 33 of the Act, which disapplied it. Exception 2, set out in section 33(3), applies where "the Secretary of State thinks that the foreign criminal was under the age of 18 on the date of conviction." In this case the Respondent was aged 16 at the time of the offences.

10. Our attention has been drawn to the relevant passages of N (Kenya) , in connection with the submission that the panel did not engage with key issues raised by the Secretary of State and did not give sufficient weight to the matters weighing in favour of deportation. May LJ stated in that case:

“64. In a deportation appeal under section 63(1) of the 1999 Act, the adjudicator has an original statutory discretion as provided in paragraph 21(1) of Schedule 4 of the 1999 Act. The discretion is to balance the public interest against the compassionate circumstances of the case taking account of all relevant factors including those specifically referred to in paragraph 364 of HC 395. Essentially the same balance is expressed as that between the appellant's right to respect for his private and family life on the one hand and the prevention of disorder or crime on the other. Where a person who is not a British citizen commits a number of very serious crimes, the public interest side of the balance will include importantly, although not exclusively, the public policy need to deter and to express society's revulsion at the seriousness of the criminality. 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.”

11. Judge LJ, as he then was, elaborated further in his judgment on the public interest aspect in the balancing exercise:

“83. "public good" and the "public interest" are wide-ranging but undefined concepts. In my judgment (whether expressly referred to in any decision letter or not) broad issues of social cohesion and public confidence in the administration of the system by which control is exercised over non-British citizens who enter and remain in the United Kingdom are engaged. They include an element of deterrence, to non-British citizens who are already here, even if they are genuine refugees and to those minded to come, so as to ensure that they clearly understand that, whatever the circumstances, one of the consequences of serious crime may well be deportation. The Secretary of State has a primary responsibility for this system. His decisions have a public importance beyond the personal impact on the individual or individuals who would be directly affected by them. The adjudicator must form his own independent judgment. Provided he is satisfied that he would exercise the discretion "differently" to the Secretary of State, he must say so. Nevertheless, in every case, he should at least address the Secretary of State's prime responsibility for the public interest and the public good, and the impact that these matters will properly have had on the exercise of his discretion. The adjudicator cannot decide that the discretion of the Secretary of State "should have been exercised differently" without understanding and giving weight to matters which the Secretary of State was entitled or required to take into account when considering the public good.”

13.
In the case of OH (Serbia) [2008] EWCA Civ 694, Wilson LJ also reflected on this point, drawing on what was said in N (Kenya) as follows:

“15. ..(c)..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 a 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.”

14. We do not believe that the panel in this current appeal failed to heed such guidance. The panel, stated at paragraph 41(c):

“ In view of the length of time to which Mr Kofi has been resident in the United Kingdom and the fact that he arrived when he was only two months short of his 11th birthday, although he is a foreign criminal within section 32 of the 2007 Act we do not consider that any reasonable person, viewing the facts of his case objectively, when considering the needs identified in N (Kenya) to deter foreign criminals from committing serious crimes and to build confidence that foreign nationals who have committed serious crimes are dealt with with appropriate severity, would realistically consider Mr Kofi to be a foreign criminal (in broad terms, using those words in their everyday usage, as opposed to the statutory definition). For all practical purposes, we conclude Mr Kofi is more properly categorised, and would be seen by all reasonable minded persons considering those needs, as a homegrown criminal. We therefore conclude that the considerations identified in N (Kenya) and 0H (Serbia) are of only the slightest weight (if they have any weight at all) in the particular circumstances of Mr Kay's case.”

15. Mr Deller’s submission on this particular passage from the determination was that it evidenced the error on the part of the panel in not according any or any sufficient weight to the Secretary of State's side of the balance. We do not accept this submission. While the Tribunal may have expressed itself forcefully, what it was saying was legitimate: that it was in this country that Mr Kofi had done most of his growing up and had acquired his criminal habits, so that, in that respect, he was unlike an adult foreigner who comes here and commits serious crimes. The panel clearly took the view that there was little was to be gained in terms of deterrence or an expression of society's revulsion, or in terms of building public confidence that appropriate treatment would be accorded to foreign citizens who have commit serious crimes. We do not consider that it was a view which was not reasonably available to them.

16. Contrary to Mr Deller’s submission, we take the view that the reference to giving only “slight weight or no weight at all” to the considerations identified in N (Kenya) and OH (Serbia) does not mean that the panel misdirected itself or did not give sufficient regard to what we might call the “public interest factors” weighing in favour of deportation. On the contrary, a reading of the determination as a whole reveals that the panel set out in some considerable detail the sentencing remarks of Judge Worsley and the disapproval expressed therein. In doing so they described the circumstances in which the offences had been committed, and details of the offences themselves (paragraphs 4 and 5 of the determination). They particularly noted the judge’s remarks that the Respondent was involved in a “voluntary commercial business” for the sale of the drugs, and that the Respondent showed no remorse for the gun which he had with him. The panel quoted the judge’s comments that Mr Kofi had been engaged in “unbelievably dreadful, wicked behaviour “. In the light of these matters set out in the determination, we have no doubt that the panel was well aware of the severity and seriousness of the offences, and we have no reason to believe that they did not take these factors into consideration.

17. It may be that another judge and another panel would have decided to attach a greater weight to those factors in the particular circumstances of this case, but we cannot say that in attaching little or no weight to these factors in this case the panel acted perversely or irrationally. They were entitled to attach such weight as they saw fit to those factors.

