Upper Tribunal
(Immigration and Asylum Chamber)

Kabia (MF: para 398 - "exceptional circumstances") 2013 UKUT 00569 (IAC)

THE IMMIGRATION ACTS

Heard at Nottingham Magistrates Court	**Determination Promulgated**
On 15 October 2013	
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Before

Upper Tribunal Judge Southern
Upper Tribunal Judge Coker

Between

YAYA KABIA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J. Nicholson instructed by Greater Manchester Immigration Aid Unit
For the Respondent: Mrs M. Morgan, Senior Home Office Presenting Officer

(1) The new rules relating to article 8 claims advanced by foreign criminals seeking to resist deportation are a complete code and the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence: MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192 at para 43.

(2) The question being addressed by a decision maker applying the new rules set out at paragraph 398 of HC 395 in considering a claim founded upon article 8 of the ECHR and that being addressed by the judge who carries out what was referred to in MF (Article 8 - New Rules) Nigeria [2012] UKUT 393 (IAC) as the second step in a two-stage process is the same one that, properly executed, will return the same answer.

(3) The new rules speak of "exceptional circumstances" but, as has been made clear by the Court of Appeal in MF (Nigeria), exceptionality is a likely characteristic of a claim that properly succeeds rather than a legal test to be met. In this context, "exceptional" means circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that a deportation would not be proportionate".

DETERMINATION AND REASONS

1. The appellant, who is a citizen of Gambia born on 7 September 1990, appeals against a decision of a panel of the First-tier Tribunal (Judge Osborne sitting with Mr Getlevog, a non-legal member of the Tribunal) who, by a determination promulgated on 19 July 2013, dismissed his appeal against a decision of the respondent that he should be deported. That decision was made by the respondent pursuant to the "automatic deportation" provisions of section 32 of the UK Borders Act 2007. That was because, as the appellant had been convicted of 2 offences of conspiracy to supply Class A drugs and sentenced to 40 months detention in a Young Offenders Institution (he being under 21 years of age at the date of conviction) he was a foreign criminal in respect of whom the respondent was required to make deportation order, such deportation being deemed to be conducive to the public good because of the provision of section 32(4) of the 2007 Act.

2. The grounds for seeking permission to appeal, drafted by Mr Nicholson with commendable clarity and economy, identify everything that could possible be advanced in challenge to the determination. Those grounds are neatly summarised by First-tier Tribunal Judge Appleyard who said this in granting permission to appeal:

> "The grounds…. contend that the appellant has a diagnosis of paranoid schizophrenia and needs support of medication and medical professionals, and of his family, and there is a lack of adequate treatment and support in Gambia. The panel found the treatment would not be adequate in Gambia and saw this to be significantly in favour of the appellant. However, the panel then failed to make conclusive findings because of errors applying the wrong threshold of "exceptionality", not adequately addressing case law and failing to deal properly with evidence. In so doing the panel erred in coming to wrong conclusions on the appellant's criminality and misdirected itself on submissions based on *MM (Zimbabwe)* [2012] EWCA Civ 279. It is further contended that the Tribunal erred in distinguishing the appellant's case too harshly from *MM*. Beyond that, for various reasons, the panel erred in its treatment of the evidence."

3. At the beginning of the hearing before us, Mr Nicholson, who has appeared as counsel for the appellant throughout these proceedings, helpfully narrowed the issued to be addressed. First, he acknowledged that although there is ample evidence of the appellant's mental health difficulties and his continuing receipt of treatment from mental health professionals, there has in fact been no diagnosis of paranoid schizophrenia. At least, it is not possible to find evidence of any such diagnosis in the extensive documentary evidence before us and so he conceded, quite properly, that it was not appropriate for us to proceed on the basis that such a diagnosis had in fact been made.

