Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11962/2018

THE IMMIGRATION ACTS

Heard remotely at Field House
On 29 January 2021 ***via Skype for Business***

Decision & Reasons Promulgated
On 17 March 2021

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

NICHOLAS NIGEL WILSON
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M. Zahab Jamali, Counsel, instructed by Burney Legal Solicitors

For the Respondent: Ms A. Everett, Senior Home Office Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has been consented to / not objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

The documents that I was referred to are in the bundles from before the First-tier Tribunal, and the grounds of appeal, the contents of which I have recorded.

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The order made is described at the end of these reasons.

The parties said this about the process: they were content the proceedings had been conducted fairly in their remote form.

1. This is an appeal against a decision of First-tier Tribunal Judge Thew dismissing an appeal brought by the appellant, a citizen of Jamaica born on 24 February 1996, against a decision of the respondent to refuse his asylum and human rights claim and deport him from the United Kingdom.

Factual background

2. The appellant arrived in this country in April 2002 aged six, on a visitor's visa. He has remained here ever since. On 8 July 2015, he was sentenced to 18 months' detention for the possession of cocaine, and to 3 months' detention for resisting or obstructing a police officer, to run concurrently. The appellant now faces deportation for those offences. The procedural history to the Secretary of State's attempts to deport him is complex and need not be stated here. It will be sufficient to state that, on 28 September 2018, the Secretary of State refused his protection and human rights claim made to resist deportation. It was that decision that was under appeal before Judge Thew.

3. The appellant's asylum claim was advanced on the basis he faced being persecuted as a member of the particular social group "deportees in Jamaica". The judge rejected his appeal on that basis, and there is no challenge to that aspect of her reasoning.

4. Before the First-tier Tribunal, the appellant is said to have "accepted" that neither of the exceptions to the public interest in deportation contained in section 117C(4) or (5) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") were engaged. His submissions contended that there were "very compelling circumstances" over and above those exceptions arising from the length of his residence in this country, the best interests of his step-siblings, who were children at the time, and that there would be a risk of Article 3 ECHR mistreatment upon his return.

5. As of 25 February 2020, the appellant is not recorded as having committed any further offences: see [16] of the judge's decision.

6. After having considered the appellant's family and private life in this country, which had been established through living with his stepmother as his father was in prison and he lost contact with his mother, the judge addressed the public interest in the appellant's deportation. At [42], the judge took into account the fact the appellant had only a single conviction for two offences and had not reoffended since. She noted the observations of the sentencing judge that the appellant had demonstrated a determination to overcome his drug use. He was a low risk of reoffending.

7. At [44], the judge noted the appellant's poor immigration history, but attached little weight to it, as the appellant had been a child for most of the time he had been here unlawfully. The judge outlined two Court of Appeal authorities addressing the

position of the appellant's relationship with his stepsiblings, finding that, despite the impact of the appellant's deportation on them, it would not be "unduly harsh" for the appellant to be deported as far as they were concerned. The appellant would not present any real risk of suicide, contrary to a suggestion that had been made in the OASyS report prepared as part of the criminal proceedings [49].

8. At [50], the judge said:

> "I take into account the length of time that he has been in the UK including all of his adult life. His separation from his stepmother and her family members if deported will undoubtedly hit him hard emotionally and he would no longer have the support of adults who have been significant in his life in the UK."

9. She continued at [51]:

> "Whilst there is a background cultural connection with Jamaica, I take into account that he has lived in the UK since the age of six and there is no evidence of any family members to assist him in Jamaica, it being unclear as to whether his mother is still there. He is now an adult aged 24 and he would have to make an entirely new life there for himself. I have no doubt that it will be far from easy for him to do so and will most likely involve considerable hardship."

10. At [52], the judge said she had undertaken a proportionality "balancing exercise", concluding that his deportation would be proportionate. His offending was serious, and to the extent deportation would break up the appellant's family relationships, that was an inevitable "and in this case a necessary" consequence of his actions. She added:

> "I find that whilst the consequences of his removal will be harsh both on him and his family members the evidence before me does not establish that the consequences will be either unduly harsh or very compelling. I recognise that there will be significant obstacles to his integration into the life in Jamaica, but I conclude that those obstacles do not reach the threshold of being very significant obstacles."

11. The judge found the decision to deport the appellant to be proportionate and dismissed the appeal.

Permission to appeal

12. The grounds of appeal are twofold.

13. First, the judge is said to have "failed to properly consider/give rational weight to material factors", namely the harsh consequences to the appellant of deportation.

14. Secondly, the grounds contend that it was irrational for the judge to place little weight out of the fact the appellant "committed a crime out of necessity".

15. Permission to appeal was granted by Upper Tribunal Judge Kamara on the basis that it was arguable that the judge's consideration of the appellant's lack of ties to Jamaica

was flawed. She also considered that insufficient consideration was given to the circumstances which led to the appellant's offending.

