Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00503/2012

THE IMMIGRATION ACTS

Heard at Field House
On 17 December 2012 and 23 May 2013

Determination Promulgated
On 5 June 2013

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

DERRICK KINSASI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Byass, Counsel instructed by Lawrence Lupin Solicitors
For the Respondent: (Hearing on 17/12/12) Mr I Jarvis, Home Office Presenting Officer
(Hearing on 23/05/13) Ms M Tanner, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the appellant, a citizen of the Democratic Republic of Congo (DRC) born on 15 November 1991 against the determination of the First-tier Tribunal

© CROWN COPYRIGHT 2013

dismissing his appeal against the decision of the respondent dated 20 July 2012, to make a deportation order by virtue of Section 32(5) of the UK Borders Act 2007.

Background

2. There was no record of the appellant's lawful entry into the United Kingdom. He claimed that he and his brother entered the United Kingdom with an agent on 9 April 2002. On 10 April 2002 they attended the Asylum Screening Unit and claimed asylum as unaccompanied minors. On 12 July 2002, asylum was refused but the appellant and his brother were granted exceptional leave to remain until 10 October 2006.

3. On 31 January 2005, the appellant was included on his mother's application for indefinite leave to remain (ILR) under the family exercise. On 29 January 2005, the appellant, his siblings and mother were granted ILR in the United Kingdom.

4. On 24 October 2011 at Wood Green Crown Court, the appellant was convicted of burglary and theft and sentenced to eighteen months' imprisonment at a Young Offenders Institution. He did not appeal the conviction or sentence.

5. The appellant's representations were assessed in line with the "Statement of Changes in the Immigration Rules" that came into force on 9 July 2012.

6. In sentencing the appellant, His Honour Judge S Lyons noted that the appellant had pleaded guilty to a count of burglary which took place in the course of the second day of widespread disturbances in London. He noted that the appellant, with a number of others, "were engaged in the violent entry to the back of a store containing high value portable desirable items. There was one group breaking in the front of Comet Store while you and others were at the back. All of this you admitted".

7. The judge continued inter alia:

> "You were arrested and pleaded guilty after having admitted to the police your part in this particular matter.
>
> I am going to treat you as being of previous good character and you are nineteen years old.
>
> For three days the citizens of London found it difficult to believe they were actually in London or in England as widespread disorder, burglary, looting and robbery took place…
>
> Had you gone to trial on this matter sentences is in the region of two and a half to three and a half years would have been contemplated. Taking into account your age and your previous good character, the sentence at the very bottom end of that range of two and a half years would have been appropriate. I then take into account your very early plea of guilty. One third off will take you down to twenty months and because you

admitted your guilt to the police and saved everyone an enormous amount of time, I am reducing your sentence again to one of eighteen months' detention in a Youth Offender Institute".

8. By letter dated 18 November 2011 the appellant was informed, that in the light of his conviction, he was liable to deportation under the Immigration Act 1971 and might be subject to automatic deportation in accordance with Section 32(5) of the UK Borders Act 2007 unless he fell within one of the exceptions set out in Section 33. This would include the contention that the appellant's removal in pursuance of a deportation would breach his Convention rights under the European Convention on Human Rights (ECHR).

9. In the event, the appellant asserted that to deport him from the United Kingdom would indeed be a breach of his rights under Article 8 of the ECHR.

10. In the respondent's subsequent Notice of Decision it was pointed out that paragraph 398 of the Immigration Rules stated as follows:

"398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention and

(a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good because they had been convicted of an offence for which they had been sentenced to a period of imprisonment of less than 4 years but at least 12 month; or

(c) the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending caused serious harm or they are a persistent offender who shows a particular disregard for the law."

11. The Secretary of State considered that in the appellant's particular circumstances, paragraph 398(b) applied in his case because he was sentenced to eighteen months' imprisonment. It was in that context that the appellant's Article 8 rights were considered.

12. It was the view of the Secretary of State that although the appellant had family ties in the United Kingdom with his mother and siblings and wider family members, the relationship between an adult applicant and their mother, siblings and wider family, did not constitute family life for the purposes of Article 8, without evidence of further elements of dependency beyond normal emotional ties. The appellant had not provided any such evidence to demonstrate that he was dependent on them or vice-versa.

13. It was noted that the appellant did not have a partner or any children in the United Kingdom. It was therefore concluded that the appellant had not established family life in the United Kingdom and that paragraph 399 of the Immigration Rules did not apply to his case.

14. The Secretary of State was mindful that the provisions of 399A of the Immigration Rules applied by way of the provisions of paragraph 398(b) that were applicable. It was concluded that the provisions of paragraph 399A of the Immigration Rules did not apply to the appellant's case because it was not accepted that he had lived continuously in the UK for at least twenty years/half of his life immediately preceding the date of the immigration decision (discounting any period in prison) because he had been resident in the UK for approximately ten years. Although the appellant was 21 years of age, the time he had spent in prison detracted from his length of ordinary residence in the United Kingdom and further, it was not accepted that he had no ties to his country of origin, the DRC, to which it was intended to deport him, because he spoke the language of that country and was aware of the cultures and traditions due to spending his formative years in the DRC.