4. Secondly, although it was the appellant's case before the First-tier Tribunal that he did have family life with his mother and sister in the United Kingdom such as to engage the protection of article 8 of the ECHR, and that remains his contention, Mr Nicholson, again quite properly and realistically, accepted that it had been open to the First-tier Tribunal to find that no such family life existed so that any relationship with those adult relatives would fall to be considered as part of the appellant's private life. Thus, he accepted that finding is unassailable in an appeal to the Upper Tribunal.

5. Third, it is important to recognise that, although the appellant has been receiving medical treatment for mental health difficulties, he does not fall within any of the exceptions set out in section 33(6) of the 2007 Act. That subsection sets out a range of orders relating to those requiring treatment for mental health issues but the appellant falls within none of those categories. In any event, as is made clear by section 33(7), even if one of these exceptions does apply to a foreign criminal, the consequence of that is not to prevent his deportation. It means only that the "automatic" deportation provision does not apply and there is no presumption applied, one way or the other, as to whether deportation is conducive to the public good. Put another way, in such a case a decision as to deportation will be made in the light of the circumstances of that particular case.

6. The relevance of this so far as this appellant is concerned is that primary legislation has identified a range of circumstances in which those with mental health difficulties should be considered on a different basis but this appellant does not fall within any of them. That does not mean, of course, that his medical condition is to be disregarded. As was recognised by the First-tier Tribunal, it remains at the very core of his challenge to the deportation decision.

7. The appellant's personal and immigration history is well known to the parties and so we do not need to set it out in complete detail. For present purposes the following summary will suffice.

8. In December 2003 the appellant's mother was granted leave to enter as the spouse of a person present and settled in the United Kingdom and the appellant and his sister accompanied his mother as dependants, her new husband accepting them even though their biological father remained in Gambia. Thus, on arrival the

appellant was just 13 years old. In June 2004 the appellant returned to Gambia with his mother because his own father was seriously ill. His mother returned to the United Kingdom the following month but the appellant stayed in Gambia for about 6 months. Following his father's death, the appellant's mother travelled back to Gambia to bring the appellant back to the United Kingdom. This was in December 2004.

9. However, by this time the appellant's mother's marriage had broken down and she and the appellant were refused leave to enter when they arrived back in the United Kingdom. They were granted Temporary Admission and the appellant's mother submitted an application for leave to remain for compassionate reasons outside the immigration rules. In due course the appellant's mother and sister were granted leave to remain, until February 2014, but the appellant was refused leave because of his criminal offending.

10. The First-tier Tribunal, having heard oral evidence from the appellant's mother and sister, as well as from the appellant himself, set out a detailed account of this history at paragraphs 8 and 9 of the determination and then went on to examine the evidence of the appellant's mental health difficulties. The judge noted that the appellant received treatment while "sectioned" under the Mental Health Act 1983 on two occasions in 2010. She said:

> "The Appellant himself described feelings of intense hopelessness during this period – he was not able to access further education because of his immigration status – his family had broken up in circumstances which he could not control or influence and it had culminated in him being detained under the Mental Health Act.
>
> The Appellant accepted that he had begun smoking cannabis at a relatively early age and the medical opinion of all of those involved in the Appellant's care was that this could have exacerbated his mental health problems. Within his sentencing remarks His Honour Judge Everett took a more robust approach stating:-
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> > "I can only have some limited sympathy for him in the medical condition that he has because it was in fact a drug related psychosis, using cannabis, which has caused him mental health problems.""

11. The First-tier Tribunal Judge noted also that immediately before appearing for sentence for the offences of conspiracy to supply class A drugs the appellant said he had "gone on a bender" the consequence of which he was held in a segregation unit initially following the imposition of a custodial sentence.

12. The judge then reviewed the circumstances of the appellant's relatives at the date of the hearing. His mother and sister were now reunited after a period of disruption and, in particular, his sister was "flourishing". Both indicated a willingness to provide continuing support for the appellant, following his release from detention. The judge reviewed the evidence relating to the support being provided to the

appellant by medical professionals and the medication being provided to him. He was being prescribed a now reduced dose of Olanzapine, an anti-psychotic drug. This was not available in Gambia but the evidence indicated that an alternative, Haloperidol, would be available at the Royal Victoria Hospital in Banjul, which was the hospital best placed to provide for the appellant in Gambia. Having said that, the judge accepted that the treatment available to the appellant in Gambia was not comparable to that which would be available to him in this country.

