



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09917/2018

THE IMMIGRATION ACTS

Heard at The Royal Courts of Justice
On 18 October 2021

Decision & Reasons Promulgated
On 15 December 2021

Before

UPPER TRIBUNAL JUDGE PITT

Between

GD
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Not represented

For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

1. This decision is the remaking of GD's appeal on Article 8 ECHR grounds brought in the context of deportation proceedings. The remaking is required following the decision of the Upper Tribunal dated 26 October 2018 which found an error of law in the decision of the First-tier Tribunal dated 7 August 2018.

Background

2. The appellant is a national of Guyana born in 1990. He is now 31 years' old.
3. The appellant came to the UK in 2000 at the age of 10 and was granted indefinite leave to remain (ILR) in line with his mother.
4. In March 2007 the appellant was cautioned for theft and kindred offences. On 2 January 2008 he was convicted of affray and of possession of a blade in a public place, for both of which offences he received a community order. Numerous convictions followed. By 2017 the appellant had fifteen convictions in respect of 22 offences. The offences included possession of controlled drugs, assault, battery, breach of anti-social behaviour order, taking a vehicle without consent, using threatening behaviour and failing to surrender to custody. Most were dealt with by way of community sentences but on 2 December 2010 he received a sentence of 6 months in a Young Offenders' Institution for going equipped for burglary.
5. On 23 November 2016 the respondent served a notice of intention to deport the appellant as a persistent offender. There was no response from the appellant.
6. On 24 January 2017 the appellant was convicted of possession of a knife in a public place. He was sentenced to a period of 9 months' imprisonment on 27 October 2017.
7. On completion of his criminal sentence the appellant remained in immigration detention. On 7 March 2018, the respondent made a decision finding that the appellant's deportation would not breach his rights under Article 8 ECHR. The appellant appealed that decision to the First-tier Tribunal.
8. The appeal was dismissed in a decision dated 7 August 2018 of First-tier Tribunal Judge Rowlands. The appellant appealed against that decision and on 3 September 2018 the First-tier Tribunal granted permission to appeal to the Upper Tribunal.
9. On 26 October 2018 the Upper Tribunal found an error of law in the decision of the First-tier Tribunal and set it aside to be remade. The error of law finding followed a concession from the respondent that the grounds had merit. There was no dispute that the appellant had a British national child, ID, born on 10 May 2014. By the time of the First-tier Tribunal hearing ID had been the subject of care proceedings which had led to a Family Court Order dated 15 February 2018 appointing the appellant's mother, JA, and his sister, JC, as Special Guardians until ID was 18 year' old. The respondent accepted that the grounds had merit, in particular as regards the assessment of whether the appellant's deportation would be unduly harsh for his son and that a fresh decision would have to be made.

10. The appellant was released from immigration detention in January 2019. On 25 October 2019 he was arrested on two counts of possession with intent to supply class A drugs. He pleaded guilty and on 25 November 2019 was sentenced to 3 years and 9 months' imprisonment.
11. The appellant was released from prison on licence on 6 October 2021.

The Hearing

12. The appellant attended the hearing with his mother, JA. Both gave evidence, having heard a summary of the case from me and also submissions from Mr Lindsay. Following the appellant's evidence Mr Lindsay added to his submissions and the appellant and his mother then gave their final views on the case. The appellant provided me with a report dated 13 September 2021 from Lauren Wilson, Assistant Psychologist in the therapy service at HMP Maidstone. He was also given permission to serve a further document concerning engagement with substance misuse services in prison and that document was provided on 20 October 2021.

The Law

13. Part 5A of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) sets out the legal framework that must be applied to an Article 8 ECHR claim brought in the context of deportation. It is not necessary to refer to the similar provisions contained in the Immigration Rules where the Court of Appeal has indicated that it is generally unnecessary to do so; see CI (Nigeria) v Secretary of State for the Home Department [2019] EWCA Civ 2027 at paragraph 21.
14. Section 117C of the 2002 Act is entitled "Article 8: additional considerations in cases involving foreign criminals". It is the central provision in this appeal and provides:
 - (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 C's 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 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”.

