Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09273/2017 (V)

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reasons Promulgated**
On: 16 July 2020	**On: 30 July 2020**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

CHATERAM [P]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Waheed, instructed by Lambeth Solicitors
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing to which there has been no objection from the parties. The form of remote hearing was skype for business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

2. The appellant appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision of 30 August 2017 refusing his protection and human rights claim, further to a deportation order issued against him on 14 August 2014.

3. The appellant is a citizen of Guyana, born on 26 November 1988. He arrived in the UK on 20 July 2005, aged 16, with entry clearance as the dependant of his mother who held a work permit visa. He was granted further leave on the same basis, followed by indefinite leave to remain as his mother's dependant, on 10 September 2009.

4. On 17 January 2014 the appellant was convicted of three counts of assault and was sentenced to a total of 15 months' imprisonment. On 11 March 2014 he was served with a notice of liability to automatic deportation and on 14 August 2014 a deportation order was signed. A decision was also made to refuse his human rights claim and to certify the claim under section 94B of the Nationality, Immigration and Asylum Act 2002. The appellant made written representations on several occasions, on medical grounds, between 2014 and 2016, all of which were refused under paragraph 353 of the immigration rules. He also made various unsuccessful applications for judicial review to challenge the refusal decisions. On 23 May 2017 the appellant claimed asylum. Following the judgment in Kiarie and Byndloss, R (on the applications of) v Secretary of State for the Home Department [2017] UKSC 42 the section 94B certified decision of 14 August 2014 and the refusal decisions made under paragraph 353 were withdrawn.

5. The respondent then made a new decision on 30 August 2017 refusing the appellant's protection and human rights claim. The appellant's asylum claim was treated as implicitly withdrawn, under paragraph 333C of the immigration rules, owing to the lack of information and evidence provided. As for the appellant's human rights claim, the respondent considered that the exceptions to deportation in paragraph 399 and 399A did not apply. The respondent accepted that the appellant had a genuine and subsisting relationship with a British partner but did not consider that it would be unduly harsh for his partner to live with him in Guyana or to live without him in the UK. With regard to private life, the respondent noted that the appellant had not spent more than half his life in the UK and did not accept that he was socially and culturally integrated in the UK or that there were very significant obstacles to his integration in Guyana. The respondent did not accept that there were any very compelling circumstances outweighing the public interest in the appellant's deportation, noting his conviction in January 2014 on three counts of assault, a previous conviction on 12 December 2012 for using threatening and abusive words for which he received a one year community order, and a subsequent conviction on 17 October 2016 for sending a communication/ article of an indecent/ offensive nature, for which he was sentenced to a one year community order. The respondent concluded that the appellant's deportation would not breach Article 8. In regard to Article 3, the respondent noted that the appellant suffered from mental health issues and that the medical evidence referred to him having tried to hurt himself with a rope/ hanging and to continue to have suicidal thoughts. The respondent did not accept that the appellant's mental health problems reached the Article 3 threshold and did not accept that he could succeed on Article 3 grounds in relation to a risk of suicide.

6. The appellant appealed against the respondent's decision and his appeal was heard in the First-tier Tribunal on 28 March 2019 by First-tier Tribunal Judge Devittie. The evidence before the judge was that the appellant was living with his mother and his partner, both of whom provided him with emotional and financial support. The appellant's mother was a nurse in full-time employment and his partner was a teacher. The appellant stated that he had no ties to Guyana and would not be able to find work there because of his mental health condition. His partner would not be able to move to Guyana with him due to her ties to the UK. The judge also had before him a witness statement from the appellant's friend as well as evidence from the appellant's GP which referred to his depression, thoughts of self-harm and increased alcohol consumption.

7. Judge Devittie noted that the appellant had arrived in the UK aged 16 and was currently 31 and observed that there was a sense in which it could be said that he had spent most of his life in the UK. He also found that the appellant was fully integrated in the UK. However he concluded that, whilst there were significant obstacles to the appellant's integration in Guyana owing to his mental health condition, he did not consider such obstacles to be very significant. The judge accepted that the appellant was in a genuine relationship with his partner and that they intended to get married. He accepted that it would be unduly harsh for the appellant's partner to move to Guyana. However, whilst he accepted that the appellant's separation from his partner would effectively destroy their relationship, he did not find that the appellant's removal from the UK would be unduly harsh on his partner and he did not consider that there were very compelling circumstances outweighing the public interest in his deportation. He accordingly dismissed the appeal.