Submissions

16. Developing ground 1, Mr Jamali submits that the judge placed insufficient weight on the absence of family or social ties in or to Jamaica, especially given the appellant left the country when he was aged six. That was an important factor in light of the moveable public interest in deportation, as underlined by Akinyemi v Secretary of State for the Home Department [2019] EWCA Civ 2098 at [45] and following. There, the then Senior President of Tribunals ascribed significance to the fact that section 117C(2) of the 2002 Act provides that: "The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal".

17. Mr Jamali also submits that the judge was required to, but did not, address whether the appellant would be able to integrate in Jamaica, pursuant to Kamara v Secretary of State for the Home Department [2016] EWCA Civ 813; [2016] 4 WLR 152. At [14], Sales LJ, as he then was, said:

> "In my view, the concept of a foreign criminal's 'integration' into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of 'integration' calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

18. Mr Jamali submits that there was simply no consideration of these matters. The judge's enigmatic reference to the appellant's "background cultural connection with Jamaica" was an insufficient basis to conclude that the judge had assessed the full spectrum of matters related to the appellant's prospective (or lack thereof) integration in Jamaica. The judge accepted that deportation would be hard; "he would have to make an entirely new life there for himself", which would be "far from easy" and would "most likely involve considerable hardship" [51]. She accepted at [52] that there would be "significant" obstacles to his integration, albeit not *very* significant obstacles to his integration.

19. Ms Everett submits that the term "background cultural connection" does not simply mean, for example, ethnic ties, but encompasses the fact the appellant was raised in this country in a Jamaican household, and was surrounded by members of the Jamaican diaspora. Although the reasoning is brief, she accepts, the judge nevertheless had regard to all relevant factors, and reached a decision that was open to her on the facts.

20. In relation to ground 2, Mr Jamali submits that the judge failed to ascribe the required significance to the fact that the appellant was only 19 years old at the time he was convicted. As recognised by the sentencing judge, he was then experiencing significant difficulties at home. He turned to those older than him for help and was pressurised into dealing drugs. It was the appellant who was the victim, he submitted. The circumstances of the offence call for the public interest in deportation to be calibrated downwards, given it was not for "pure financial gain to fund a luxurious lifestyle".

Legal framework

21. Under section 32(5) of the UK Borders Act 2007, the Secretary of State must make a deportation order in respect of a "foreign criminal". The principle does not apply if the removal of the foreign criminal in pursuance of the deportation order would breach that person's rights under the European Convention on Human Rights ("ECHR").

22. Section 117C(1) of the 2002 Act provides that the deportation of "foreign criminals" is in the public interest for the purposes of determining the proportionality of deportation under Article 8(2) ECHR. The appellant satisfies the definition of foreign criminal as he is not a British citizen, and has been convicted of an offence which led to a period of imprisonment of at least 12 months: see section 117D(2) of the 2002 Act.

23. The appellant's convictions fall into section 117C(3) of the 2002 Act; he has not been sentenced to a period of imprisonment of four years or more, with the effect that, if Exception 1 or 2 applies, his deportation will not be in the public interest. Those exceptions are:

> "(4) Exception 1 applies where—
>
> > (a) C has been lawfully resident in the United Kingdom for most of C's life,
> > (b) C is socially and culturally integrated in the United Kingdom, and
> > (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2."

24. Subsection (6) also applies to foreign criminals sentenced to less than four years' imprisonment, it has been held. The extent to which an individual satisfies the criteria in Exceptions 1 and 2, even if not meeting their requirements fully, is relevant

to the assessment of "very compelling circumstances…" See NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662.

Discussion

Ground 1 – failure "to properly consider/give rational weight to material factors"

25. Before addressing the substance of Mr Jamali's submissions, it will be helpful to recall the restraint with which this tribunal should approach the findings of the First-tier Tribunal. This ground of appeal challenges the weight ascribed by the judge to the evidence and her evaluation of that evidence. The appellant therefore invites me to stray into the territory which would ordinarily be the preserve of the first instance judge. Weight is a matter for trial judges, and an appeal lies to this tribunal only on the basis of an error of law, and not an error of fact or disagreement of weight. Of course, some findings of fact, and decisions as to weight, may be infected by an error of law, and properly be open to challenge on appeal. In relation to questions of weight, this tribunal looks to whether the decision of the First-tier Tribunal was rational, or properly open to it on the evidence before it.

26. It is also helpful to refer to the appellant's case as advanced before the First-tier Tribunal. The appellant's counsel before the First-tier Tribunal, Mr Jay Gajjar, accepted at [2] of his skeleton argument dated 17 February 2020 that the appellant did not rely on section 117C(4) or (5) of the 2002 Act. The skeleton argument conceded that paragraphs 399(a), (b) and 399A of the Immigration Rules were not met. On the appellant's behalf, Mr Gajjar advanced a three-limbed argument.

   a. First, there were "very compelling circumstances" militating against the appellant's deportation.

   b. Secondly, his removal would be contrary to the best interests of the appellant's children.

   c. Thirdly, the appellant would be at risk on return, and deportation would breach his Article 3 ECHR rights (which, at [5] of the skeleton argument, appear to be a term used as a proxy for the appellant's protection claim). The claimed "very compelling circumstances" included the fact the appellant's immigration history should not be held against him, given he was a child when he was arrived, and also related to the best interests of his step siblings. He was of good character before the index offences, did not have a strong relationship with his biological mother, had developed strong ties with the Scott/Wilson family in this country, and presented a low risk of reoffending. The OASys report suggested that there was a risk of suicide upon his return.

