



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/05342/2017

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice, Belfast  
On 4 April 2019

Decision & Reasons Promulgated  
On 20 May 2019

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

CHILINDA FULA  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S McTaggart, instructed by Andrew Russell & Co Solicitors  
For the Respondent: Mr M Mathews, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Zambia where he currently resides and where he was born in 1994. He came to the United Kingdom with his mother in December 2005 where she has worked as a nurse. They were granted settled status on 9 November 2010.
2. On 7 February 2013 the appellant was convicted at Downpatrick Crown Court of causing death by dangerous driving for which he was sentenced to a custodial sentence of five years and ten months, with half to be served on licence.
3. On 10 September 2015 the Secretary of State made a deportation order as she was required to pursuant to section 52(5) of the UK Borders Act 2007. The Secretary of State also certified the appellant's human rights case under section 94B of the Nationality, Immigration and Asylum Act 2002 which resulted in the appellant only being able to bring his appeal once he had left the United Kingdom. The appellant

chose not to give evidence by video-link but relied instead on a written statement. The judge however heard evidence from the appellant's mother. His factual conclusions were set out in paragraphs 48 to 50 of his decision.

4. The case put by the appellant was that he first lived with his uncle and now with his aunt in Zambia where he feels very much an outsider. He finds life difficult because his qualifications were not recognised and the process of endeavouring to convert them is expensive and bogged down by bureaucracy. Because he does not know anyone, he is not able to get employment and is in limbo. He is able to keep contact with his mother and fiancée through WhatsApp. They visited him in 2017.
5. The judge's application of his findings of fact to the law was focused on Part 5A of the 2002 Act. He explained at paras [51] to [53]:
  - "51. Exception 1 (4) (c) requires "very significant obstacles" and that denotes a high threshold. Life in Zambia may be less congenial than County Down but the evidence does not permit a finding that he is facing very significant obstacles to integration. She said, "he is coping, he is trying to cope."
  52. For these reasons I find the appellant does not meet the provisions of Exception 1 which apply to a medium offender.
  53. In the case of a serious offender, being the appellant, the public interest requires deportation unless there are very compelling circumstances - over and above - those described in Exceptions 1 and 2."
6. After making a further reference to *NA (Pakistan) v SSHD* [2016] EWCA Civ 662 (it had been earlier referred to in his decision), the judge explained at paragraph 56:
  - "56. Mr McTaggart at paragraphs 6 to 13 of his skeleton argument identifies what he considers to be very compelling circumstances but the assessment of the matters he identifies only come into play, if they come into play at all, when he can satisfy the Exception 1 provisions. Furthermore, even a bare compliance with Exception 1 per Jackson LJ in *NA (Pakistan)* does not permit a description of the situation as amounting to very compelling circumstances."
7. In respect of the appellant's fiancée, the judge explained at para [57]:
  - "57. I have considered the evidence of Ms Tremers. I have no reason to doubt anything she says. The relationship only began after the deportation order had issued and which had the effect of cancelling the appellant's ILR in the UK. Whilst it is unfortunate that the couple have not been able to conduct their relationship in the way they wish to do so I am not persuaded a boyfriend/girlfriend relationship of some 24 months duration and developed in these circumstances is a matter of great weight in the assessment."
8. The grounds of challenge are succinctly argue errors by the judge at [56] and [53] to [58] and assert a misinterpretation of the caselaw.
9. At the hearing before me, Mr McTaggart argued that with reference to para [56], the judge had imposed an additional burden which rendered the decision unlawful. Mr

Mathews submitted that the relationship between the appellant and his partner had developed in January 2016 after the Secretary of State's decision but the judge had nevertheless taken it into account. He contended that the judge had made careful findings based on exception 1 as to the appellant's private life and had taken his integration (in Northern Ireland) into account. What was left was not a great deal and it did not come anywhere near the threshold the appellant was required to meet. It was open to the judge to consider the case on an initial basis under the exceptions in section 117C and having regard to all the relevant factors capable of being relied on over and above the exceptions this was not a case that could have succeeded. By way of response, Mr McTaggart pointed to his submissions before the FtT in which it was acknowledged the exceptions in s.117C could not be made out. The judge had misdirected himself as to the law and failed to apply all the relevant factors; this was a case that could have gone either way.

10. Neither party had any additional submissions to make in the event that I set aside the decision other than Mr Mathews reiterating that the case did not come anywhere near the threshold. Mr McTaggart accepted that no application had been made under rule 15(2A) in relation to new evidence that had been provided to him only recently and did not seek to rely on that. He explained that the appellant and his partner had now recently married in Lusaka.
11. My reading of para [56] of the decision indicates that before examining whether there were very compelling circumstances, the judge first considered whether a case was made out under Exception 1. He was correct to do so having regard to the principal plank of the appellant's case being private life as enjoined by Jackson LJ in *NA (Pakistan)* at para [37]:

"37. In relation to a serious offender, it will often be sensible first to see whether his 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 section 117C(6). It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6)."