8. The appellant sought permission to appeal Judge Devittie's decision to the Upper Tribunal on the grounds that he had failed to follow the guidelines in Razgar [2004] 2 AC 368 and had failed to take into account the rights of the appellant's partner in accordance with the guidance in Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39; that the judge had overstepped his powers by assuming the role of doctor in assessing the appellant's ability to manage in Guyana in light of his mental health concerns; and that the judge's findings were inconsistent with guidance in Huang v Secretary of State for the Home Department [2007] UKHL 11 and JD (Congo) & Ors v Secretary of State for the Home Department & Anor [2012] EWCA Civ 327.

9. Permission to appeal was refused by the First-tier Tribunal and, on a renewed application, by the Upper Tribunal. However, in a "Cart" challenge to the Administrative Court, the appellant sought to judicially review the refusal to grant permission and permission was granted by the Honourable Mr Justice Griffiths on the following basis:

> "The FTT decision considered the application of section 117C and found that Exception 1(a) and (b) applied (claimant lawfully resident in the UK for most of his life, socially and culturally integrated in the UK). In relation to (c) …the FTT decision identified many relevant factors but concludes that "whilst it is fair to say that there would be significant obstacles to his integration, I am

> not able to reach the conclusion that such obstacles would be very significant." The basis on which the FTT drew this distinction was arguably wrong in law. Much of its reasoning was to the effect that the significant obstacles in question might have been worse but the test is "very significant" not "most significant" or "significant in the extreme". The claimant would have succeeded if he had been within Exception 1.
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> The FTT decision also considered Exception 2 and accepted that C "has a genuine and subsisting relationship with a qualifying partner". As to whether "the effect of C's deportation on the partner…would be unduly harsh" the FTT decided that the relationship had been one of cohabitation since 2013 and that they intended to marry and start a life together and that "considerable emotional distress will be caused to his partner by a separation from him" and that deportation would mean the end of the relationship altogether…The FTT decided that there would be "harsh consequences"…but that they would not be "unduly harsh". The basis upon which this distinction was drawn was arguably wrong in law, since (a) it was based on the partner's health, employment, and family and friends, rather than on the effect of the deportation and end of the relationship, and (b) it was based on the fact that the consequences would be mitigated, rather than considering whether they were in themselves unduly harsh. The claimant would have succeeded if he had been within Exception 2.
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> The FTT considered only the section 117C factors and conducted no assessment by reference to Article 8 itself or the guidance in R(Huang) v SSHD [2007] UKHL 11.
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> The UT decision was arguably wrong in law in failing to identify and address these points and in refusing permission to appeal."

10. In the absence of any request for a substantive hearing following the grant of permission, the Administrative Court quashed the decision of the Upper Tribunal refusing permission and permission was subsequently granted by Vice-President Ockelton in the Upper Tribunal on 3 January 2020.

11. The matter came before Upper Tribunal Judge Finch on 20 February 2020, but was adjourned in order for the appellant to clarify and amend his grounds in light of the decision of the Administrative Court and for the respondent to then serve a rule 24 response in reply. UTJ Finch made directions to that effect. The appellant served his amended grounds on 9 March 2020 and the respondent served a rule 24 response on 19 March 2020. Following the issuing of further directions, the matter was listed for a remote hearing on 16 July 2020 and both parties submitted skeleton arguments for the hearing. The matter came before me.

12. Both parties raised preliminary issues. Mr Jarvis objected to the amended grounds on the basis that, whilst they reflected the order of Mr Justice Griffiths in the Administrative Court, they were significantly different from the original grounds which led to the refusal of permission in the Upper Tribunal. Mr Jarvis relied upon the case of Shah ('Cart' judicial review: nature and consequences) [2018] UKUT 51 and the guidance therein, that a 'Cart' challenge was not an opportunity to raise new grounds against the First-tier Tribunal's decision and he submitted that permission had not yet been given to argue these new grounds. Mr Jarvis submitted further that if the amended grounds were

admitted, the Secretary of State ought to be able to challenge the finding that the appellant had spent more than half his life in the UK, as he had not done so. That was raised in the rule 24 response. Mr Jarvis acknowledged that the rule 24 response was filed three days out of time, but he asked me to extend time and admit it. He submitted that the respondent could not have raised this ground of challenge previously, as she had succeeded in the appeal in all respects. He referred to the cases of Smith (appealable decisions; PTA requirements; anonymity) [2019] UKUT 216 and The Secretary of State for the Home Department v Devani [2020] EWCA Civ 612 (paragraph 27) in that respect.