13. Having directed herself in terms of the guidance to be drawn from *GS and EO (Article 3 – health cases) India* [2012] UKUT 00397 (IAC) the judge set out these clear findings of fact:

> "We find that in the Appellant's case he is likely to remain vulnerable to further psychotic episodes which may be exacerbated by circumstances which he finds stressful and by continuing to spoke cannabis. The Appellant himself accepted that he had been a regular smoker of cannabis since his early teenage years and that he had "gone on a bender" immediately before he was sentenced in June 2010.
>
> He experienced two periods of psychotic behaviour in 2010 before he was sent into custody and one immediately afterwards. He expressed delusional beliefs and behaved in a disinhibited manner including aggressive outbursts and we find that such behaviour, if repeated, would be bound to draw the Appellant to the attention of others."

The judge recorded the appellant's evidence that, in addition to medication, he needed the support of mental health professionals and that he believed, the judge thought with "ample justification", that such support would not be available to him in Gambia. The judge considered carefully a report from Dr Pamela Kea about the limited availability of the medical treatment the appellant would wish to access in Gambia and reached this conclusion:

> "We find that the prospects for good psychiatric care continuing to be available for the appellant are bleak. We take into account his own lack of insight, the psychotic episodes he has thus far experienced and the paucity of available expertise and facilities in Gambia."

Thus, there can be no doubt at all that the judge had clearly in mind the stark contrast in the availability of treatment that the appellant would face upon return to Gambia and, as she made clear at paragraph 38 of the determination, that the appellant's present relationship with the health professionals who were supporting him constituted "significant relationships" in the context of his private life.

14. With all this in mind the judge considered the appellant's claim under article 8 of the ECHR, considered first under the immigration rules applicable, as set out at paragraphs 398 and 399 of HC 395. The judge recognised that in view of her findings in relation to family life the appellant could not succeed on the basis that paragraph 399 applied and so considered paragraph 399A in respect of his private life. The judge concluded, correctly, that the appellant could not succeed under that

provision because, despite the young age at which he had arrived he had not, by the relevant date spent at least half his life here. Indeed, he had spent the first 13 years of his life in Gambia, returning there for a further six months or so when his father had become ill.

15. Having arrived at that position the judge went on to carry out an assessment of the article 8 claim, not within the scope of the immigration rules, but by applying an assessment guided by the five step approach provided by *Razgar, R (on the application of) v Sectretary of State for the Home Department* [2004] UKHL 27. The judge cannot be criticised for that because in doing so she was following the approach indicated as the correct one by the reported case of *MF (Article 8 - new rules) Nigeria* [2012] UKUT 393 (IAC) (31 October 2012). As has now been made clear by the Court of Appeal in MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192 in fact the rules do provide a complete code and so it is not necessary to look outside them. That is because paragraph 398 provides that:

> "… the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors."

It is, therefore, at this stage that everything relevant is considered as the decision maker looks at the "other factors" not relevant to the application of paragraphs 399 and 399A to see whether they outweigh the public interest in deportation. That is the same exercise of striking a balance between the competing interests in play as this judge carried out by applying the Razgar analysis. As was explained by the Master of the Rolls in *MF (Nigeria)* at paragraph 39:

> "… the rules expressly contemplate a weighing of the public interest in deportation against "other factors". In our view, this must be a reference to all other factors which are relevant to proportionality and entails an implicit requirement that they are to be taken into account."

True it is that paragraph 398 speaks in terms of circumstances being "exceptional" but, as was pointed out in *MF (Nigeria)*, that has to be considered in the light of the "Criminality Guidance for Article 8 ECHR cases: issued by the respondent to decision makers:

> "… "exceptional" means circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that deportation would not be proportionate. That is likely to be the case only very rarely."

