



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/15509/2018

THE IMMIGRATION ACTS

**Field House
On 23rd April 2019**

**Decision & Reasons Promulgated
On 29th April 2019**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**PRAKASH [G]
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Ms P Woodrow, of Counsel, instructed by JBR Morgan Solicitors

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Kenya. He probably arrived in the UK in 2004 shortly before his 18th birthday having been granted leave to enter to accompany his parents who were settled in the UK. He was granted indefinite leave to remain on 20th September 2006. He was convicted of a series of criminal offences between January 2008 and March 2018

which include six offences against the person, two offences against property and three public order offences. As a result he received a number of community orders but also three sentences of imprisonment, the longest being for 20 weeks. He was served with a notice to provide reasons why he should not be deported in April 2018, and a decision was made that he should be deported on 17th July 2018 which set out why it was not accepted that he had human rights grounds for resisting deportation. His appeal against the decision was allowed by First-tier Tribunal Judge O'Hagan in a determination promulgated on the 7th November 2018.

2. Permission to appeal was granted by Judge of the First-tier Tribunal O'Keeffe on 21st November 2018 on the basis that it was arguable that the First-tier judge had erred in law in failing to consider whether very compelling circumstances existed when allowing the appeal.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

4. The Secretary of State's grounds of appeal set out that the First-tier Tribunal found the claimant was a persistent offender at paragraphs 62 and 63, and so his deportation is conducive to the public good. It was not accepted that he had subsisting relationship with his partner at paragraphs 76 to 77. His appeal therefore depended on his private life ties with the UK. It was accepted that he could not meet the requirements of s.117C(4) of the 2002 Act or paragraph 399A of the Immigration Rules as the claimant had not been legally present in the UK for half of his life. It is argued firstly by the Secretary of State that the First-tier Tribunal misdirected itself in applying a test of whether his deportation would be unduly harsh at paragraph 88 of decision, and in finding that very significant obstacles to integration sufficed alone to find that the claimant's deportation was disproportionate.
5. Secondly it is argued in the grounds of appeal that there was a failure to give adequate reasons as to why the claimant would have problems re-integrating into Kenyan society when it was found he would be familiar with the culture, society and language at paragraph 84. The expertise of the social worker to conclude that the claimant does not function as an adult is questioned, and it is argued that the report in any case gives no reasons as to why this is the case, and consideration is not given as to whether the claimant simply needs to stop drinking alcohol as the evidence is that whilst he was in prison he was able to do work and found to be trustworthy, see paragraph 11 of the decision. There was a failure to consider whether the claimant would address his alcoholism and lead a productive life in a new environment. It was wrong to treat the visit to Kenya as evidence that the claimant would not find work as the claimant may have viewed the trip as a holiday and had no incentive to find work. Even if the claimant is immature this might not

be reason in itself why he would become destitute in Kenya as it might not mean he would not find work. Further, insufficient reasons are given for the finding that being a single man without family and having epilepsy (which is said to be linked to accusations of witchcraft in Kenya) would make him stand out and constitute very significant difficulties to integration, particularly as there was no evidence that he would not be able to access the medication he uses to control his epilepsy in Kenya.

6. Mr Clarke made further oral submissions that the First-tier Tribunal Judge erred in law by failing to look at the possibility of the claimant giving up alcohol or having therapy to address his alcoholism if he were returned to Kenya as this had been possible in prison. He submitted that this was an issue which required consideration before it could be concluded that there were very significant obstacles to integration on return to Kenya.
7. Ms Woodrow argues, in summary, in her skeleton argument and oral submissions that there is no material error of law as the First-tier Tribunal applied the correct test in substance as importance and weight was given to the public interest in deportation and a balance sheet Hesham Ali approach was conducted to assess whether the claimant's deportation was proportionate, and there was reference to the "very compelling circumstances" test under the Immigration Rules in the record of the submissions of the parties. It is argued that it was clearly correct that the circumstances the claimant would find himself in if returned to Kenya went beyond very significant obstacles to integration because he would be destitute without family support and ostracised due to prejudicial attitudes to his epilepsy, his Indian ethnicity and his lack of family support. He is suffering from 8 to 10 epileptic seizures a month on his current medication, and has needed hospital admission and been unable to work as a result of this medical problems in the past. This, added to his alcohol addiction, learning difficulties and other mental health problems which include admission to hospital for overdoses, depression and anxiety lead to a conclusion that he is a deeply vulnerable young man and not a functioning adult, and in turn entirely justify allowing the appeal as there are very compelling circumstances over and above those set out in the exceptions to deportation.
8. I informed the parties that I found that the First-tier Tribunal had erred in law by applying the wrong legal test but had not erred in law in making any of the factual findings. My reasoning for this decision is set out below. As a result it was agreed that we would remake the appeal by way of submissions based on the findings of the First-tier Tribunal. It was agreed that there were no significant factual changes in the claimant's situation: the only new development was one which only had potential peripheral importance to the decision-making and related to the claimant's mother having a diagnosis of lung fibrosis. The parties were given 15 minutes to prepare for making submissions for the

remaking hearing. I have not set out their submissions but have dealt with the points made in my “*Conclusions – Remaking*” section of this decision.