13. Mr Waheed, in response, submitted that the argument based on the guidance in Shah had been fully ventilated by UTJ Finch on 20 February 2020 and she had granted permission to amend the grounds. He asked that the amended grounds therefore be relied upon. However he asked that the rule 24 not be admitted as it was filed out of time, and that the respondent not be permitted to challenge the finding that the appellant had spent most of his life in the UK.

14. Having heard from both parties I accepted Mr Waheed's submission that permission had been granted to amend the grounds. In any event I did not consider the grounds to be as significantly different to those originally pleaded as Mr Jarvis was suggesting, albeit that they were expressed in different terms to the original, rather vague grounds. I also considered it to be in the interests of justice to extend time for the rule 24 response, given the short period of delay and the current circumstances relating to coronavirus. Furthermore, I admitted the respondent's challenge to the appellant having spent most of his life in the UK, given that the judge appeared to have made an observation rather than a clear and specific finding in that regard and that, in any event, it was manifestly wrong and factually incorrect to conclude that the appellant had spent more than half his life in the UK.

15. The appeal then proceeded on the basis of the amended grounds. Mr Waheed expanded upon those grounds in his submissions. He submitted that the judge had applied a higher test than "very significant obstacles" when considering the exception in section 117C(4) of the NIAA 2002 Act, as it was not necessary for the appellant to show an absence of any mental health services in Guyana. It was sufficient, for the correct test of "very significant obstacles", for the appellant to show that the mental health services in Guyana were inadequate, which is what the judge found at [17]. In view of the appellant's mental health condition of moderate to severe clinical depression, as confirmed in the medical evidence produced of which the most recent was a letter from his GP dated 18 March 2019, and considering his previous suicide attempt and the lack of adequate services in Guyana, there was sufficient to meet the test of very significant obstacles. The judge relied on the appellant's mother's ability to assist him financially in mitigating against the obstacles to integration but did not explain how financial assistance would resolve the lack of adequate mental health services in Guyana, a country which had the highest suicide rate. As for the exception in section 117C(5), Mr Waheed submitted that the judge again applied too high a test for 'unduly harsh' and wrongly focussed

on the mitigation of the appellant's partner's loss rather than on the fact that deportation would end the relationship. The judge relied on "glib" factors and failed to consider the effect upon the appellant's partner of the man she loved returning to a country with no adequate mental health support. Mr Waheed submitted further that the judge, when considering 'very compelling circumstances' failed to analyse matters through the prism of Article 8 and proportionality.

16. Mr Jarvis, in response, submitted that Mr Waheed had focussed on the inadequacy of the mental health services in Guyana but had failed to consider that the appellant had made no case on his own evidence of an absence of relevant support and had failed to show any evidence of how the appellant functioned on a daily basis. The judge did not find the appellant to be a suicide risk and did not accept the claim that his mother had to watch over him. The evidence did not show that the appellant was in need of substantial intervention from the mental health services. The judge's approach was therefore perfectly permissible. In regard to the question of deportation being 'unduly harsh'. Mr Jarvis relied on the case of LE (St Vincent And the Grenadines) v The Secretary of State for the Home Department [2020] EWCA Civ 505 in submitting that the 'unduly harsh' test was a high one and that the normal impact of separation on a partner or child was not sufficient to reach that threshold. Likewise, the 'very compelling circumstances' test was very high and it could not be said that that high test was met on the findings made by the judge.

17. In reply, Mr Waheed reiterated the points previously made in regard to the appellant's mental health concerns and the lack of support in Guyana.

