



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/18119/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House
(Remote Hearing)
On 29 January 2021

Decision & Reasons Promulgated
On 23 February 2021

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AA

(ANONYMITY DIRECTION MADE)

Respondent

Representation

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

For the Respondent: Unrepresented

This has been a remote hearing to which both parties have consented. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties, and neither party expressed any concern, with the process.

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State. However, I will refer to the parties as they were designated in the First-tier Tribunal.
2. The appellant is a citizen of St. Lucia, born in July 1997, who has been in the UK since 2005 (when he was eight years old). He was granted indefinite leave to remain in February 2008.
3. He has a partner and son (born in May 2017) who are British nationals. He does not live with them but is involved, and has a genuine and subsisting parental relationship, with his son. The appellant was diagnosed with autism at the age of 18.
4. In November 2014 the appellant received a youth conditional order for assaulting his sister.
5. Since 2016 the appellant has been convicted of multiple offences. In January 2019 he was sentenced to 42 months' imprisonment. The summary of his offending history given by the respondent consists of the following:
 - a. On 1 September 2016 he was convicted of possession of cannabis and aggravated vehicle taking, for which he received a suspended sentence.
 - b. On 30 November 2016 he was convicted of failing to comply with the suspended sentence order.
 - c. On 13 November 2017 he was convicted of three counts of burglary, dangerous driving and driving whilst disqualified.
 - d. On 22 January 2018 he was convicted of failing to stop a vehicle when required.
 - e. On 19 March 2018 he was convicted of two counts of possession/control of articles for use in fraud, for which he served one day in custody.
 - f. On 31 October 2018 the appellant was verbally abusive to immigration officials.
 - g. On 14 December 2018 he was convicted of conspiracy to commit burglary.
 - h. On 7 January 2019 he was sentenced for the convictions of 13 November 2017 and 14 December 2018 to 42 months' imprisonment.

6. On 16 January 2019 the respondent served on the appellant a decision to make a deportation order against him pursuant to section 32(5) of the UK Borders Act, subject to consideration of section 33 (which provides that there is an exception to section 32(5), inter alia, where deportation would breach a person's rights under the ECHR). The appellant made a human rights claim arguing that his deportation would be contrary to article 8 ECHR. His human rights claim was refused by the respondent in a decision dated 8 October 2019.
7. The appellant appealed to the First-tier Tribunal where his appeal came before Judge of the First-tier Tribunal Behan ("the judge"). In a decision promulgated on 16 March 2020, the judge allowed the appeal. The respondent is now appealing against that decision.

Legal Framework

8. Section 117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), considered together with the rest of Part 5A of the 2002 Act, provides the framework to evaluate whether deporting a foreign criminal will breach article 8 ECHR.
9. Section 117C 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.
10. The relationship between the Exceptions in sections 117C(4) and (5) and section 117C(6) was explained succinctly in paragraph 36 of *NA (Pakistan) v Secretary of State for the Home Department & Ors* [2016] EWCA Civ 662 (cited with approval in paragraph 30 of *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176):

"In relation to a medium offender, first see whether he falls within Exception 1 or Exception 2. If he does, then the Article 8 claim succeeds. If he does not, then the next stage is to consider whether there are 'sufficiently compelling circumstances, over and above those described in Exceptions 1 and 2'. If there are, then the Article 8 claim succeeds. If there are not, then the Article 8 claim fails."

11. The reference in *NA* to a "medium offender" is to a foreign criminal, as defined in section 117D of the 2002 Act, who has been sentenced to less than four years imprisonment. The appellant is a medium offender.

Decision of the First-tier Tribunal

12. The judge found the appellant to be a truthful witness but with one exception, which was that he had not been honest about his continued use of cannabis since leaving prison.
13. The judge considered whether Exception 2 in Section 117C(5) applied. She found that although the appellant has a genuine and subsisting relationship with a qualifying partner and a genuine and subsisting parental relationship with a qualifying child, Exception 2 was not applicable as the effect of the appellant's deportation would not be unduly harsh on either his partner or child.
14. The judge then turned to consider Exception 1 in Section 117C(4). There are three conditions that must be met for this Exception to be satisfied. These are: (a) the appellant must have been lawfully resident in the UK for most of his life, (b) he must be socially and culturally integrated in the UK, and (c) there must be very significant obstacles to his integration in St Lucia. It was accepted by the respondent that the appellant has been lawfully resident in the UK for most of his life. Therefore, it was only the second and third conditions that were in dispute.
15. The judge's assessment of the second condition (social and cultural integration in the UK) is brief. It is set out in paragraph 41 of the decision, where the judge stated:

"The respondent concluded [that] the appellant is not socially and culturally integrated in the UK. I do not think this conclusion is correct. The appellant committed very serious offences but he has lived in the UK since he was eight, he went to school and college in the UK, he has worked, has family in the UK and has been attending and doing what he characterises as voluntary work, at a youth club. Without doubt he has conducted himself in an anti-social way but that does not, in my view negate the effect of years of socialisation in the UK."

16. The judge's assessment of third condition (very significant obstacles to integration in St Lucia) is more comprehensive. The judge found that this condition was met for the following reasons:
- a. It was unlikely the appellant would have connections in St Lucia who would help him establish himself.
 - b. He does not have qualifications or skills that will be of great assistance in St Lucia.
 - c. Due to his mild autism he struggles with communication and social interaction, and this will be an impediment to integration in St Lucia.
17. The judge allowed the appeal on the basis that the conditions of Exception 2 in Section 117C(5) were met.