15. Having considered the factors in the appellant's case, the Secretary of State did not accept that the appellant's right to private life outweighed the public interest in seeing him deported and therefore his deportation would not amount to a breach of his rights under Article 8 of the ECHR.

16. Whilst account was taken that the evidence that showed that the appellant had attended secondary school and college in the UK, it was considered that whilst he may have built relationships with friends during that time, adult friends often maintained their relationships at great distance both within and between countries, using modern channels of communication, and there was no evidence to suggest the appellant would be unable to maintain contact with any friends in the UK were he to be deported.

"Exceptional Circumstances"

17. The Secretary of State proceeded to consider whether there were exceptional factors about the appellant's case that would still cause his deportation to be a breach of Article 8. The Secretary of State concluded on the evidence available that there was nothing exceptional about the appellant's case.

18. Although he had been resident in the UK since 2002, no evidence had been provided of his being engaged in employment or owning any property in the UK. Neither was there any evidence of any financial standing. It was considered that the skills and academic qualifications that the appellant had acquired could be utilised in the DRC if he were to be deported there. It was not considered unreasonable to expect the appellant to be able to readjust to life in the DRC.

19. Account was taken of the appellant's representations of May 2012 when he claimed that he was financially dependent on his mother, but it was considered that financial support could continue in the DRC where monies could be sent through money transfers or other banking facilities.

20. The appellant's claim to have no family left in the DRC and nothing to go back to, was considered, but the Secretary of State repeated that the appellant having spent his formative years in the DRC, meant that he would have no difficulty speaking the language or be estranged from the culture of his country of origin. Further, the appellant had failed to provide any evidence to substantiate his claim of having no relatives left in DRC. As the appellant was a healthy adult who had acquired skills in the UK, it was considered not unreasonable to expect, that he should be able to re-establish and support himself upon his return to the DRC.

21. It was further considered that it would be open to the appellant's mother and siblings to visit him in the DRC, should they wish to do so or otherwise continue their relationships with the appellant by using modern means of communication.

22. These factors were not considered to be exceptional because the appellant had not met the criteria in terms of the family/private life test and his criminal activity.

23. It was therefore believed that the appellant's deportation would not be in breach of Article 8 of the ECHR and the Human Rights Act 1998.

24. It was pointed out to the appellant that his deportation would be pursued under paragraph 398(b) of the Immigration Rules, as he was a foreign national offender who was sentenced to eighteen months' imprisonment, because his case did not fall into any exception of the Immigration Rules and because his case met the criteria for deportation under the UK Borders Act 2007.

<u>The Finding of the First-tier Tribunal</u>

25. The Tribunal did not find either the appellant or his mother to be credible witnesses. They proceeded to set out a series of discrepancies identified within the witnesss' respective evidence.

26. The Tribunal noted that the appellant left the DRC when he was 10 years old. His mother did not speak very much English. He had lived with her until he was imprisoned. Although the appellant now spoke English fluently, the Tribunal did not accept his evidence that he spoke only 25% Lingala. It was his first language that he still used at home with his mother.

27. The Tribunal therefore found that the appellant was minimising his abilities in Lingala and that if he was deported to the DRC he would have little difficulty communicating.

28. The Tribunal also noted that the appellant's claim to have no real recollection of the DRC, was lacking in credibility bearing in mind he was 10 years old when he left that country. It was considered that the appellant's evidence in this regard "was a further attempt by the appellant to minimise his knowledge of the DRC and his links to that country".

29. The Tribunal found as a fact that the appellant did have some extended family in the DRC.

30. The Tribunal took account of the judge's sentencing remarks.

31. The Tribunal pointed out, that whilst they had taken into account what they had been told about the appellant's younger brother's offending and the outcome of his deportation appeal, they intended to deal with this appellant's appeal on its own particular merit. In that regard the Tribunal were of the view that the fact that the appellant's brother's appeal was successful, did not mean that the appellant's appeal would necessarily succeed. There was, said the Tribunal, "an important distinction between the two appeals in that this appellant is some 2 years older than his brother".

32. In terms of Article 8, the Tribunal reminded themselves of the five stage step-by-step process identified by Lord Bingham in Razgar.

33. The Tribunal considered the evidence about the appellant's relationship with his mother and siblings and in so doing took into account the fact that the appellant was now 20 years old. It was appreciated that since the appellant's arrival in the UK, he had always lived with his mother, save at the time since his imprisonment.

