IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-001857
First-tier Tribunal No: HU/21505/2018

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 31 July 2023

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

Secretary of State for the Home Department

Appellant

and

Erikson Domingo Gaspar
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr N Wain, Senior Home Office Presenting Officer
For the Respondent: Mr I Rica-Richardson, Counsel, instructed by Duncan Lewis Solicitors

Heard at Field House on 14 April 2023

DECISION AND REASONS

1. The appellant in the appeal before me is the Secretary of State for the Home Department ("SSHD") and the respondent to this appeal is Mr Gaspar. However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the FtT. I refer to Mr Gaspar as the appellant, and the Secretary of State as the respondent.

2. The appellant is a national of Angola. He arrived in the United Kingdom with his parents and siblings in July 2001 when he was almost 5 years old. Although a claim for asylum was refused, the family was granted

exceptional leave to remain until 22 August 2005. The appellant was subsequently granted indefinite leave to remain on 26 June 2007.

3. The appellant has a history of offending behaviour between 2013 and 2015 that I do not need to refer to at any length in this decision. For present purposes it is sufficient to record that the appellant was arrested in February 2015 and found to be in possession of a loaded handgun. On 14 May 2015 he was convicted at Blackfriars Crown Court for possession of a handgun contrary to s5 (1) Firearms Act 1968 and for possessing ammunition without a certificate contrary to Section 1 (1) (b) of the same Act. On 15 June 2015 the appellant was sentenced by His Honour Judge Blacksell QC to a term of six years imprisonment for being in possession of a handgun and a sentence of two years imprisonment, to run concurrently, for possession of ammunition.

4. The appellant was informed of his liability to deportation and following the consideration of representations made by the appellant, on 22 December 2016 the appellant became the subject of a deportation order. On 27 June 2018, the respondent served the appellant with a decision to refuse this human rights claim having concluded that none of the exceptions to deportation set out in s33 of the UK Borders Act 2007 apply. The appellant's appeal against that decision was eventually heard by First-tier Tribunal Judge Cary and allowed for reasons set out in a decision promulgated on 21 April 2022.

5. The respondent claims the decision of Judge Cary is vitiated by material errors of law. In summary, the respondent advances two grounds of appeal. First, in considering Exception 1, set out in s117C(4) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), the judge erroneously concluded the appellant is socially and culturally integrated in the United Kingdom and that there are very significant obstacles to the appellant's integration in Angola. Second, the erroneous consideration of the factors relevant to Exception 1 has infected the judge's consideration of s117C(6) of the 2002 Act and whether there are very compelling circumstances, over and above those described in Exceptions 1 and 2. The respondent claims the judge had regard to the conclusion of the Single Competent Authority that the appellant was the victim of modern slavery in the UK, however the judge failed to consider why the appellant failed before the criminal court to argue that coercion had taken place. The respondent claims that must diminish the weight to be placed in favour of the appellant. The respondent claims that although the conclusive grounds decision of the Single Competent Authority is relevant, it is not a trump card and Judge Cary fails to give adequate reasons for finding that it amounts to very compelling circumstances over and above Exception 1.

6. Permission to appeal was granted by Upper Tribunal Judge Macleman on 16 January 2023. He said:

> "2. Ground 1, alleging error on the private life exception to deportation, is misconceived. Judge Cary found the appellant to be integrated here, but there were no very significant obstacles to his integration in Angola. The exception was not established.

> 2. On ground 2, it is arguable that the decision at [111 -113] does not adequately explain how the threshold of "very compelling circumstances" over and above the statutory exceptions is reached."

The hearing before me

7. Mr Wain submits Judge Cary did not make an explicit finding as to whether there would very significant obstacles to the appellant's integration in Angola. He submits that at paragraph [106] of his decision, Judge Cary does not explain why the elevated threshold that requires something more that "mere inconvenience or upheaval" is met. He submits that in turn infects the judge's consideration of whether there are very compelling circumstances over and above Exception 1 for the purposes of s117C(6). He refers to paragraph [50] of the decision of the Supreme Court in HA (Iraq) v SSHD [2022] UKSC 22.

8. Mr Wain submits Judge Cary referred to the positive conclusive grounds decision that had been reached by the Single Competent Authority. He accepted at paragraph [76] that that there was no evidence that the possibility that the appellant could be the victim of modern slavery was considered by the Crown Court in 2015, but speculated as to what may have been raised and dealt with during a 'Newton hearing'. Mr Wain submits that here, Judge Cary adopts the fact that the Single Competent Authority acknowledged that the appellant had been a victim of exploitation in relation to his criminality from approximately 2013 to 2015, as a factor that reduces the weight of the public interest in the deportation of the appellant. Mr Wain accepts it is a relevant factor, but he submits, it is not conclusive and it is a factor to which Judge Cary attached undue weight.