Discussion

18. Whether rightly or wrongly raised at the stage that it was, the fact was that the appellant could not meet the exception to deportation in section 117C(4), irrespective of the question of 'very significant obstacles to integration', as he had not spent most of his life in the UK. The conclusion that Exception 1 did not apply was accordingly the correct one, irrespective of any decision on the other limbs of section 117C(4).

19. In any event, the judge was fully and properly entitled to find that the requirements of section 117C(4) could not be met with respect to 'very significant obstacles' to integration in Guyana. I find no error in the judge's approach to that matter and do not agree with the suggestion that he applied a higher test, nor that he required there to be obstacles to integration which were "most significant" or "significant in the extreme". The judge was fully and properly aware of the correct test, he directed himself appropriately in that regard, he fully engaged with the medical evidence and he correctly applied the test to the evidence and the facts. It is not the case, as Mr Waheed suggested, that the judge required there to be an absence of mental health services in Guyana in order for the test of 'very significant obstacles' to be met. As Mr Jarvis submitted, the judge found that the evidence showed there to be some mental health support in Guyana, albeit limited, and that the appellant

had not made a case of his own to show that he would not be able to access any support or to show the effect on him of such limited services being available. I disagree with Mr Waheed, that the availability of financial assistance from the appellant's mother was irrelevant to the question of access to mental health services in Guyana. Clearly, having access to funds would assist.

20. Furthermore, it is relevant to have regard to the medical evidence which had been produced by the appellant which, as Mr Jarvis submitted, was limited and did not provide any information as to how he functioned on a daily basis. Having considered the medical evidence myself, it is clear that it contained very limited information about the appellant's mental health condition and little about his support needs, that it included no evidence in the form of psychiatric or psychological reports despite there being letters of appointments following referrals made to mental health services, and that the most recent evidence was simply a short and not particularly informative letter from the appellant's GP, dated 18 March 2019. In addition to the limited medical evidence the judge, at [16(4)], rejected the claim that the appellant had to be watched by his mother and needed looking after and clearly was of the view that the appellant had overstated his limitations as a result of his mental health. Accordingly I agree with Mr Jarvis that it is difficult to see how the judge could have concluded, on the evidence before him, that the appellant had met the test of showing 'very significant obstacles' to integration on the basis of his mental health condition, even if considered cumulatively with the other factors at [16].

21. Likewise, I do not agree that the judge erred in his approach to the 'unduly harsh' question or applied a more stringent test than was lawfully required. The appellant's grounds suggest that the fact that deportation would effectively put an end to his relationship with his partner was sufficient to meet the unduly harsh test, but that it is clearly not the case. As Mr Jarvis submitted, with reference to the case of LE, the reality of deportation was that families would be separated and there would be an adverse impact on partners and children, but that did not meet the high threshold of showing that it was 'unduly harsh'. It is not the case that the judge focussed only on factors mitigating the consequences of deportation for the appellant's partner rather than considering whether it would be 'unduly harsh'. Clearly, the impact of deportation on the appellant's partner was a relevant consideration and the judge was perfectly entitled, and indeed was required, to consider her circumstances and how she would be affected by his deportation. The judge clearly had regard to the evidence from the appellant's partner and considered all relevant circumstances and, as Mr Jarvis submitted, it is difficult to see, on the evidence before the judge, how a finding could have been made that the impact of deportation on the appellant's partner was 'unduly harsh'.

22. As regards the third ground of appeal, namely a failure by the judge to undertake an Article 8 analysis outside the immigration rules, I agree with Mr Jarvis' submission that it is simply wrong in law to require a further assessment outside section 117C of the NIAA 2002. Mr Jarvis' submissions at [16] refer to the relevant caselaw in that regard. The correct test was whether there were

very compelling circumstances, over and above those in the exceptions 1 and 2, outweighing the public interest in deportation, and the judge properly found, for the reasons cogently given at [20], that there were none. On the evidence before the judge, and for the reasons given above in regard to the questions of 'very significant obstacles' and 'unduly harsh', that was a conclusion fully and properly open to him.

23. For all of these reasons I find no errors of law in the judge's approach to the relevant statutory provisions in section 117C of the NIAA 2002, in his application of the relevant tests to the evidence, and in the conclusions that he reached.

DECISION

24. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeal stands.

Signed: S Kebede Dated: 17 July 2020
Upper Tribunal Judge Kebede