18. The principal criticism of the Secretary of State, however, was that the panel acted in disregard of the clear jurisprudence. We do not accept that submission. Clearly the panel did have regard to the relevant jurisprudence and made express reference to N (Kenya) and OH (Serbia) **.** Mr Deller submitted that the panel did not pay due regard to the Secretary of State's view and failed to engage with the key issues raised by her. In this regard, we note that, in at paragraph 32 of the

determination, the panel set out passages from the judgement of Wilson LJ in the case of OH (Serbia) , which we have noted above.

19. In order to ascertain what the Secretary of State's views were in this particular case we have had regard to the decision letter dated 11 August 2009, and, as far as we can see those views are set out in paragraph 8 thereof where it is stated:

"The Secretary of State regards as particularly serious those offences involving violence, and drugs. Also taken into account is the sentencing court's view of the seriousness of the offence as reflected in the sentence imposed, the result of any appeal upon that sentence as well as the effect of that type of crime on the wider community. The type of offence in its seriousness, together with the need to protect the public from serious crime and its effects are important factors when considering whether deportation is in the public interest."

The refusal letter then goes on, in paragraph 9, to set out extracts from the judge's sentencing remarks. We can find nothing else in that letter to describe the key issues regarded by the Appellant as requiring particular weight in favour of deportation.

20. We now turn to consider whether the panel had regard to those views. As we have set out above, the panel was clearly cognisant of the seriousness of the offences involved. The panel also noted that the Respondent's appeal had been unsuccessful (see paragraph 7 of the determination). As regards the effect of this type of crime on wider community, it is difficult to see what the panel could have done with that statement. The Secretary of State did not apparently provide any evidence to show the result of this type of crime on the wider community. The Respondent had engaged in a crime of violence and in the supply of Class A drugs. The impact of drugs and violence on the community is well known both to the Appellant and to the Tribunal and there is no reason to think that the Tribunal underestimated it here.

21. As regards the "need to protect the public from serious crime", this raises the issue of risk of re-offending. The panel noted in their determination that the Respondent had been convicted of minor matters, two motoring offences in January 2007 and an assault in 2003 when he was 12 years old. They had the various pieces of evidence from the Young Offender institution in which Mr Kofi had been detained, and from his personal officer at HM Prison Rochester. They were satisfied that his conduct while in custody had been more than "simply good". They also noted that the sentencing judge had been satisfied that there was another side to the Respondent other than that shown by the offences, and that he was a young man "with good in him". The panel indicated that they agreed with this assessment.

22. There does not appear to have been any evidence of professional assessment of future risk of re-offending, and therefore the panel had to do the best they could with the evidence that they had. There was no expert evidence to show that the Respondent posed any risk in the community, just as there was no expert evidence to show that he did not. In the circumstances we cannot see how the panel could have done any more than they did when there simply was no real evidence in this regard.

23. We have concluded, therefore, that, to the limited extent that the Secretary of State made known his views in the context of this case, it has not been shown that the panel failed to take them into consideration.

24. We note, as an aside, that N (Kenya) was decided at a time when there was no legislative guideline or policy in place to determine which offenders ought to be deported, subject always to human rights

considerations, and which need not be **.** Hence the weight required by the Court of Appeal to be given to the Home Secretary's view of the public interest in arriving at the adjudicator's or immigration judge's own conclusion. It is possible that this always difficult exercise – that is to say, giving weight but not primacy to the opinion of another authority in arriving at an independent judgment – has been superseded by the enactment of section 32 of the UKBA 2007. This section draws a bright line, calling for no further judgment, where its terms are met: a "foreign criminal" faces "automatic deportation". Other foreign offenders do not – they may be deported, but there is no legislative presumption that they will be. Both classes may resist deportation on human rights grounds; but in the case of a "foreign criminal" the Act places in the proportionality scales a markedly greater weight than in other cases. In this situation it is not easy to see what separate or additional weight is to be given to the Home Secretary's own judgment beyond the fact that it is known to be in favour of deportation. Arguably the executive's view of policy and its immediate requirements has been superseded by the legislature's. However, we do not need to decide this point in this appeal because, although touched upon, it was not directly relevant because Mr Kofi comes within one of the exceptions in section 33 of the UKBA 2007.

25. It was also submitted that there were no findings on whether it was reasonable or unreasonable for the Respondent's sister to relocate to Ghana. It was submitted that the panel had a duty to set out why, on the basis of the evidence provided, the entire family unit could not live in Ghana. The Appellant has argued that it may be thought that it would be unreasonable for the Respondent's sister to relocate to Ghana after her long residence in the UK, but that this was a matter which should at least have been considered by the panel, and was not.

26. We agree that there is no expression in the determination of the consideration of this point by the panel. However the panel noted at paragraph 39 (g) that the Respondent had lived in the United Kingdom since December 2001 and had no real connection with Ghana or with his parents there. They noted that the only member of his family with whom he had any real contact was his sister in the UK and that to remove him to Ghana would involve him being separated from her and sending him to a country where he had no friends or relatives who were willing or able to assist him. They further noted in paragraph 41 that his sister had been living in the United Kingdom for 10 years and had indefinite leave to remain here. Mr Deller did not direct our attention to any evidence which might be said to show that it was reasonable to expect the Respondent's sister to relocate to Ghana. Having had regard to the situation of the Respondent's sister in the United Kingdom we have little doubt that there is no real case to argue that it was reasonable to expect this young lady to sever her connections with the United Kingdom and return to a country which she had left in 2001 when she was 14 years old, and where she had no family with whom she was in contact and to whom she could look to for help and support. We therefore do not regard this as an error which materially affected the outcome of the appeal.

Decision

27. For all the above reasons, we conclude that no material error of law has been shown and the decision of the panel is therefore to stand.

Signed

Senior Immigration Judge Ward Judge of the Upper Tribunal