9. Mr Wain submits Judge Cary acknowledged the relevant public interest considerations that are set out in s117C of the 2002 Act at paragraphs [108] and [109] of his decision, but he fails to give any adequate reasons as to how the relevant test is met. It was for the appellant to establish that there are very compelling circumstances, over and above those described in Exceptions 1 and 2, and at paragraph [113] of his decision, Judge Cary focuses upon a few aspects of the appellant's case that are more relevant to Exception 1, but without adequately explaining why there are very compelling circumstances over and above that.

10. In reply, Mr Ricca-Richardson submits that in essence the respondent's grounds amount to a challenge to the reasons given by Judge Cary and the Upper Tribunal should be slow to overturn a decision of the First-tier Tribunal where the decision is properly made and where the correct test is applied. Mr Ricca-Richardson submits that at paragraphs [85] to [90] of his decision, the judge correctly set out the relevant legal framework. He submits that at paragraph [102] of the decision Judge Cary gives a number of discrete reasons why he was prepared to accept that the appellant is socially and culturally integrated into the United Kingdom and they are based on the evidence before the Tribunal. At paragraphs [104] to [106] of the decision, Judge Cary carefully considered whether there would be very significant obstacles to the appellant's integration into Angola and in

reaching his decision, the judge drew upon the evidence of the appellant's mother, as recorded in paragraph [44], that if the appellant is removed to Angola she would go with him.

11. Mr Ricca-Richardson submits Judge Cary properly considered factors that are relevant to a proper consideration of Exception 1 and there is no proper basis upon which it can be said that the judge erred in his consideration of the relevant factors. As such the findings and conclusions do not infect the consideration of the real question for the judge, which was whether there are very compelling circumstances, over and above those described in Exception 1. He submits the criticisms made by the respondent are unfounded. Judge Cary had noted, at [71], the extensive evidence that was before the Single Competent Authority and at paragraph [74] he noted that reaching its decision the Single Competent Authority had considered a substantial amount of material including the sentencing remarks of His Honour Judge Blacksell QC. Judge Cary gave extensive reasons for agreeing with the conclusions reached by the Single Competent Authority and then explained the impact of that, as far as the public interest in removal of the appellant is concerned. Mr Ricca-Richardson submits Judge Cary had proper regard to the decision of the Single Competent Authority and acknowledged that he was not bound to follow the decision and did not treat that decision as a trump card. Judge Cary considered the relevant factors for himself on the basis of the evidence before Tribunal, giving proper consideration and due weight to the decision. Mr Ricca-Richardson submits Judge Cary followed a structured approach to the trafficking decision and explained why he would not go behind the findings of the Single Competent Authority. Judge Cary was entitled to consider the public interest in the appellant's removal as a foreign criminal is reduced by the assessment that it is more likely than not that his offending between 2013 and 2015 occurred as a result of exploitation by others for criminal purposes. He explained why this appeal may be one of those exceptional cases envisaged in Akinyemi.

Decision

12. Section 32 of the UK Borders Act 2007 defines a foreign criminal, as a person not a British citizen who is convicted in the UK of an offence and, inter alia, sentenced to a period of imprisonment of at least 12 months. Section 32(4) of the 2007 Act sets outs out the clear proposition that deportation of a foreign criminal is conducive to the public good. That is a statement of public policy enacted by the legislature, which the courts and tribunals are obliged to respect. Section 32(5) of the 2007 Act requires the Secretary of State to make a deportation order in respect of every foreign criminal, subject to the exceptions set out in section 33.

13. Part 5A of the Nationality, Immigration and Asylum Act 2002 NIAA 2002 informs the decision making in relation to the application of the section 33 exceptions. Section 117A in Part 5A provides that, when a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article 8, and, as a result, would be unlawful under section 6 of the HRA

1998, the court, in considering the public interest question, must (in particular) have regard to the considerations listed in section 117B and, additionally, in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C. Section 117C specifically deals with the weight to be attached to the public interest in deporting foreign criminals and provides a structure for conducting the necessary balancing exercise, dependent in part, on the length of sentence imposed.