15. The appellant is a “medium” offender where his highest sentence was over 12 months’ but under 4 years’ imprisonment. He maintains that his appeal should be allowed as he comes within Exception 1 and Exception 2 as set out in ss.117C(4) and (5). If the appellant cannot come within those Exceptions, he maintains that there are “very compelling circumstances, over and above those described in Exceptions 1 and 2” as provided in s.117C(6).
16. There have been a significant number of cases addressing the correct interpretation and application of these provisions. The main principles are set out below.
17. The statutory framework is a “complete code” and “... the entirety of the proportionality assessment required by article 8 can and must be conducted within it”: HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176 at [27]. That means that I must also take into account Strasbourg case law and I set out the relevant cases below.
18. The Court of Appeal considered the issue of the impact of criminal offending on social and cultural integration in CI (Nigeria) v Secretary for the Home Department [2019] EWCA Civ 2027. The Court concluded in [61] that criminal offending and periods of imprisonment are “in principle” relevant to the assessment of social and cultural integration as they indicate an absence of the relevant social and cultural ties. However, the court also identified in [62] that even where there is significant offending and periods of imprisonment, it is also important to factor in “whether and how deeply the individual was socially and culturally integrated in the UK to begin with”. They give the example of someone who has lived “all or almost all his life in the UK, has been educated here, speaks no other language than (British) English and has no familiarity with any other society or culture”. They identify that such a person will have “much deeper roots” than someone who moved here at a later age. The court goes on in [62] to indicate:
- “It is hard to see how criminal offending and imprisonment could ordinarily, by themselves and unless associated with the breakdown of relationships, destroy the social and cultural integration of someone whose entire social identity has been formed in the UK.”
19. Regarding the assessment of very significant obstacles to reintegration, the Court of appeal said this in Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813 at [14]:

“... 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.”

20. Guidance on the test that must be met for a finding of undue hardship for a child that is set out in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC), approved in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 and HA (Iraq):

“... unduly harsh does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. “Harsh” in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the additional adverb “unduly” raises an already elevated standard still higher.”

21. HA Iraq provides additional guidance on the correct approach to the assessment of whether deportation would be unduly harsh for a child, Underhill LJ setting out at [56]:

“... As explained above, the test under section 117C (5) does indeed require an appellant to establish a degree of harshness going beyond a threshold ‘acceptable’ level. It is not necessarily wrong to describe that as an ‘ordinary’ level of harshness, and I note that Lord Carnwath did not jib at UTJ Southern’s use of that term. However, I think the Appellants are right to point out that it may be misleading if used incautiously. There seem to me to be two (related) risks. First, ‘ordinary’ is capable of being understood as meaning anything which is not exceptional, or in any event rare. That is not the correct approach: see para. 52 above. There is no reason in principle why cases of ‘undue’ harshness may not occur quite commonly. Secondly, if tribunals treat the essential question as being ‘is this level of harshness out of the ordinary?’ they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly-encountered pattern. That would be dangerous. How a child will be affected by a parent’s deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of ‘ordinariness’. Simply by way of example, the degree of harshness of the impact may be affected by the child’s age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child’s emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child”.

22. The very compelling circumstances test is a high one. In a case where an appellant cannot come within the Exceptions in s.117C(4) and (5) “great weight should generally be given to the public interest in the deportation of such offenders, but ... it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed”; Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60. Hesham Ali at [38] and HA (Iraq) at [32] set out the need to respect the “high level of importance” which the legislature attaches to the deportation of foreign criminals.

23. The Strasbourg cases of particular relevance to the Article 8 ECHR proportionality assessment are well known. They include Boultif v Switzerland (2001) 33 EHRR 50, Üner v Netherlands (2007) 45 EHRR. 14 and Maslov v Austria [2009] INLR 47. Maslov provides in paragraph 74:

“Although Article 8 provides no absolute protection against expulsion for any category of aliens (see Üner, cited above, § 55), including those who were born in the host country or moved there in their early childhood, the Court has already found that regard is to be had to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there (see Üner, § 58 *in fine*).”

24. The factors identified in [57] and [58] of Üner have been approved subsequently in both European and domestic case law and are uncontroversial. Of relevance here are (i) the nature and seriousness of the offence committed by the applicant (ii) the length of the applicant's stay in the country from which he or she is to be expelled (iii) the time elapsed since the offence was committed and the applicant's conduct during that period (iv) the solidity of social, cultural and family ties with the host country and with the country of destination. The Supreme Court in Sanambar v Secretary of State for the Home Department [2021] UKSC 30 identified at [46] that Maslov does not set down a “condition subsequent” to the Uner criteria of a requirement for “very serious reasons” justifying deportation.

25. The Supreme Court in Sanambar at [18] and the Court of Appeal in [106] of CI (Nigeria) set out the important distinction in European Court case law, for example in Jeunesse v The Netherlands [2004] 60 EHRR 17, between settled migrants with a right of residence in the host country and those without such status. In paragraph 112 of CI (Nigeria), Leggatt LJ identifies:

“... the distinction of principle drawn in the case law of the European Court is between the expulsion of a person who has no right of residence in the host country on the one hand and, on the other hand, expulsion which involves the withdrawal of a right of residence previously granted.”