34. By reference to relevant case law, the panel accepted that family life did not cease when a child attained the age of 18 and that the appellant had family with his mother and with his siblings, "although that family life has been disrupted by the detention of both the appellant and his younger brother. As a result of his sentence he has been separated from his two younger siblings since October 2011".

35. The panel appreciated that the deportation of the appellant would have consequences of sufficient severity as to engage Article 8.

36. The panel found that the decision to deport the appellant was lawful and in pursuit of a legitimate aim, namely the protection of the public from those who had committed serious criminal offences.

37. The panel proceeded to consider the proportionality of the decision to deport the Appellant and in so doing made reference to relevant case law guidance.

38. At paragraphs 45 and 46 of the determination it was stated that:

> "45. The question for us is whether the interference with the family life of the Appellant is outweighed by the public interest.
>
> 46. We take into account that we must consider the impact of an adverse decision upon other members of the family in the United Kingdom. We also consider the interest of the Appellant's siblings."

39. It was noted that the Appellant's Counsel Mr Byass (who also appeared before me) did not make any submissions on the interests of the children of the family, evidence was adduced on the closeness of the Appellant's relationship with his younger siblings and of their feelings about him and the possible separation. It was recognised that the interest of the children were a primary consideration. However their primary carer was their mother. It was considered that the deportation of the Appellant would not affect his mother's care or be contrary to the interests of the two younger children, save to the limited extent they would miss someone who had been part of the family. Account was taken of the considerable age gap between the Appellant and the younger children and the likelihood that the Appellant would have left the family home at some time, either to go to university or to establish himself as an independent adult. Account was also taken of the fact that the Appellant was already separated from the younger children as a result of his sentence and subsequent immigration detention.

40. The panel pointed out that having regard to all those factors, they did not find that the deportation of the Appellant would be contrary to the interests of his younger siblings.

41. Insofar as the Appellant's younger brother was concerned, he was now over 18. Submissions addressed to the panel on the importance of this relationship to the Appellant were borne in mind. Account was taken of the fact, that the brothers were both adults who had been separated by their offending and consequent custodial sentences. It was noted that if the Appellant's younger brother reoffended and was sentenced to twelve months or more there was a risk that he would also face deportation.

42. At paragraph 15 of their determination, the panel pointed out, that they had considered the case law to which Mr Byass had referred them, but noted that all those cases were decided before the recent changes to the Immigration Rules.

43. At paragraph 51 of their determination, the panel pointed out that they based their assessment of proportionality on the fact that the Appellant was a citizen of the DRC aged 20 who had lived in the United Kingdom since he was 10. They had rejected his claim that he had little memory of the DRC. They were satisfied that the Appellant spoke Lingala sufficiently well to be able to communicate with his mother and found on a balance of probability that he had extended family in the DRC.

44. The panel proceeded to consider Mr Byass' written submissions on the Maslov criteria.

45. In that regard, the panel observed that the Appellant's offence was serious as reflected in the Judge's sentencing remarks. The panel were mindful of the length of the Appellant's stay in the United Kingdom but did not accept that as submitted, the Appellant had been in a loving and supportive relationship with his family having regard to his offence and resulting imprisonment and separation from them.

46. The panel took account of the Appellant's early plea of guilty and his expressions of regret and statement about his determination to avoid offending in the future. They also took account of the letter written by the Appellant to the Respondent in that regard. Whilst the panel accepted that the Appellant's existing ties to the UK were stronger than his existing ties to the DRC, they found that he did have links with that country through his family and his language.

47. Insofar as the public interest was concerned, the panel noted that there was a presumption that where a person was liable to be deported, he would be deported. They continued at paragraph 53:

> "53. The public is entitled to expect that an offender will not be permitted to remain in the United Kingdom having committed an offence of this gravity unless paragraph 399 or 399A apply or there are exceptional circumstances. Neither paragraph applies in this case. As was said in Masih [2012] UKUT 00046, the public interest in the removal of foreign criminals concerns the prevention of future offending and the deterring of others from committing serious offences."

48. The panel considered that the reasoning in Masih was "to some extent, reflected in the Rules which had been issued since that decision." It was noted that paragraph 399A made provision for a case in which an offender aged less than 25 had spent at least half his living continuously in the United Kingdom and had no ties to his country of origin. It was noted that in Masih the offender was 24 and had spent fourteen of those years in the UK. Further that the Tribunal in Masih stated that in such a case very serious reasons were required to justify expulsion.

49. The panel continued by concluding at paragraph 54 as follows:

> "54. Whilst we accept that the deportation of someone age 20 who had lived in the United Kingdom for almost half his life is a serious step, we must take into account the new Rules, and we are unable to describe the circumstances which weigh in favour of the Appellant as amounting to exceptional circumstances. In any event, serious reasons for taking such a step exist by reference to the gravity of the offence. We find therefore that the interference with the Appellant's family life is outweighed by the public interest."