12. Earlier Jackson LJ explained how "very compelling circumstances" were to be approached in para [28] *ff*:

"28. The next question which arises concerns the meaning of "very compelling circumstances, over and above those described in Exceptions 1 and 2". The new para. 398 uses the same language as section 117C(6). It refers to "very compelling circumstances, over and above those described in paragraphs 399 and 399A." Paragraphs 399 and 399A of the 2014 rules refer to the same subject matter as Exceptions 1 and 2 in section 117C, but they do so in greater detail.

29. In our view, the reasoning of the Court of Appeal in *JZ (Zambia)* applies to those provisions. The phrase used in section 117C(6), in para. 398 of the 2014 rules and which we have held is to be read into section 117C(3) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that "there are very compelling circumstances, over and above those described in Exceptions 1 and 2". As we have indicated above, a foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paras. 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.
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.
31. Any interpretation of the relevant phrase to exclude this possibility would lead to violation of Article 8 in some cases, which plainly was not Parliament's intention. In terms of relevance and weight for a proportionality analysis under Article 8, the factors singled out for description in Exceptions 1 and 2 will apply with greater or lesser force depending on the specific facts of a particular case. To take a simple example in relation to the requirement in section 117C(4)(a) for Exception 1, the offender in question may be someone aged 37 who came to the UK aged 18 and hence satisfies that requirement; but his claim under Article 8 is likely to be very much weaker than the claim of an offender now aged 80 who came to the UK aged 6 months, who by dint of those facts satisfies that requirement. The circumstances in the latter case might well be highly relevant to whether it would be disproportionate and a breach of Article 8 to deport the offender, having regard to the guidance given by the ECtHR in *Maslov v Austria* [2009] INLR 47, and hence highly relevant to whether there are "very compelling circumstances, over and above those described in Exceptions 1 and 2."
13. Where the judge erred in my judgment was not to go on to consider whether there were Exception 1 factors of such force in themselves or considered with other factors not captured by Exception 1 that satisfied the test of "very compelling". This was not an error of the wrong approach but a failure to complete the exercise required.
14. Mr McTaggart argued that there were factors that the judge had not taken into account with reference to his skeleton argument which included:

- (i) At the time of the index offence the appellant would have been just eligible to apply for citizenship. Such an application if pre-offence would prima facie have been granted.
- (ii) The appellant had attended secondary school here and had shown remorse in many ways by meeting a family of the bereaved, being a model prisoner and speaking to other young people through a group called Radar to discourage them from doing similar things.
- (iii) The appellant had a good immigration history during his formative years in the United Kingdom.
- (iv) He spoke English fluently and was well integrated into society and would be ready and willing and able to work.
- (v) His engagement to a British/Irish national living in the UK.
- (vi) The appellant had been unable to gain proper employment due to difficulties having his qualifications recognised in Zambia and also due to cronyism and corruption that existed there.
- (vii) In addition to his fiancée the appellant enjoyed a particularly close bond with his mother which went beyond normal emotional ties.

15. The findings by the First-tier Tribunal on the facts were as follows:

- “48. There is no diary of events recording what has happened to him since returning to Zambia. There is no photographic evidence to prove his living conditions: the property of his aunt and uncle. He produced no evidence to show what steps he has taken to register any qualifications he has. There is no evidence of educational or occupational opportunities in Zambia and what efforts he has made to undertake such, or at the very least investigate whatever is available. There is no account of how the substantial sum of £5333 sent by his mother in the first six months of this year has been spent. Neither is there any evidence of housing costs or the availability or otherwise of rented accommodation. There is no evidence of the two occasions on which his mother said he was robbed.
- 49. The social background of his mother, uncles and aunt shows they come from a generation of individuals who have been able, for the most part, to access education and occupational opportunities in Zambia and I am satisfied they would be able to provide him with mentoring and support and to advise him on how they were able to progress.
- 50. I have considered this mother’s evidence. I am afraid I did not find her evidence straightforward. Most of what she said I have no difficulty in accepting. However, her explanation for his inability to register his qualification and the fee allegedly sought was vague. She is in frequent contact with him by electronic means and yet there is no solid evidence of what his difficulties are in participating in life in Zambia on a day to day basis.”

16. Earlier in his judgment, the judge took into account the appellant's remorse and meeting with his victim's family, and also his low risk of re-offending. In my judgment he was correct to conclude without error that the appellant was unable to come within Exception 1. Had he proceeded to complete the task before him, in the light of the findings made and the evidence which is not in dispute, there are no factors which fell for consideration under Exception 1 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 Exception 1. In the light of the evidence before the judge, had he completed what was required in this case, there was only one rational answer. Although I am satisfied the judge erred in law, the appeal could not have succeeded.
17. This appeal is dismissed.

Signed

Date 1 May 2019

*UTJ Dawson*

Upper Tribunal Judge Dawson