



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00100/2020 (V)

THE IMMIGRATION ACTS

Heard by skype for business
On 29 April 2021

Decision & Reasons Promulgated
On 10 May 2021

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KORIE DAVID LENNARD

Respondent

Representation:

For the Appellant: Mr Tan, Senior Home Office Presenting Officer

For the Respondent: Mr Nath, Counsel

DECISION AND REASONS (V)

Introduction

1. The SSHD has appealed against a decision of the First-tier Tribunal ('FTT') promulgated on 4 December 2020, allowing Mr Lennard's appeal on Article 8 grounds, against the SSHD's decision dated 17 December 2019 refusing his human rights claim following a decision to deport him.

Background

2. Mr Lennard is a citizen of Trinidad and Tobago, born in December 1997. He first entered the UK with his mother in 2011 and re-entered in 2012 when he was granted a settlement visa to join his mother. He spent a six-month period in Trinidad in 2013, when he lived with his paternal grandfather. After this time, he has lived continuously in the UK and was granted indefinite leave to remain on 4 July 2016.
3. Mr Lennard and his mother were thrown out of her ex-husband's home in 2014 and it has not been disputed that life was very difficult for them at around this time. Mr Lennard was described as spending most of his time in his bedroom between 2014 and 2018, whilst using cannabis, at a time when his mother was working at three jobs whilst studying to become a social worker. He obtained very limited school qualifications. After an altercation with his mother concerning, Mr Lennard left the family home in February 2018 and his life quickly unravelled. He became involved in a gang whilst sofa surfing and sleeping in a park and his drug use progressed to wide ranging class A substances. He fell into debt and began selling drugs. As the FTT found at [49] his drug use increased and his mental health deteriorated after he left home and lost his support network.
4. Between 2018 and 2019 Mr Lennard was convicted of various offences including drugs offences (3 years sentence) and an offence of violent disorder (18 months sentence), all of which took place within the period April to September 2018.
5. On 19 November 2018 the SSHD made a deportation order against Mr Lennard. In response he made a human rights claim, which was refused in the decision under appeal. Mr Lennard, his mother and his stepfather gave evidence before the FTT. Mr Lennard was released from prison in June 2020.
6. Although the FTT had concerns regarding some aspects of the evidence provided by Mr Lennard and his mother, in allowing the appeal it accepted much of the evidence adduced on Mr Lennard's behalf, including a 37-page carefully drafted report from Dr Sen, a Consultant Forensic Psychiatrist. The FTT recorded at [11] that Dr Sen's conclusions were not challenged by the SSHD. Dr Sen diagnosed Mr Lennard as suffering from a mental and behavioural disorder due to his use of cannabis, but that he was currently stable. He also found him to have significant vulnerabilities in his personality due to adverse childhood experiences (including significant deprivation), which has an effect on his adult behaviour in the form of difficulties in managing stress, difficulties in emotional regulation, poor self-esteem and vulnerability to ideas of hopelessness. Dr Sen found that when, in 2018, he was without the protective factors of his supportive family network, particularly his mother and stable accommodation he fell into multiple drug use and a life of crime. He concluded that without these protective factors, the risk of deterioration in his

mental disorder of addiction escalating to polydrug dependence and a life of crime was very high.

Appeal to the Upper Tribunal ('UT')

7. The SSHD's grounds of appeal contain 12 paragraphs but Mr Tan clarified that the SSHD relied upon two overarching grounds of appeal:
 - (i) The FTT's reasoning did not disclose "very compelling circumstances" for the purposes of s. 117C(6) of the Nationality Immigration and Asylum Act 2002 ('the 2002 Act');
 - (ii) The FTT was not entitled to accept Dr Sen's conclusion, when that was based upon a different factual matrix (Mr Lennard has no family and accommodation to turn to in Trinidad) to the findings of fact made by the FTT (Mr Lennard has some family and temporary accommodation available in Trinidad).
8. UTJ Martin granted permission to appeal in a decision dated 4 January 2021. She observed that the FTT's conclusion that there were very compelling circumstances to outweigh the public interest in deporting Mr Lennard was not arguably sustainable on the evidence, particularly when he continued to use cannabis and would have family support and access to employment in Trinidad, where any mental health issues might be dealt with.
9. At the beginning of the hearing before me Mr Nath sought to place reliance upon an email indicating that Mr Lennard had recently sought assistance from Turning Point in accordance with Dr Sen's recommendations. I indicated that post-decision evidence would not assist me in determining whether the FTT erred in law and declined to admit the evidence.
10. Mr Tan relied upon the grounds of appeal in support of the two grounds of appeal. Mr Nath took me to the detail of Dr Sen's report. This was not available on the Tribunal's file but a copy was emailed to me and I have considered it in full. Mr Tan's reply was very brief. He repeated his submission that Dr Sen was only partially informed of the likely position in Trinidad, and the FTT erred in failing to find that this undermined his overall conclusions.
11. After hearing from both parties I reserved my decision, which I now provide with reasons.