50. The panel proceeded to dismiss the appeal.

The Proceedings

51. The Appellant successfully sought permission to appeal that decision and in granting permission to appeal, First-tier Tribunal Judge Pooler noted that the grounds in support of that application submitted that the First-tier Tribunal erred in law in its assessment under Article 8 by directing itself that it would be disproportionate to deport the Appellant only if there were exceptional circumstances; and in applying paragraphs 399 and 399A of the Immigration Rules.

52. Judge Pooler considered it arguable that the Tribunal misdirected itself in law in relation to Article 8 by requiring there to be exceptional circumstances in the Appellant's favour and in that regard what the First-tier Tribunal had to say at paragraph 54 (see above) was noted.

53. Judge Pooler further observed that the grounds argued that paragraphs 399 and 399A were contrary to Article 8. He continued:

> "It would however be appropriate for the Tribunal to consider the Immigration Rules as an indication of where the Respondent considers the public interest to lie. Nevertheless, since permission is to be granted all grounds may be argued".

54. Directions were subsequently issued that the parties should appear for hearing on the basis that it would be confined to whether the determination of the First-tier Tribunal should be set aside for legal error and, if so, whether the decision in the appeal could be remade without having to hear oral evidence.

55. Thus the appeal came before me on 17th December 2012 when my first task was to determine whether the determination of the First-tier Tribunal disclosed an error on a point of law that might otherwise have materially affected the outcome of the appeal.

56. Immediately prior to that hearing, the Tribunal received from the Appellant's solicitors two bundles of documents, Part A of which included documents relating to the application for permission and evidence previously presented before the First-tier Tribunal. Bundle B contained a series of case law authorities that included the guidance of the Tribunal in MF (Article 8 – new Rules) Nigeria [2012] UKUT 00393 (IAC). This was a decision heard on 18 September 2012, that was promulgated on 25 September 2012 and thus post-dated the determination in the present case However, I would point out that Judges interpret existing legal principles. They reveal the law. They do not do so prospectively. Therefore, if for example, a First-tier Judge misunderstands those legal principles, then notwithstanding that a leading case on the issue post-dates the determination, it would still amount to an error on a point of law that may well in the given circumstances, be considered to have been material to the outcome of that appeal.

57. I further took account of the Respondent's response to the grounds of appeal under Rule 24 dated 24 October 2012 that submitted that the First-tier Tribunal Judge had correctly applied the Immigration Rules to the Appellant's case. That it was only in exceptional circumstances that paragraphs 399 or 399A would not apply. In the

Appellant's case, the Judge had concluded that the Appellant was not in exceptional circumstances. That finding was open to him on the established facts. The Judge had properly taken into account the seriousness of the offence in considering whether deportation was a disproportionate interference.

58. It was submitted that the European Court in Maslov did not have the benefit of considering Article 8 in the light of the Respondent's policy as encapsulated in the Immigration Rules. Those Rules represented the public interest as determined by the Secretary of State. It was argued that in any event, the Appellant fell outside the Maslov criteria as he had spent less than half his pre-adult life lawfully in the United Kingdom.

59. It was contended that the grounds of challenge, amounted to no more than a disagreement with findings open to the First-tier Tribunal on the evidence before them.

60. Before me, Mr Byass advanced two grounds of challenge. Firstly that the guidance in MF came into play, from which it was apparent that the new Immigration Rules did not provide a complete code for Article 8 as a result of which the Tribunal had fallen into error in a number of ways. For example, they had applied an exceptionality test and nothing more, when considering the proportionality of the Appellant's removal. Further, they had failed to adequately if at all, explain their conclusion that the Appellant's particular circumstances demonstrated very serious reasons to justify his deportation.

61. There was no indication within the determination that the panel had considered Article 8 outside of the Rules.

62. Mr Jarvis submitted inter alia, that the new Immigration Rules were extremely important to a consideration of proportionality outside of the Rules. He maintained that the Appellant's challenge to the determination, failed to take proper account of the panel's reasoning starting with their findings of fact from paragraph 34 of their determination.

63. Mr Jarvis continued that it was accepted that the Appellant did not meet the requirements of the new Rules and therefore those findings had to be read in to the panel's conclusion and could not be ignored.

64. Mr Jarvis maintained that the panel had conducted a very close scrutiny of the facts and made findings for and against the Appellant in terms of his credibility.

65. They had taken account of the Judge's sentencing remarks against the backdrop of the aggravating context of the riot made in this offence akin to violent disorder. The panel had taken careful account of the Maslov criteria that they applied against the backdrop against the Appellant's particular circumstances. Mr Jarvis maintained that this was very important, as the panel had reached their consideration on two

footings, namely exceptionality required by the Rules and in the alternative, their application of the Appellant's circumstances to the guidance as found in both Masih and Maslov. Either way, submitted Mr Jarvis, the panel were entitled to conclude that in the light of their findings, the Appellant's deportation was justified.