Discussion

Exception 1 - s.117C(4)

26. The respondent accepted that the appellant had been lawfully resident in the United Kingdom for most of his life. That was because he obtained settlement on arrival in 2000 at the age of 10 years' old. The appellant meets the requirements of s.117C(4)(a).
27. It is not disputed that the appellant came to the UK in 2010 lawfully and has lived here ever since, now being aged 31 years old. He has made only two visits to Guyana, one in 2001 for four weeks and one in 2007 for four weeks. He attended school here and has had various forms of employment. His evidence was that he was a qualified barber, had done painting and decorating work and worked for the UPS delivery service. It is unarguable that he has lived by far the majority of his life here and has essentially grown up in the UK amongst family and friends.
28. The respondent maintained that even though the appellant might have been socially and culturally integrated in the past, that could not be the case following the serious drugs conviction in 2019. That conviction showed him to be someone who did not follow the social and cultural norms of the UK.
29. Applying the guidance from CI (Nigeria) on the impact of criminal offending on social and cultural integration to the facts here, it is my judgment that the appellant remains socially and culturally integrated into the UK. He has been here for 21 years, having come at the age of 10. He has been educated and worked here and developed the shared social norms and sense of belonging that identifies him as somebody who is socially and culturally integrated. His relationships with his family and friends have not broken down following that offence. The serious criminal offence in 2019 is not sufficient, in my view, to break the depth of integration that had already been established. The requirements of s.117C(b) are therefore met.
30. I must also assess whether the appellant would face very significant obstacles to re-integration in Guyana. As before, he spent the first ten years of his life in Guyana and has visited the country twice for two four week periods since coming to the UK, the last visit being in 2007.
31. The appellant did not have much knowledge of his family in Guyana but his mother confirmed that there are relatives still living there. The appellant's mother confirmed that her own mother remained in Jamaica, living in the countryside, supported by her sister. Her mother had dementia and her sister was effectively her carer. Further, the appellant's mother confirmed that she had two adult children in Jamaica, older half-siblings to the appellant, both of them having established their own families. She was not confident that they would be able to offer the appellant much support given that they had very limited incomes and both had five children. The appellant's mother confirmed that she had spoken to her adult son about the appellant before he had come out of prison and that he had said he did not think that his home could accommodate the appellant. Her daughter's husband was somewhat difficult and she was not confident that he would permit the appellant to live in the house where her daughter's child from another relationship was not welcome. The appellant's mother confirmed that she last went to Guyana in 2019 when her father died.

32. I considered this evidence carefully with reference to the guidance in Kamara that the assessment is a broad one and not limited to the ability to obtain work and accommodation but to participate in society to the extent that the appellant can establish some form of substantive private or family life.
33. I found the question of the appellant's integration in Guyana to be finely balanced. The appellant was a child when he came to the UK and has been here for 21 years. His identity is essentially British and his understanding of life in Guyana is limited. He lived there for the first 10 years of his life, however, and has also visited on two occasions for an extended holiday whilst a child. He will have a little knowledge of the country, therefore, albeit from when he was a child and not as an adult needing to establish and support himself. He has some work experience and skills that would assist him to make some kind of a living. He has relatives there who could provide some contacts and a little support by way of accommodation for a short period, their resources otherwise being very limited.
34. My conclusion was that there would be significant obstacles to reintegration for the appellant but not very significant obstacles. He has small building blocks that can assist him to establish himself in the country by way of his knowledge of the culture and society from having lived there until the age of 10, and two visits of four weeks whilst a child, has relatives there who can provide a little support that can assist him to put his work experience and skills into practice. For these reasons I did not find that the requirements of s.117C(c) were met. Exception 1 set out in s.117C(4) is therefore not met.

Exception 2

35. The respondent did not dispute that the appellant retains parental responsibility for his son, ID, notwithstanding the Special Guardianship order made on 15 February 2018 in favour of the appellant's mother and sister. The respondent accepted that the appellant retained a genuine and subsisting parental relationship with ID. The materials from the Family Court case indicated that in the past the appellant was involved in caring for ID, on occasions bringing or collecting him from nursery at which times it was "observed that they have a very positive relationship". The child was noted to speak "frequently and with warmth about his father and throughout the years he has had regular telephone contact with him and currently still does". Those particular comments were made in a letter from Camden Social Services dated 23 February 2018. There was no dispute that the appellant has returned to live in the same household as his son since coming out of prison on 6 October 2021.
36. The papers that have been provided from the Family Court proceedings, however, show that the appellant has not lived for long with ID and that others have always provided ID's primary care. ID lived with his maternal grandmother from 2014 to 2017. At some point in 2017 or 2018 ID went to live with the appellant's mother and sister.