14. Judge Cary set out the appellant's immigration history at paragraph [2] of his decision. The appellant's offending is carefully set out at paragraphs [3] to [8] of the decision. He noted, at [14] that rather late in the day, on 17 May 2015, the appellant was referred to the National Referral Mechanism by the Home Office as a potential victim of traffic and modern slavery in relation to his offending from 2013 to 2015. A positive reasonable grounds decision was made on 21 May 2021 followed by a positive conclusive grounds decision on 4 January 2022. At the hearing of the appeal the Tribunal heard oral evidence from the appellant, his partner Cherelle Fox, his mother Elsa Domingo, and the appellant's brother Yuri Da Cunha, that is all set out at paragraphs [17] to [49] of the decision.

15. Judge Cary considered the decision of the Single Competent Authority and at paragraph [75] he said:

> "I therefore approach this appeal on the basis that the Appellant is entitled to be recognised as a victim of modern slavery in relation to his "criminality in the UK from approximately 2013 to 2015" which was said by the SCA to have been "forced" and was categorised as exploitation. I see no reason to disagree with the reasoned findings of the SCA particularly as there in no real challenge to those findings in the supplementary refusal letter."

16. There is in my judgement no merit to the respondent's claim that Judge Cary failed to consider why the appellant failed before the criminal court to argue that coercion had taken place. At paragraph [76], Judge Cary accepted there was no evidence that the possibility that the appellant could be the victim of modern slavery was considered by the Crown Court in 2015. He did not have a transcript of the 'Newton Hearing' and was therefore unaware of the matters dealt with at that hearing. The referral by the to the National Referral Mechanism by the Home Office that the appellant may be a potential victim of traffic and modern slavery in relation to his offending from 2013 to 2015 was not made until 17 May 2021. At paragraph [76], Judge Cary explained that the defence provided by s45 of the Modern Slavery Act 2015 did not apply to offences committed before 31 July 2015 and in any event, would not have applied to the particular firearms offences the appellant faced. He also noted that at the time the appellant appeared in the Crown Court he was still then only aged 18. I am satisfied Judge Cary had regard to relevant matters and gave adequate reasons for the approach he adopted.

17. Judge Cary found, at [77], that the claim by the appellant under the refugee convention cannot succeed. He also found, at [78], that there is no breach of Article 4 ECHR. At paragraph [84] he said that he did not

accept it is reasonably likely that the appellant will be at risk of suicide if removed. None of those findings and conclusions are challenged by the appellant. Having addressed those matters, Judge Cary went on to address the appellant's Article 8 claim.

18. There is no doubt the appellant is a 'foreign criminal' as defined in s117D. Applying s117C(6) of the 2002 Act, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

19. It is now well established that it will often be sensible first to see whether the case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are "very compelling circumstances, over and above those described in Exceptions 1 and 2" as is required under s117(6). Judge Cary noted at paragraph [92] of his decision that in view of the sentence received by the appellant in June 2015 neither Exception 1 nor 2 applies directly although both have a part to play in an assessment under s117C (6).

20. Judge Cary found that the appellant has established some form of family life in the United Kingdom with his immediate family and Ms Fox. He accepted the appellant has a genuine and subsisting relationship with Ms Fox, and although the judge accepted the appellant's removal will have a significant impact on Ms Fox, he did not accept it would be unduly harsh for Ms Fox live in Angola with the appellant or for her to remain in the United Kingdom without the appellant. Judge Cary was not satisfied that Exception 2 applies.

21. As far as Exception 1 is concerned, Judge Cary found the appellant has been lawfully resident here for most of his life. He found the appellant is socially and culturally integrated in the United Kingdom for reasons set out in paragraphs [101] and [102] of the decision.

22. I reject the respondent's claim that Judge Car erred in finding the appellant is socially and culturally integrated in the United Kingdom. Whether a foreign criminal is socially and culturally integrated in the United Kingdom is to be determined in accordance with common sense. The fact that the appellant has been sentenced to a period of imprisonment is relevant but it is only one relevant factor. Judge Cary was entitled to have regard to the fact that the appellant has lived here since he was 4 and was educated here. The judge accepted criminality can impact on integration, but he was entitled, on the particular facts and circumstances here to have regard to the fact that appellant's offending occurred as a result of exploitation. Judge Cary noted the appellant has been able to resume his links since his release in June 2018 some 4 years ago. He has not offended since then and that judging from the references to be found in the appellant's bundles he has various friends here. He

noted the appellant is able to speak the language. He also noted that although the appellant is not working, he has worked in the past and there is no reason to believe he will not be able to do so in the future if his immigration status is regularised. It was open to the judge to conclude on the facts that the offending was not sufficient to break the appellant's links to society and culture in the United Kingdom for the reasons he set out.