66. Mr Byass in response submitted that the panel had failed to carry out a two stage assessment as MF made clear and to that extent alone, the panel's proportionality assessment was clearly flawed.

67. I reserved my decision but in so doing ascertained from the parties that in the event that I decided that the determination of the First-tier Tribunal indeed disclosed errors on a point of law that the appropriate course would be to have a resumed hearing reserved to myself on the basis of submissions only.

Assessment

68. I concluded that the determination of the First-tier Tribunal indeed disclosed errors on a point of law that were material to the outcome of the appeal.

69. The error that I in particular identified and considered sufficient for this purpose (see EK v ECO (Columbia) [2006] EWCA Civ 926) related to the First-tier Tribunal's consideration of the proportionality of the appellant's removal in terms of Article 8 of the ECHR which on a careful consideration of the determination satisfied me that the panel's approach to the proportionality of the appellant's removal was essentially predicated upon a consideration of whether there were any exceptional circumstances in the appellant's particular situation that would outweigh the public interest in deportation in accordance with the provisions of paragraph 397 of the Immigration Rules.

70. It was apparent to me, that there was nothing in the determination to suggest, that the panel had undertaken a separate consideration of Article 8 outside the Rules. In such circumstances and in the light of the guidance in MF, I was satisfied that the panel had materially erred in law.

71. In that regard I was in particular mindful of paragraphs (vi), (vii) and (viii) of the head note to **MF** in which the following is stated:

> *"(vi) Even if a decision to refuse an Article 8 claim under the new Rules is found to be correct, Judges must still consider whether the decision is in compliance with a person's human rights under s.6 of the Human Rights Act (see s.84(i)(c), (g) and (e) and s.86(2) and (3) of the 2002 Act) and, in automatic deportation cases, where removal would breach a person's Convention rights (s.33(2) UK Borders Act 2007). Thus, in the context of deportation and removal case, the need for a two stage approach in most Article 8 cases remains imperative because the new Rules do not encapsulate the guidance given in Maslov v Austria at App number 1683/03 [2008] ECHR 546, which has been endorsed by the higher courts.*

(vii) *When considering Article 8 in the context of an Appellant who fails under the new Rules, it will remain the case, as before, that 'exceptional circumstances' is not to be regarded as a legal test and 'insurmountable obstacles' is to be regarded as an incorrect criterion.*

(viii) *However, as a result of the introduction of the new Rules, consideration by Judges of Article 8 outside the Rules must be informed by the greatest specificity which they give to the importance the Secretary of State attaches to the public interest. For example, the new Rules set out thresholds of criminality by reference to terms of imprisonment, so that Article 8 private life claims can only succeed if they not only have certain periods of residence but can also show their criminality has fallen below these thresholds".*

72. It was abundantly clear to me, that the First-tier Tribunal had simply failed to conduct that necessary two stage approach and to appreciate that whilst in the present case, the Appellant failed under the new Rules, that in considering his Article 8 appeal, 'exceptional circumstances' was <u>not</u> to be regarded as a legal test. It followed that the First-tier Tribunal's Article 8 findings in terms of the proportionality of the appellant's removal from the United Kingdom to the DRC was tainted by error of law such that their findings from paragraphs 40 to 54 of the determination could not be preserved.

73. I therefore set aside the First-tier Tribunal's decision and directed that there be a resumed hearing reserved to myself in terms of the appellant's appeal under Article 8 of the ECHR for the purposes of making a fresh decision.

74. Immediately prior to the resumed hearing on 23 May 2013 the Tribunal received from the appellant's solicitors two bundles of documents. The first bundle comprised the evidence that was indeed before the First-tier Tribunal. It also included Mr Byass's skeleton argument dated 23 October 2012 that I had indeed already considered prior to the Error of Law hearing.

75. The second bundle comprised various case law authorities that included <u>Izuazu</u> (Article 8 – new Rules) [2013] UKUT 00045 (IAC), in relation to which it would be appropriate were I to set out below the head note to that decision as follows:

"1. *In cases to which the new Immigration Rules introduced as from 9 July 2012 by HC194 apply, judges should proceed by first considering whether a claimant is able to benefit under the applicable provisions of the Immigration Rules designed to address Article 8 claims. Where the claimant does not meet the requirements of the Rules it will be necessary to go on to make an assessment of Article 8 applying the criteria established by law. The Upper Tribunal's observation in <u>MF</u> (Article 8 – new Rules) Nigeria [2012] 00393 (IAC) to the same effect is endorsed.*

2. *The procedure adopted in relation to the introduction of the new Rules provided a weak form of Parliamentary scrutiny; Parliament has not altered the legal duty of the judge determining appeals to decide on proportionality for himself or herself.*

3. *There can be no presumption that the Rules will normally be conclusive of the Article 8 assessment or that a fact-sensitive inquiry is normally not needed. The more the new*

Rules restrict otherwise relevant and weighty considerations from being taken into account, the less regard will be had to them in the assessment of proportionality.