37. ID is now 7 years' old. He has always been cared for by other relatives. The appellant was in detention from at least October 2017 to January 2019. He went to prison again in October 2019 until October 2021. The appellant has therefore been in detention for at least three years of ID's life. I accept that there was regular telephone contact during the most recent prison sentence but that contact cannot equate to the kind of relationship that is built up by living with and being the primary carer for a small child. I accept that the appellant has lived in the same home as ID for approximately 18 months in total during ID's life. That was because his mother and sister became primary carers for ID. I accept that he has played a limited fatherly role in the periods that he has lived with ID. Nothing indicates that his role was significant compared to the primary care provided by other relatives. The appellant stated that since he came out of prison in October 2021 he is looking to resume his relationship with ID and I accept that also.
38. The appellant's mother confirmed that she is the person who makes all the important decisions for ID, about his education, his health, whether he travels and so on. The appellant's mother said that ID would find it difficult if the appellant were deported because "he would miss him", the appellant being a father figure who could take ID to play football, which he enjoyed, and that because he was a boy he liked to be with his father and do things that father and sons did, looking to his father for cuddles.
39. It must be right that it is in ID's best interests for his father to remain in the UK and for their relationship to continue. I accept that if the appellant is deported now ID would feel a loss and that this might well increase as he grows older and realises the full implications of growing up without his father. I did not find that this amounted to unduly harsh circumstances for ID. ID has been cared for over the last 3 years by his grandmother and aunt and this can continue. His grandmother described him doing well at home and at school. That is so despite the appellant's absence while he was in prison for the last two years. ID's life will remain relatively the same if the appellant is deported. The telephone calls he has had with the appellant could continue, even if not so frequently, and there will be other options for remote communication. There is no past or current evidence from third parties such as ID's school or a social worker that there is a particular closeness between the appellant and ID the child such that unduly harsh circumstances might arise in the appellant's absence. Even if the situation for ID if the appellant is deported could be said to be difficult, nothing indicated to me that it could be found to be unduly harsh.
40. The appellant referred at the hearing to having a girlfriend but did not suggest that this was a relationship of such duration or seriousness that could engage s.117C(5).
41. For these reasons, Exception 2 set out in s.117C(5) is not met.

Very Compelling Circumstances

42. I must therefore consider whether the factors considered above, taken with any other relevant matters, could show very compelling circumstances capable of outweighing the public interest here.

43. Obviously, the public interest here is high where the appellant has not only an extensive criminal record but one that escalated to a much more serious level in 2019. The conviction of possession with intent to supply class A drugs which led to a sentence of 3 years and 3 years and 9 months' imprisonment is serious and must weigh heavily against the appellant.
44. It is also significant that the appellant committed that serious drugs offence even after deportation action and these proceedings had commenced. The fact that the appellant committed the drugs offence less than a year after coming out from a 2 year period of detention also weighs against him.
45. There is no OASys report or other objective estimate of the risk of reoffending but both of those matters suggest that there is a concerning risk of reoffending here. That is so notwithstanding the documents the appellant provided as to having engaged with drug abuse services in prison and having done some therapeutic work in prison to address the difficulties in his past that led him to offend.
46. It is my judgment that the evidence before me, whether that considered under Exceptions 1 and 2 or on any other matter, is not capable of displacing the weight that attaches to the public interest here. In reaching that conclusion, I have weighed the appellant's long, lawful residence in the UK, his social and cultural integration, the difficulties he will face on return to Guyana and his relationship with his son on his side of the balance. I accept that his meaningful family and social ties are in the UK and that he will find it difficult to leave those ties and hard to establish anything of the same degree of private and family life in Guyana. The appellant provided evidence that he has been prescribed antidepressants for depression but nothing suggested that he would not be able to access suitable medication in Guyana.
47. As above, I accept that it is in ID's best interests for the appellant to remain in the UK and I accept that both the appellant and his son will experience emotional hardship because of their separation. It is not my view that this is a sufficient factor even when taken with all the other matters relied on for the appellant to show very compelling circumstances capable of outweighing the public interest.
48. It is therefore my conclusion that weighing all of the appellant's evidence at its highest, he does not meet Exceptions 1 and 2 of Section 117C of the 2002 Act and cannot show that there would be very compelling circumstances capable of outweighing the public interest in deportation. For these reasons I do not find that s.117C(6) is met and I must therefore refuse the appeal.

Decision

The appeal under Article 8 ECHR is dismissed.

Signed: *S Pitt*
Upper Tribunal Judge Pitt

Date: 7 December 2021