Legal framework

12. There was no dispute between the parties as to the applicable legal framework. The SSHD's appeal turns upon the application of the factual matrix to the governing legal test in s.117C(6) in the 2002 Act, as informed by the remainder of Part 5A and the criteria to be considered as part of the relevant balancing exercise contained in the Strasbourg authorities on Article 8. It is nevertheless helpful to set out s.117C in full:

- “(1) The deportation of foreign criminals is in the public interest.
- (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
- (3) In the case of a foreign criminal (“C”) who has not been sentenced to a period of imprisonment of four years or more, the public interest requires Cs deportation unless Exception 1 or Exception 2 applies.
- (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 Cs 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 effects of Cs 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.”

13. In NA (Pakistan) v SSHD [2016] EWCA 662, [2017] 1 WLR 207 it was established that s.117C(6) still applied to a person who was a ‘medium offender’ and not a ‘serious offender’, like this appellant. Moreover, positive evidence of rehabilitation, and thus of a reduced risk of re-offending, could in principle be included in the overall proportionality exercise. The correct approach was described by Jackson LJ in this way:

“32. ... The decision-maker, be it the Secretary of State or a tribunal, must look at all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation.

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.”

14. Therefore, in considering whether “very compelling circumstances” for the purposes of s.117C(6) exist, the tribunal should consider the proportionality test required by the Strasbourg Court – see [27] and [38] of HA (Iraq) and [81] of Unuane. For the avoidance of doubt, when I refer to “very compelling circumstances” during the course of this decision, I am merely using this as shorthand for the full expression contained in s.117C(6) i.e. “very compelling circumstances, over and above those described in Exceptions 1 and 2...”.

15. The flexible and movable nature of the public interest, as described in Akinyemi v SSHD [2019] EWCA Civ 2098, [2020] 1 WLR 1843, does not mean that the s. 117C(6) test is anything less than “*extremely demanding*”. As Underhill LJ put it at [38] of HA (Iraq):

“The effect is clear: circumstances will have to be very compelling in order to be sufficiently compelling to outweigh the strong public interest in deportation.”
16. In the recent decision of the European Court of Human Rights in Unuane v The United Kingdom (Application no. 80343/17), the applicant’s case was that courts and tribunals were precluded by domestic immigration rules from carrying out an assessment of deportation in compliance with the case-law of the Court but that argument was rejected at [83]. However, on the facts of the individual case, it was found that the UT had not conducted a separate balancing exercise under Article 8, and the Court made its own assessment, which led it to conclude that the seriousness of the applicant’s offences was not of a nature or degree capable of outweighing the best interests of the children so as to justify his expulsion.
17. Unuane did not materially change the complexion of the recent Court of Appeal guidance in HA (Iraq) v SSHD [2021] WLR 1327, [2020] EWCA Civ 1176. At [29(A)] Underhill LJ made it clear that in a case such as this wherein it is accepted that the appellant is a ‘medium offender’ who cannot meet the requirements of the Exceptions:

“... a full proportionality assessment is required, weighing the interference with the article 8 rights of the potential deportee and his family against the public interest in his deportation. In conducting that assessment the decision-maker is required by section 117C(6) (and paragraph 398 of the Rules) to proceed on the basis that “the public interest requires deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2”.”
18. The wide-ranging evaluative exercise required under s.117C(6) clearly includes an application of the principles in the Strasbourg authorities to ensure compatibility with the UK’s obligations under Article 8 and must be accommodated within the statutory scheme - see NA (Pakistan) at [29] and [38]; HA (Iraq) at [28] and Unuane at [72-75] and [81-83].
19. This is a case in which the FTT found that one of the necessary ingredients of Exception 1 could not be met. Nevertheless, facts and matters relevant to the assessment of whether an Exception applies remain relevant to the overall assessment, and could be sufficient to outweigh the public interest in deportation either, if especially strong, by themselves or in combination with other factors. As the Court put it in NA (Pakistan) at [29] (as endorsed in HA (Iraq) at [33]):