Conclusions – Error of Law

9. The First-tier Tribunal correctly makes findings about the seriousness of the offences the claimant was convicted of, and makes an unchallenged finding that they are at the lower end of the spectrum, see first guidance point in MS (s.117C(6): “very compelling circumstances”) Philippines [2019] UKUT 00122.
10. However, there is a failure to make it clear that a test of “very compelling circumstances over and above those in the Exceptions” applied from the point at paragraph 79 of the decision where it was found that the claimant could not meet the Immigration Rules exceptions/ s.117C exceptions to deportation. Instead an erroneous “unduly harsh” test is employed, and this is set out again in the conclusion at paragraph 88. I find that this was a material misdirection of law, and as a result the appeal will need to be remade as it cannot be certain that the outcome of the appeal would be the same if the correct test was applied to the findings of fact.
11. I do not find that the First-tier Tribunal has erred in the ways contended in the second ground of appeal, where it is said that there was a failure to give adequate reasons for findings in a number of contexts. The assessment of social work evidence at paragraphs 80 to 81 is very fair, astute, and well-reasoned and ultimately the First-tier Tribunal only accepts the picture in the social work report as it is the same that has emerged from the other evidence. The First-tier Tribunal Judge makes a fair and careful assessment of the claimant’s likely understanding of life in Kenya at paragraph 84. It was undoubtedly reasonable, in the context of the evidence, for the First-tier Tribunal to find that the claimant is an immature man who is alcohol dependent but has family support in the UK but not in Kenya at paragraph 85 of the decision. The assessment of the expert report of Mr Aguilar at paragraph 86 of the decision is also reasoned, particularly in the absence of any challenge to the reliability of that report in the submissions made by the respondent at the First-tier Tribunal, and it was rationally found that the appellant would be vulnerable to threats due to witchcraft as a result of his being epileptic particularly as he would be likely to be living with poorer and less educated people in Kenya due to his destitution.
12. There was no reason why the First-tier Tribunal should have considered that being returned to Kenya would be equivalent to being in prison, and that it would prevent the claimant having access to alcohol and thus induce him to address his addiction and improve his ability to cope with life. This was not a submission made by the Secretary of State at

the First-tier Tribunal. It was in fact the submission of the Secretary of State that the claimant remained an alcoholic who was not addressing his condition through therapeutic programmes in the four months after being released from prison, and this was the finding of the First-tier Tribunal as set out at paragraph 54 of the decision.

13. The findings regarding the claimant's epilepsy are very well reasoned at paragraph 47. There is reference to the medical letters and records at pages 54 to 339 of the appellant's bundle, and good reasoning for the finding that his medication had been doubled and that as a result that the epilepsy was not well controlled, and that this had a likely relationship with the alcoholism. The claimant, who gave his own evidence about his medical condition, said he has between 8 and 10 seizures a month and was found to be an open, candid and generally honest witness at paragraph 42 of the decision.
14. In the context where the claimant is found, with reasons, to be an immature alcoholic suffering from badly controlled epilepsy without any Kenyan family support and with his memory and cognition having been impaired by his alcohol abuse, and where it is found that his family could not afford to support him in any substantial way in Kenya the finding that the claimant would be likely to become destitute if returned to his country of origin was a rational and reasoned one. There was no evidence that since he became an alcoholic in the UK in approximately 2008 he had managed to accommodate and support himself in this country, and so despite having knowledge of Kenyan society acquired by his life there between the age of 4 and 17 years, as set out at paragraph 84 of the decision, there was no reason to think he would be able to avoid destitution on return given a lack of any state safety net system.

Conclusions - Remaking

15. The issue of whether there are very compelling circumstances over and above those described in the exceptions to deportation is not a "hard-edged test" but a "wide-ranging evaluative exercise" which must ensure that the result of an appeal is compatible with the UK's obligations under Article 8 ECHR, see paragraph 16 of MS. As set out in NA (Pakistan) & Anor v SSHD [2016] EWCA Civ 662 at paragraph 33, there is no requirement of exceptionality but: "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." It is a very demanding test. As set out by the Supreme Court in Hesham Ali the best approach to determine an appeal is one employing a balance sheet setting out the factors in favour and against the deportation of the appellant, and then coming to a conclusion on the proportionality of his deportation, in this case applying the test of requiring "very compelling circumstances" to make his deportation disproportionate.