4. *When considering whether a decision is in accordance with the law, it has been authoritatively established by the higher courts that the test to be applied is not exceptional circumstances or insurmountable obstacles.*

5. *The UKBA continues to accept that EU law prevents the state requiring an EU law citizen from leaving the United Kingdom, although contends with good reason, that this is to be distinguished from a case where an independent adult can choose between continued residence in the United Kingdom or continued cohabitation abroad.*"

76. At the outset of the resumed hearing I agreed with the parties, that on reflection, paragraphs 40 to 44 of the First-tier Tribunal's determination could be preserved and which are set out below below:

"40. We have considered the five stage step by step process identified by Lord Bingham in Razgar. We take into account each claim under Article 8 is fact sensitive and that the burden of proving the facts on which he relies rests on the appellant.

41. We started by considering the evidence about the appellant's relationship with his mother and his siblings. We take into account that the appellant is now 20 years old. However, since his arrival in the United Kingdom he has always been with his mother, save for the time since his imprisonment. Having regard to the case of HK (Turkey) [2010] EWCA Civ 583 we accept that family life does not cease when a child attains the age of 18 and we accept that the appellant has family life with his mother and with his siblings although that family life has been disrupted by the detention of both the appellant and his younger brother's. As a result of his sentence he has been separated from his two younger siblings since October 2011.

42. The deportation of the appellant will have consequences of sufficient severity as to engage Article 8.

43. We find that the decision to deport the appellant is lawful and is in pursuit of a legitimate aim, namely the protection of the public from those who have committed serious criminal offences.

44. We went on to consider the proportionality of the decision to deport. In considering proportionality we have taken into account the case of Miao v Secretary of State for the Home Department [2006] EWCA Civ 75 in which Sedley LJ paragraph 12 said this:

> 'The assessment of proportionality is not a simple weighing of two cases against each other. It arises only when the Claimant has established that he enjoys a protected right which is threatened with violation; at that point the burden shifts to the State to prove that the violation is nevertheless justified. To do this the State must show not only that the proposed step is lawful but that its objective is sufficiently important to justify limiting a basic right, but that it is sensibly directed to that objective; and that it does not impair the right more than is necessary. The

> last of these criteria commonly requires an appraisal of the relative importance of the State's objective and the impact of the measure on the individual'."

77. Mr Byass confirmed to me that the appellant's brother's appeal against deportation (in relation to which I was informed he was convicted of an offence of greater seriousness than that of the appellant before me) had been allowed in a determination promulgated on 1 August 2012.

78. Ms Tanner accepted that if the appellant's Article 8 appeal was allowed, it would follow that the appellant's former grant of Indefinite Leave to Remain in the United Kingdom would be in consequence, reinstated.

79. Having heard the parties' respective submissions, I reserved my decision.

Assessment

80. Having most carefully considered the evidence in its totality including the parties' most helpful submissions I have concluded that the appellant's Article 8 ECHR appeal must be allowed.

81. No doubt acting on instructions, Ms Tanner referred me to the case of Nagre [2013] EWHC 720 (Admin). I am not sure, with great respect to her as to why, because I find that it does not help me. It is a decision of the Administrative Court and therefore not binding on me. In Nagre, the Administrative Court approved the guidance of the Upper Tribunal in Izuazu and the two stage approach recommended by the Upper Tribunal in MF. Sales J added the proviso that it would not always be necessary to move on to the second stage and consider Article 8 proportionality apart from the provisions of the Immigration Rules. Where the Rules and the learning on Article 8 were in harmony, the answer given by the Rules might render further inquiry unnecessary unless there were exceptional circumstances. In that case the difference between the Rules and the Strasbourg principles was marginal. In my experience, there will only be a very few cases where this can properly be said and it is likely to be confined to those cases where the Rules recognise that the removal would be contrary to the person's rights under Article 8. Save for those unlikely cases, the appellant's rights will have to be considered in accordance with the Human Rights Act and that will almost always involve a separate consideration.

82. Indeed the Upper Tribunal in a decision chaired by the President, in Green (Article 8 – new Rules) [2013] UKUT 00254 (IAC) observed that it followed from Izuazu and MF and the decision of the Upper Tribunal in Ogundimu (Article 8 – new Rules) Nigeria [2013] UKUT 00060 (IAC) that judges hearing appeals against decisions made after 9 July 2012 should consider how the Immigration Rules would apply and make any relevant findings in that context, before considering the wider application of Article 8 and the jurisprudence of the Upper Tribunal, and the Higher Courts, and either decide whether there are exceptional factors not contemplated by the Rules or that the decision is an unlawful one and is proportionate to the legitimate aim. In

Green, the Tribunal considered that pending any further guidance from the Court of Appeal, judges of both Chambers should apply the principles set out in Izuazu.