27. Significantly, there was no express challenge to deportation on the basis that the appellant would face "very significant obstacles" to his integration on his return. Mr Gajjar specifically eschewed reliance on section 117C(4) of the 2002 Act, which is the statutory source of the very provision Mr Jamali now contends the judge failed

properly to consider. Put another way, the challenge being advanced on appeal is an emphasis which did not feature in the appellant's case below.

28. It is against that background that I approach the decision of the First-tier Tribunal. In her analysis, the judge was clearly aware of the extent of the difficulties that would be encountered upon the appellant returning to Jamaica. She took those factors into account at [50] and noted the impact upon him of the lack the support he enjoys in this country upon his return to Jamaica. As Ms Everett submits, the reference to the "background cultural connection" with Jamaica must be read in the context of the facts of the case; the appellant had been raised within the Jamaican community, and would have been familiar with Jamaican culture. At [51], the judge's findings that establishing a new life for himself in Jamaica would be "far from easy" and would involve "considerable hardship" must be read as a whole: the judge found that the appellant *would* make a new life for himself in Jamaica, albeit with some difficulty. That is entirely consistent with finding, as the judge expressly reached at [52], that there would be no *very* significant obstacles to his integration in Jamaica. As Sales LJ said in Kamara:

> "It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use".

29. The judge considered the difficulties the appellant would encounter, and concluded that, although the obstacles to his integration would be "significant", they would not be *very* significant [52]. It is also important to recall the judge's unchallenged findings that the appellant would not be at risk upon his return to Jamaica as a returned deportee, and that he would not come to the adverse attention of gang members. Those unchallenged findings dealt dispositively with Mr Gajjar's Article 3-based submissions, and also form part of the factual matrix upon which the judge's consideration of the appellant's integration was based.

30. Another judge may have reached a different conclusion, but that is no basis for this tribunal to interfere with the judge's findings, which were open to her on the evidence, and sufficiently, if briefly, expressed. It cannot be said that no reasonable judge could have reached these findings. Ground 1 is a disagreement of weight and discloses no error of law.

31. Ground 2 similarly seeks to challenge the weight ascribed by the judge to the evidence she heard, this time to the case-specific public interest in the appellant's deportation. The appellant committed a serious offence at a young age, having moved here at an even younger age. The judge considered the Recorder's sentencing remarks, which themselves noted the difficult circumstances the appellant was in at the time of the offence. In that respect, the judge also noted that the Recorder had herself observed that many others in difficult situations would not, in contrast to this appellant, resort to dealing in Class A drugs. The judge in the First-tier Tribunal expressly recognised that it was to the appellant's credit that he had developed an awareness of his offending, and that he had taken steps to address his behaviour.

32. It is true that the public interest has a moveable quality, as held by the Senior President in Akinyemi at [39]:

> "The correct approach to be taken to the 'public interest' in the balance to be undertaken by a tribunal is to recognise that the public interest in the deportation of foreign criminals has a moveable rather than fixed quality. It is necessary to approach the public interest flexibly, recognising that there will be cases where the person's circumstances in the individual case reduce the legitimate and strong public interest in removal. The number of these cases will necessarily be very few i.e. they will be exceptional having regard to the legislation and the Rules."

33. However, the moveable quality of the public interest does not mean that this judge was *bound* to ascribe minimal weight to this appellant's offending, to the extent that a failure to do so was irrational. While it may have been open to the judge to ascribe reduced weight to the public interest in the appellant's deportation, she chose not to do so. That was an entirely rational decision.

34. The sentencing judge specifically noted that not all those facing the circumstances this appellant faced at the time would have turned to crime, and certainly not drug-related crime. The First-tier judge agreed. The appellant was not, for example, under pressure, or subject to intimidation or coercion falling short of duress, as many drugs offenders are. The suggestion that a different approach should have been adopted because the appellant acted out of necessity, or was not funding a lavish lifestyle, is simply a disagreement of weight. Another judge may not have adopted this approach. But the fact that this judge did does not take her decision into the territory of irrationality. Indeed, as the Senior President noted in Akinyemi, the number of cases in which the legitimate and strong public interest in the removal of foreign criminals will be reduced will be very few, and will be exceptional. It was not an error of law for this judge not to find anything exceptional in the circumstances of this appellant. This ground is without merit.

35. This appeal is dismissed.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law. This appeal is dismissed.

No anonymity direction is made.

Signed *Stephen H Smith* Date 9 March 2021

Upper Tribunal Judge Stephen Smith