16. Put another way, the question being addressed by a decision maker applying the new rules set out at paragraph 398 of HC 395 in considering a claim founded upon article 8 of the ECHR and that being addressed by the judge who carries out what was referred to in *MF (Article 8 - New Rules) Nigeria* [2012] UKUT 393 (IAC) as the

second step in a two-stage process is the same one that, properly executed, will return the same answer.

17. The new rules speak of "exceptional circumstances" but, as has been made clear by the Court of Appeal in *MF (Nigeria)*, exceptionality is a likely characteristic of a claim that properly succeeds rather than a legal test to be met. In this context, ""exceptional" means circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that a deportation would not be proportionate".

18. The new rules relating to article 8 claims advanced by foreign criminals seeking to resist deportation are a complete code and the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasberg jurisprudence: *MF (Nigeria)* at para 43.

19. Thus, nothing turns in this case upon the route taken by the judge to her conclusion upon the article 8 claim. This brings us to what we understand to be the main challenge now pursued by Mr Nicholson which is that, in applying her own assessment, the judge erred in applying too high a threshold as she considered there was in fact a requirement of exceptionality. This is because, at paragraph 48 of the determination, the judge said:

> "We have concluded that there is nothing within the Appellant's circumstances which would make it so exceptional as to enable us to finds that his Article 8 rights with regard to his mental health issues should be taken into account. We take from the judgment *MM* that there has never been a case where a "health" case has succeeded under Article 8 but not Article 3"

Having concluded already that the appellant could not succeed under Article 3 the judge found absent the nature of circumstances anticipated by the Court of Appeal as being required for a claim under Article 8 to succeed.

20. The key to a correct understanding of the reasoning of the judge is found, unsurprisingly, in the words used and the way in which she expressed herself in this regard. It is plain, unambiguously, that here she was concerned with the guidance to be drawn from *MM (Zimbabwe)*. That is the unavoidable conclusion from the phrase "with regard to his mental health issues" and the reference in the sentence that follows to *MM (Zimbabwe)*. This was a separate exercise from that which followed in paragraph 49 of the determination, which we set out in full below as here is found a summary of the reasoning that led to the article 8 claim in its entirety, rather than that part of it being considered earlier, being rejected. This assessment was informed by the summary of the appellant's case set out at paragraph 38 which brought together everything that could be gleaned from the evidence that spoke in the appellant's favour:

> "Having thus examined and considered the Appellant's case with care we have concluded that the Secretary of State has established that the need for deportation in

> this case has been established because of the need to put in place measures for the prevention of disorder or crime as set out in Article 8(2) and this outweighs the Appellant's rights to have his Article 8 rights respected to the extent that he should be allowed to remain in the United Kingdom. He cannot claim that right simply on the basis that he would receive better medical treatment in the United Kingdom than in Gambia and other aspects of his private life are not sufficiently compelling to outweigh the interests of the Secretary of State. In the circumstances we find that the appeal must be dismissed."

21. For these reasons we must reject the first challenge to the determination. The judge did not apply an impermissibly high threshold of exceptionality. She carried out a very careful assessment in which she confronted directly everything advanced on the appellant's behalf and explained why those factors did not outweigh the public interest in deportation.

22. Nor do we accept that the judge erred in distinguishing the circumstance of this appellant with those on *MM (Zimbabwe)*. There are a number of reasons for doing so. MM had a clear diagnosis of serious mental illness and had been made subject to a transfer order from prison to a suitable hospital pursuant to sections 47 and 49 of the Mental Health Act 1983, that being sufficient to bring him within one of the exceptions in section 33(5) of the UKBA 2007. There was medical opinion to the effect that the fact he would be living with the same close family members he had before would be "protective" because they would notice early signs of relapse and would refer him for early treatment, as they had before. There was no suitable medication available in Zimbabwe. And, perhaps most significantly, there was a finding of fact that

> "Any risk of further offending behaviour is closely linked to his mental health, his treatment, and to his family and home circumstances."