83. The Tribunal in Green repeated that paragraph 398 of the Immigration Rules make no reference to persons who had committed crimes as juveniles. By contrast, the decision of the Grand Chamber in Maslov was clear that "*when assessing the nature and the seriousness of the offences committed by an applicant, it has to be taken into account whether he or she committed them as a juvenile or as an adult*".

84. It was held that as explained in Izuazu and Ogundimu, where the Immigration Rules did not reflect the established principles under human rights law, it was the law as laid down in primary legislation that must be followed.

85. I have of course applied those principles against the backdrop of the appellant's particular circumstances.

86. In that regard there are key facts that are accepted between the parties. The appellant is 21 years of age. He was a juvenile when convicted and sentenced. He came here from the DRC aged 10 and has now been in the United Kingdom for more than half of his life. The First-tier Tribunal found that he still enjoyed family life with his mother and two younger siblings who are now aged 7 and 3 years respectively, both born here in the United Kingdom. They found as a fact that the appellant had some ties with relatives in the DRC but no higher than some extended family members, but the appellant has had no contact with them.

87. It is further apparent on reading the First-tier Tribunal determination and in terms of their preserved findings, that they concluded that the appellant's existing ties to the United Kingdom were stronger than those with the DRC, an observation that Mr Byass before me aptly described as a "simple matter of commonsense".

88. It was accepted that the appellant has been in the United Kingdom lawfully for almost .the whole of his stay. He came here on 9 April 2002 and claimed asylum the following day aged 10 and was granted extended leave to remain and from that, ILR. It follows that he is therefore a person lawfully in the United Kingdom throughout his period of residence which is a factor that is clearly relevant to the issue of proportionality.

89. I am mindful that the appellant was convicted of an offence of burglary as part of the London Riots in August 2011. This was undeniably a unique event and conduct that properly was considered by the courts to go beyond the normal boundaries of criminality and thus attached higher sentences.

90. I am mindful in that context, of Mr Byass's submission that if the appellant's first offence of burglary had been outside the context of the London Riots he would likely have received a far more lenient sentence. Nonetheless the appellant had accepted that the context in which he was sentenced was important.

91. I am mindful that the judge in his sentencing remarks took into account, in addition to the backdrop of the London riots, that the appellant had pleaded guilty at a very early stage. He had handed himself in. He had admitted his guilt to the police and had maintained his guilt throughout. His very early acceptance of his wrongdoing resulted in the judge giving him credit and of course the sentencing judge was mindful that the appellant had otherwise no previous convictions and he was treated as a person of previous good character. That resulted in a sentence of eighteen months' imprisonment.

92. I have had regard to the NOMS Report that concludes that future risk of serious harm was "low". It is said that the index offence "does not denote high risk of harm features" and advises that "it was committed within the context of the rioting and looting that took place in London in 2011". The report records that whilst an aggravating feature of this offence was that which had occurred in the midst of lawless behaviour by rioters and looters, the appellant's personal behaviour appeared to be tempered the fact that he acted out of character and co-operated fully with the police and the Courts. The report recognises that there was no evidence of any previous anti-social discriminatory attitudes of behaviour on the part of this appellant. It was further noted the appellant attended Enfield College where he had studied for the past four years and that he was in the second and final year of a Level 3 course on Art and Design and planned to read Graphic Design at university. I have noted the Offender Group Reconviction Scale (OGRS) that estimates the probability that offenders with a given history of offending will be reconvicted for any recordable offence within two years of sentence. It is estimated that in the appellant's case, he is in the banding category of medium within the first two years. However this relates to the period "within two years of sentence". I am mindful in that regard that the appellant has already been in custody for twenty months since that sentence was imposed. I also observe that the OGRS scale does not measure the severity of predicted reoffending. The appellant has only positive entries as for his time in prison.

93. The reference in the NOMS Report as to friction with the appellant's mother at home was clarified to me by Mr Byass and I accept that observation in its context. The appellant had breached bail which had been subject of a curfew in that he had left his home due to an argument. However, immediately upon leaving home he had contacted police that he was living at an alternative address and he provided the police with details of that address and indeed reported back to the police the following morning. This was not an explanation that in fairness was challenged by Ms Tanner but I would agree with Mr Byass that such a response was markedly mature in letting the authorities know what the appellant had done in circumstances where arguably they would not otherwise have been aware that there had been such breach. The police indeed clearly were satisfied and they took no further steps.

94. It was clear that the appellant could not meet the requirements of paragraph 398 of the Immigration Rules in that he had not spent his life in the UK immediately

preceding the immigration decision for a requisite period, he was in fact just three months short. The consequence is that in terms of the Rules the appellant had to show "exceptional circumstances".