16. I start by setting out the factors in favour of the claimant's deportation. I place the finding of the First-tier Tribunal Judge that the claimant's offending is at the lower end of the spectrum and is likely to remain at that level and not escalate (a fact which is supported by the claimant not having any further convictions over the past 11 months since he was released from prison) into the balance, as the seriousness of his convictions are clearly of relevance to whether very compelling circumstances exist, see the first reported finding in MS. It was also found by the First-tier Tribunal that the claimant is a persistent offender with a particular disregard for the law who is likely to recommit public order offences due to his alcoholism, and his deportation remains in the public interest for reasons of the protection of the public against his criminality, as a deterrent to others, and to maintain public confidence in the immigration system. It has been found that the appellant has familiarity with Kenyan society, culture and languages as someone who has lived in that country until he was 17 years old, and so does not have any disadvantage linked to these factors in re-integrating himself. He has no family life with his girl-friend in the UK as that relationship was found to be volatile and dysfunctional, and whilst it may be a genuine relationship it has not been shown to be unduly harsh for the couple to be separated by the claimant's deportation. The claimant no longer has a relationship with his child who was taken into care. The fact that he is financially independent as he is supported by his parents and not by the state (see paragraph 55 of Rhuppiah v SSHD [2018] UKSC 58) and speaks English are neutral matters.
17. On the other side I place into the balance that the claimant has lived in the UK for entire adult life, a period of 14 years, and held indefinite leave to remain for 11 years until it was removed in these deportation proceedings. It has been found that he would have very significant obstacles to integration in Kenya because of his being an immature alcohol dependent man without family support whose medical condition, epilepsy, may make him a figure of dangerous suspicion in the poor, less educated echelons of Kenyan society amongst whom he is likely to live if returned due to his lack of ability to support and accommodate himself. His parents in the UK do not have funds to send to support him in any substantial way in Kenya, and as a result of his alcoholism he is likely to become destitute in Kenya and fail to take any medication for his epilepsy, if he manages to source this, which is not well controlled even in the UK with proper medication.
18. Mr Clarke argued that the claimant could make better choices if returned to Kenya, for instance to undertake therapy for his addiction as he did in prison, and that as it would appear from the medical notes at least some of his seizures relate to alcoholism that this would place the claimant in a position to use the university degree that he appears to have obtained in the UK prior to becoming an alcoholic and obtain work. However, I find that that the First-tier Tribunal found the claimant to be someone who was not capable of making such a choice as his memory and cognition were found to be damaged by his alcoholism and

epilepsy, see paragraph 42 of the decision, and the evidence was that since released from prison despite the desire of his father that he stop drinking the claimant continues to drink large quantities of alcohol every day and lacks the capacity to exercise control over this, see paragraph 54 of the decision. The evidence of the expert on which the First-tier Tribunal place reliance, Dr Aguilar, is that medication for epilepsy would be available but would have to be paid for and that many medications available are poor quality ones from India and China, see paragraphs 15 to 18 of the report. In the context of the finding of the First-tier Tribunal that the claimant would be likely to be destitute, as his parents cannot afford to support him in Kenya and he is not capable of doing so either, I find that return to Kenya would also probably leave the claimant without medication and with only limited assistance from state medical services for his epilepsy when and if he became acutely unwell.

19. I find that the claimant's circumstances go beyond a finding that he would have very significant obstacles to integration in the following ways. There is the finding of the First-tier Tribunal that he would be likely to be destitute if returned; there is the finding that the claimant as a person, now aged 32 years, who has needed and had loving family support all of his adult life due to a lack of maturity, would have no family at all to turn to in Kenya; there is a finding that he would face social ostracization and difficulties in Kenya due to not having a family in a society where it is the overwhelming norm to be part of one and due to his epilepsy which has associations with witchcraft (Dr Aguilar's view is that there is a risk of violence to the claimant if he is seen as a witch due to his fitting, and the finding of the First-tier Tribunal is that reliance can be placed on that report and that such a risk would be more likely amongst the poorer, less educated sections of society where the claimant is likely to have to live due to his lack of means); there is a finding that the claimant has health problems, primarily alcohol addiction but also poorly controlled epilepsy, having two or more seizures a week (and with his medical notes making clear he also has a history of some hospital admissions for this and that he has also made suicide attempts in the context of anxiety and depression at points of crisis in 2015, and an assessment by the DWP that he was not fit for work) and that the claimant has impaired memory and cognition due to this and his alcoholism.
20. In the context of the above findings; the claimant's previous lawful permanent residence in the UK with indefinite leave to remain; and the finding relating to his having a relatively low level of offending, whilst giving significant weight to the likelihood of the claimant recommitting public order offences and the public interest in his deportation, I find the claimant has shown very compelling circumstances over and above the exceptions to deportation which make his deportation a disproportionate interference with his private life ties to the UK.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal but preserved the findings of fact.
3. I re-make the decision in the appeal by allowing the appeal under Article 8 ECHR.

Signed: Fiona Lindsley
Upper Tribunal Judge Lindsley

Date: 23rd April 2019