That of course differs from the position of this appellant, who has not been living with his close relatives for some considerable time and whose offending was not related to a medical condition but to his "destitution" and his resolve to make money by selling drugs. That was a clear finding of fact made by the First-tier Tribunal, informed by the sentencing remarks of the Crown Court Judge.

23. The next challenge we address is that the judge is said to have gone behind the assessment in the pre-sentence report put before the sentencing judge and as a consequence, wrongly, substituted her own assessment of the risk the appellant posed to the community. This is because the author of the pre-sentence report had said:

> "He is assessed as a low risk of serious harm and therefore I would respectfully ask that consideration is given to a Suspended sentence order…."

But the judge said, at paragraph 47 of her determination:

> "Our own assessment of the risk posed by the Appellant is that he should be regarded as a medium risk of re-offending as stated by the Probation Officer but that the level of risk posed to others is likely to be at least medium if not high."

24. In our judgment the judge was plainly entitled to depart from the view expressed in the pre-sentence report. It is clear that this conclusion chimed with the sentencing remarks of the judge who imposed what was a lengthy sentence given the appellant's youth and his guilty plea. The sentencing judge, expressing his fundamental disagreement with the approach of the Probation Officers who had prepared pre sentence reports for the appellant and his co-defendant by saying (in the appellant's absence as he had been removed from the court after having become disruptive):

> "… It is a regret, it seems to me, that two separate probation officers have seen fit to raise the hopes of either you or Yaya Kabia by suggesting alternatives, because the Court of Appeal has made it very, very clear that only a substantial prison sentence must follow as a result of the sale of these evil drugs."

And then continued:

> "It is important to keep in mind the seriousness of the sale of Class A controlled drugs. These drugs (heroin and crack cocaine in particular) are a terrible evil on our streets, this court sees all too often the end results of the sale and use of these drugs, addicts, who cause terrible harm to themselves by using it, indeed on occasions with fatal consequences, not only do they put themselves at risk for their lives, they do not care about where their next amount of money is going to come from, they just need money for drugs, it is as simple as that and they will do anything to get that money to get those drugs and that behaviour extends to thefts from shops, for example affecting the community, robberies, affecting the community, burglaries, affecting the community and of course as you and Yaya Kabia did, actually selling drugs and perpetrating that evil cycle…..

25. Next, the grounds complain that the judge "speculated for herself on the role of cannabis in the likely recurrence of A's criminal behaviour and ignoring the re-establishment of his family life with both his mother and sister." As we have observed above, Mr Nicholson does not pursue the second limb of that challenge. He is plainly right to take that approach because such a challenge is simply unarguable. We are unable to accept that the conclusion reached in respect of cannabis use and its consequences was speculative. There was ample evidence to support what was said by the judge. The appellant's heavy and consistent use of cannabis was clearly associated with his medical condition. "Cannabis dependant syndrome" has been a consistent aspect of the comment made in medical notes. A report before the judge from Dr Chaturvedi, Associate Specialist of the Prison in-reach Team dated 23 January 2012 noted that the Appellant "admitted using cannabis daily", that "Once released he would go back to using cannabis as it helps him relax and helps him sleep". The doctor said:

> "… He appeared not to have any evidence of an active psychotic disorder…

> In summary I feel that Mr Kabia has had a psychotic illness, however, it is unclear whether this was solely due to substance misuse which Mr Kabia does not accept. It appears that his symptoms have not reoccurred since the decrease of his medication from Olanzapine 15 mg to 5 mg… and he appears to be currently well…."

26. Given the sentencing remarks, taken together with what was said in the pre-sentence report, it was open to the judge to find an association between the appellant's drug use and his propensity to reoffend, especially in the light of his lack of insight and asserted intention to consume cannabis on his release.

27. For these reasons we are satisfied that the determination of the First-tier Tribunal discloses no error of law and so shall stand.

28. The appeal to the Upper Tribunal is dismissed.

Signed
Upper Tribunal Judge Southern
Date: 16 October 2013.