95. I am mindful that whilst the circumstances of the offence were serious it was not a case in consequence of the mitigating features that the sentencing judge accepted, that resulted in a lengthy sentence but I am of course mindful that the sentence imposed was in the particular context of the London riots. This is an appellant who had never been convicted of offences in the past. He had been until his conviction, a young man of previous good character. I am also aware of the evidence before me that in addition to the mitigating factors the sentencing judge recognised, there has, since the sentence, been evidence of positive conduct and clear expressions of significant remorse for the appellant's involvement in this offence. Such is apparent from his written statement (see F2 of the Tribunal bundle). In circumstances when he was not represented, he expressed remorse inter alia in the following terms:

> "I know what I did it was wrong and I have been given maximum sentence for my crime and this is my first time breaking the law and I am sorry for that. I promised myself I would never do anything like that again as long as I am still alive… I don't have no one (in the DRC) there is no family to go back to. I got a good life here – one more year till I go to university… I got my mum three brothers and little sister. Prison aint a place for me to be and I never come back again. I'm trying to keep my head down doing education and get help to sort out my bad habit so when I get back out there I know what to do to stay keep out of trouble and is going well for me."

96. The appellant has spent more than half of his life in the United Kingdom he has been here since the age of 10. The consequence of his removal to the DRC would amount to a splitting of the family unit. There is no suggestion on the part of the respondent that the whole family could relocate to the DRC.

97. The findings of the First-tier Tribunal refer to "some" ties but not strong ties. I am mindful that in contrast, this is an appellant who has strong ties in the United Kingdom having come here at the age of 10 following circumstances in which his father was killed.

98. I am mindful that the appellant's private life is reflected in many ways within the guidance in Maslov.

99. This appellant's criminal activity is in the context of the London riots and it is established that the particularly repugnant nature of riots and this kind of public disorder must attract condign punishment. However I would repeat that it is plain from the judge's sentencing remarks in the present case, that the condign punishment appropriate was much diminished by reason of the responsibility the appellant showed after he had committed the offence, coupled with the fact that this was otherwise a young man with no previous convictions and of previous good character.

100. It is certainly not the case that a person convicted of an offence of this kind and punished with eighteen months' imprisonment has to be deported if he is not a British national. I am bound to take note of the well-established jurisprudence in these matters and particularly the case of Maslov. They are indeed incorporated in the judgment of the Court of Appeal in JO (Uganda) [2010] 1WLR 607 where at paragraph 21 their Lordships had this inter alia to say:

> "…for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country, very serious reasons are required to justify expulsion; and this is all the more so where the person concerned committed the relevant offences as a juvenile."

101. The appellant is now aged 22. He came to the United Kingdom from the DRC when he was 10. He has been in the United Kingdom for rather more than half his life and although I respect the First-tier Tribunal's finding that he has some contacts with the country and can speak some of the language, his memories of the country will be those of a 10 year old boy who knows almost nothing about life there now and is singularly ill-equipped to deal with it.

102. I find that removing him to the DRC has echoes of 'exile' rather than exclusion and it is unlikely to be proportionate.

103. I bear in mind the deep regret that the appellant has expressed for his actions that he has shown at every stage, which supports my finding that he is unlikely to get into any further trouble. I have also had regard to the NOMS Report which regards the risk of reoffending as low.

104. This is a case where in all the circumstances and as I find, it would be clearly disproportionate to remove him. In reaching that conclusion I am also mindful that as held in Masih the impact on this appellant of not only his term of imprisonment but indeed his period in detention can properly be given weight. The appellant's ties in the UK include his family, with whom he enjoys a close relationship, in particular with his mother, who continues to give him ongoing financial support and his younger siblings.

105. It cannot possibly be in such circumstances, in the interests of the appellant's younger siblings, that the appellant should now be deported. He is part of their family unit notwithstanding that I recognise and indeed note that it was accepted by the appellant that his mother would continue to care for his siblings if he was deported.

106. The appellant's private life also includes his schooling, the course of education that he was following with the view to attending university and of course the ties that he has developed since arriving here as a young boy aged 10.

107. I have hunted for a sensible reason to justify removal and in so doing I have had regard to the importance of respecting the properly devised scheme of immigration control which was approved by Parliament. Mindful not least of the guidance in Maslov and the other case law to which I have referred, it cannot be said in the particular circumstances of this appeal and this appellant, that there are very serious reasons demonstrated to justify his removal from the United Kingdom. I conclude that it would not in all the circumstances be proportionate to remove this appellant to the DRC.

Conclusions

108. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

109. I set aside the decision.

110. I remake the decision in the appeal by allowing it.

Signed Date 4 June 2013

Upper Tribunal Judge Goldstein