23. Although not expressly stated, it is clear that the judge found, for the reasons he set out at paragraph [106] that there would be very significant obstacles to the appellant's integration into Angola. In reaching his decision, Judge Cary had properly directed himself to the relevant test and threshold and in my judgement gave adequate reasons for the conclusion he reached.

24. As Judge Cary noted at paragraph [107] of his decision that was not the end of the matter since section 117(c)(6) of the 2002 Act provides that in the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, as here, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

25. In the decision of the Supreme Court in HA (Iraq), Hamblen LJ said:

> "48. In Rhuppiah v Secretary of State for the Home Department [2016] 1 WLR 4203 *at para 50* Sales LJ emphasised that the public interest "requires" deportation unless very compelling circumstances are established and stated that the test "provides a safety valve, with an appropriately high threshold of application, for those exceptional cases involving foreign criminals in which the private and family life considerations are so strong that it would be disproportionate and in violation of article 8 to remove them."

26. He went on to say:

> "50. How Exceptions 1 and 2 relate to the very compelling circumstances test was addressed by Jackson LJ in NA (Pakistan). In relation to serious offenders he stated as follows:
>
> > "30. In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute 'very compelling circumstances, over and above those described in Exceptions 1 and 2', whether taken by themselves or in conjunction with other factors relevant to application of article 8."
> >
> > ...

He also emphasised the high threshold which must be satisfied:

"33. Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient."

“51. When considering whether there are very compelling circumstances over and above Exceptions 1 and 2, all the relevant circumstances of the case will be considered and weighed against the very strong public interest in deportation. As explained by Lord Reed in *Hesham Ali* at paras 24 to 35, relevant factors will include those identified by the European Court of Human Rights ("ECtHR") as being relevant to the article 8 proportionality assessment. In *Unuane v United Kingdom (2021) 72 EHRR 24* the ECtHR, having referred to its earlier decisions in *Boultif v Switzerland (2001) 33 EHRR 50* and *Üner v The Netherlands (2006) 45 EHRR 14* , summarised the relevant factors at paras 72-73 as comprising the following:

"• the nature and seriousness of the offence committed by the applicant;

• the length of the applicant's stay in the country from which he or she is to be expelled;

• the time elapsed since the offence was committed and the applicant's conduct during that period;

• the nationalities of the various persons concerned;

• the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;

• whether the spouse knew about the offence at the time when he or she entered into a family relationship;

• whether there are children of the marriage, and if so, their age; and

• the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.

• the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and

• the solidity of social, cultural and family ties with the host country and with the country of destination."

52. The weight to be given to the relevant factors falls within the margin of appreciation of the national authorities. As Lord Reed explained in *Hesham Ali* at para 35:

"35. While the European court has provided guidance as to factors which should be taken into account, it has acknowledged that the weight to be attached to the competing considerations, in striking a fair balance, falls within the margin of appreciation of the national authorities, subject to supervision at the European level. The Convention on Human Rights can thus accommodate, within limits, the judgments made by national legislatures and governments in this area."

27. At paragraph [6], Judge Cary had already referred to the index offences and the description of the sentencing judge that they were 'very serious'. At paragraph [108] he reminded himself of the high public interest in deporting foreign criminals as emphasised in s117C of the 2002 Act. The judge did not in my judgment treat the decision of the Single Competent Authority as a trump card. The weight to be attached in this particular appeal to that decision was a matter for the judge and I reject the claim that he attached undue weight to it. The background to the appellant's offending between 2013 and 2015 was clearly relevant and the decision of the Single Competent Authority put the offending in context. It was a relevant factor albeit not conclusive. At paragraphs [109] to [113] of the decision the judge had regard to all relevant factors and Judge Cary was satisfied that the culmination of all the factors in the appellant's favour mean that the appellant makes out the very compelling circumstances threshold.

28. The assessment of an Article 8 claim such as this and the consideration of whether deportation is proportionate, is always a highly fact sensitive task. The findings and conclusions reached by Judge Cary were in my judgment, neither irrational nor unreasonable in the Wednesbury sense, or findings and conclusions that were wholly unsupported by the evidence. They were based on the particular facts and circumstances of this appeal and the strength of the evidence before the Tribunal. Where a judge applies the correct test, and that results in an arguably generous conclusion, it does not mean that it was erroneous in law.

29. It follows that in my judgment the decision of First-tier Tribunal Judge Cary is not vitiated by a material error of law and his decision to allow the appeal stands.

Notice of Decision

30. The respondent's appeal is dismissed.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

12 July 2023