“... [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 Rules]), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.” (my emphasis)

Error of law discussion

20. It is clear from several passages in its decision but in particular [38], that the FTT correctly understood that the test posed by s.117C(6) of the 2002 Act is a very demanding one. I accept that the harder a test is to meet, the more important it is to marshal the relevant factors on each side so that they can be given the weight which the tribunal considers appropriate, and balanced against one another. Although the FTT’s decision might be described as generous, there has been no suggestion on behalf of the SSHD that the FTT misapplied the law. Mr Tan was correct to take this approach. When assessing proportionality from [83] onwards, the FTT properly adopted the balance sheet approach, by marshalling all the relevant factors against the appellant followed by all the relevant factors in his favour. This included the strong public interest in deportation in the light of the severity of the offending and the risk of re-offending and the explanation that this was outweighed by the likely significant deterioration in Mr Lennard’s mental health in Trinidad, such that there were “very compelling circumstances”.
21. The grounds of appeal criticise the FTT’s failure to pay particular regard to four matters, which count against Mr Lennard in the requisite balancing exercise. Mr Tan limited his submissions to the first two of these. I deal with each in turn together with Mr Tan’s two overarching grounds of appeal.
22. First, it was submitted that Mr Lennard continued to be a daily cannabis user and the FTT minimised the importance of this. The FTT was well aware of the nature, extent and history of Mr Lennard’s cannabis use. This was set out in detail in Dr Sen’s report. At [51] the FTT found that Mr Lennard continued to be an ongoing user of cannabis and placed weight on Dr Sen’s diagnosis of cannabis dependency syndrome. Indeed, the FTT specifically factored this in as a factor against Mr Lennard when compiling the balance sheet at [87].
23. The SSHD’s linked submission that Mr Lennard had no real desire to reform or rehabilitate himself away from drug addiction was clearly rejected by the FTT. The FTT accepted the overall evidence from all three witnesses and Dr Sen that notwithstanding his continued cannabis use, Mr Lennard had drastically changed his life around (in terms of stable employment, stable mental health and positive family relationships) since his release from prison and return to the family home – see [59] to [72] of the FTT’s decision. The FTT was careful to note at [89] and [90] that cannabis use continued but at a reduced level and there were other significant protective factors which reduced the risk of re-offending in contrast to the relevant short period of instability and accompanying offending in 2018.

24. Second, Mr Tan submitted that the FTT was wrong to attach weight to Dr Sen's opinion that Mr Lennard would suffer a deterioration in his mental health and a return to hard drug use in Trinidad. This constituted his second ground of appeal. Mr Tan pointed out that this was predicated upon the evidence available to Dr Sen from Mr Lennard and his mother to the effect that there would be no family support available in Trinidad. The FTT rejected this aspect of the evidence and Mr Tan argued that in those circumstances, it was not entitled to accept Dr Sen's conclusion, which was based upon a different factual matrix. This submission does not fit comfortably with the position adopted by the SSHD before the FTT: as set out at [11] the SSHD did not challenge Dr Sen's expertise, qualifications, experience or conclusions.
25. The FTT clearly found that there would be *some* family support in Trinidad, having made that express finding at [58], which is then repeated later on during the course of the balance sheet exercise at [88]. The FTT went on to carefully explain that it accepted the evidence from Dr Sen that Mr Lennard remained particularly dependent upon his mother (see [70]) and the level of dependency went beyond normal emotional ties (see [72]). When the decision is read as a whole, the FTT was entitled to accept Dr Sen's conclusions (see [72]) notwithstanding its own findings on the availability of some family in Trinidad. The FTT accepted that the loss of the close support Mr Lennard accrued from his mother, stepfather and stepsister and the absence of that particular support in Trinidad would result in a deterioration of his mental health and addiction, leading to a return to a life of crime and hard drugs addiction. In reaching this finding, the FTT clearly had in mind its earlier finding there would be "*temporary accommodation and some family support*" in Trinidad, but considered this would not be sufficient or stable enough to replicate the family support in the UK, so as to avoid the high risk of deterioration in Trinidad. Although Dr Sen's analysis was based upon a slightly different factual matrix to that which the FTT applied, it is significant that Dr Sen focussed his attention upon the loss of Mr Lennard's "*current support systems*" (my emphasis) given his past mental and behavioural past disorders and his significant personality vulnerabilities – see 1.3.1, 5.3 and 5.4 of Dr Sen's report. In addition, when the report is read as a whole Dr Sen clearly identified "*a supportive family network around him, particularly his mother*" (my emphasis) as the protective factor and not mere presence of family members – see 5.2 of Dr Sen's report. I am satisfied that whilst there was a different factual matrix, that difference was not as stark as submitted by Mr Tan, and this probably explains why the SSHD did not challenge Dr Sen's conclusions before the FTT. On the FTT's findings the requisite particular family support Mr Lennard was dependent upon in the UK, could on no legitimate view be replicated in Trinidad.
26. That analysis of the FTT's reasoning is consistent with [78] and [79] when it addressed Exception 1. At [78] the FTT repeated the family support and accommodation Mr Lennard would have in Trinidad before saying this regarding s.117C(4)(c), at [79]:

“However, we balance these factors against the high risk, identified by Dr Sen, of the appellant’s mental health significantly deteriorating if he is removed from his current stable environment, with a resultant return to addiction and a life of crime. On balance, we find that the very high risk of such deterioration would cause *very significant* obstacles to the appellant’s integration to Trinidad.”

27. This finding has not been challenged by the SSHD and it clearly contributed to the overall assessment of “very compelling circumstances”.
28. Third, the grounds suggest that Mr Lennard could be financially supported by his mother in Trinidad. Mr Tan was correct not to highlight this during his submissions. The FTT was clearly aware of this and expressly found that there would be some accommodation for Mr Lennard in Trinidad and he could maintain a long-distance relationship with his mother and stepfather.
29. Fourth, the grounds submit that no consideration was given as to what medical support would be available if Mr Lennard returned to drugs or his mental health deteriorated in Trinidad. This is not a case in which it was argued that medical treatment would be unavailable in Trinidad. That is because notwithstanding its availability or otherwise, the FTT accepted that Mr Lennard’s particular circumstances including the personal vulnerabilities described by Dr Sen are such that he faced a high risk of a return to polydrug addiction, without the family support he derived from his UK-based family.
30. I now return to Mr Tan’s first ground of appeal. As I have said the FTT’s conclusion that the high s.117C(6) threshold was met might be considered generous, given the severity of Mr Lennard’s relatively recent offending and his continued cannabis use. Whilst the conclusion that the strong public interest was outweighed by other matters capable of giving rise to “very compelling circumstances” was relatively briefly expressed, the reasons for it are tolerably clear, when the decision is read as a whole. It is important to note that the FTT accepted that the high risk of Mr Lennard’s deterioration would cause very significant obstacles to his integration in Trinidad. As noted above, NA (Pakistan) and HA (Iraq) endorse the principle that the fact that (b) and (c) of Exception 1 are met, remains relevant to the overall assessment, and could be sufficient to outweigh the public interest in deportation either, if especially strong, by themselves or in combination with other factors. The FTT clearly regarded the highly likely deterioration in Mr Lennard, in combination with other factors, as especially strong for the reasons summarised at [88] to [92]. This reasoning could have been more detailed but I am satisfied that the reasoning for the ultimate conclusion is tolerably clear and was open to the FTT on the evidence.

Conclusion

31. I do not consider that the FTT made any material errors of law. On the contrary, the FTT carried out a careful and balanced evaluation of all the

important factors and reached a rational conclusion. This included keeping the severity of the offending, the strong public interest and the need to identify “very compelling circumstances” fully in mind. This was a decision arrived at after a specific assessment of the evidence and not by a process of generalisation. As such it accords with the approach that has been laid down in HA (Iraq) and described in Unuane.

Decision

The decision of the FTT does not contain a material error of law and is not set aside.

Signed:

Ms Melanie Plimmer

Upper Tribunal Judge Plimmer

Date:

30 April 2021