Grounds of Appeal and Submissions

18. The respondent argues that the judge erred in her assessment of (a) whether the appellant was socially and culturally integrated in the United Kingdom, and (b) whether there would be very significant obstacles to his integration into St Lucia.
19. With respect to social and cultural integration, the grounds argue that the judge erred in the following ways:
- a. First, it is argued that the judge failed to take into consideration that the appellant lied about continued use of cannabis. It is asserted that this lie, and his continued use of cannabis, demonstrates a continuing disrespect for the law.
 - b. Second, it is submitted that the judge erred by failing to take into account the history of the appellant's convictions since 2016 which, it is argued, show a break in the continuity of his integration.
 - c. Third, it is contended that the judge erroneously failed to take into consideration the judge's sentencing remarks, which highlight the harm the appellant caused.
20. In written submissions, the respondent argued that the judge's approach was inconsistent with two recent Court of Appeal authorities: *Binbuga (Turkey) v Secretary of State for the Home Department* [2019] EWCA Civ 551 and *CI (Nigeria) v The Secretary of State for the Home Department* [2019] EWCA Civ 2027. It is submitted that, contrary to these authorities, the judge (a) failed to recognise that criminal conduct is capable of causing discontinuity to

integration; (b) did not give consideration to the appellant's history of offending; and (c) did not consider the facts of the appellant's offending.

21. Mr Jarvis, in his oral submissions, reiterated the points made in the respondent's written submissions. He made the overarching argument that the judge appears, at paragraph 41 of the decision, to have set to one side, and not take into consideration, the appellant's anti-social and criminal conduct.
22. With respect to the judge's finding that there would be very significant obstacles to integration in St Lucia, the grounds of appeal argue that the judge erroneously diluted the very high threshold and failed to appreciate that the question of whether the appellant has the ability to form an adequate private life is to be measured by the standards of the country of return, not by UK standards. It is also argued that the judge failed to consider the appellant's relationship with his son when evaluating his ability to form relationships. A further submission in the grounds is that the appellant's autism, and absence of family, would not prevent him seeking employment and establishing a private life in St. Lucia.
23. At the hearing Mr Jarvis advanced an argument that was also set out in the respondent's written submissions, which is that the judge failed to give consideration to the feasibility of the appellant's family assisting and supporting him, either directly or remotely, with integration into society in St. Lucia.
24. The appellant, who was not represented, did not address directly the legal arguments advanced by the respondent. He did, however, in response to questions I asked him, state that he had studied bricklaying at college and, since leaving prison, was spending more time with his son. He also stated that his family in the UK do not have any money and therefore would not be able to assist him in St Lucia. He added that there is no one who will be able to help him in St Lucia. He emphasised that he knew he had done wrong and was sorry for the crimes he had committed.

Analysis

Social and cultural integration in the UK

25. In *Binbuga (Turkey) v Secretary of State for the Home Department* [2019] EWCA Civ 551 at [56] – [57], the Court of Appeal stated:
 56. Membership of a pro-criminal gang tells against rather than for social integration. In this context, social integration refers to the extent to which a foreign criminal has become incorporated within the lawful social structure of the UK. This includes various incidents of society such as clubs, societies, workplaces or places of study, but not association with pro-criminal peers.

57. Similarly, cultural integration refers to the acceptance and assumption by the foreign criminal of the culture of the UK, its core values, ideas, customs and social behaviour. This includes acceptance of the principle of the rule of law. Membership of a pro-criminal gang shows a lack of such acceptance. It demonstrates disdain for the rule of law and indeed undermines it.

26. In *CI (Nigeria) v The Secretary of State for the Home Department* [2019] EWCA Civ 2027 “social and cultural integration” was explained as follows:

The nature and formation of private life

57. In assessing whether a "foreign criminal" is "socially and culturally integrated in the UK", it is important to keep in mind that the rationale behind the test is to determine whether the person concerned has established a private life in the UK which has a substantial claim to protection under article 8. The test should therefore be interpreted and applied having regard to the interests protected by the concept of "private life". The nature and scope of the concept was explained by the Grand Chamber of the European Court of Human Rights in *Üner v The Netherlands* (2006) 45 EHRR 14, para 59, when it observed that:

"... not all [settled] migrants, no matter how long they have been residing in the country from which they are to be expelled, necessarily enjoy 'family life' there within the meaning of article 8. However, as article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of 'private life' within the meaning of article 8." (citations omitted)

58. Relevant social ties obviously include relationships with friends and relatives, as well as ties formed through employment or other paid or unpaid work or through participation in communal activities. However, a person's social identity is not defined solely by such particular relationships but is constituted at a deep level by familiarity with and participation in the shared customs, traditions, practices, beliefs, values, linguistic idioms and other local knowledge which situate a person in a society or social group and generate a sense of belonging. The importance of upbringing and education in the formation of a person's social identity is well recognised, and its importance in the context of cases involving the article 8 rights of persons facing expulsion because of criminal offending has been recognised by the European Court. Thus, in the *Üner* case at para 58, the court considered it "self-evident" that, in assessing the strength of a foreign national's ties with the "host" country in which they are living, regard is to be had to "the special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there."

59. The European Court returned to this theme in *Maslov*, stating (at para 73) that:

"... when assessing the length of the applicant's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it evidently makes a difference whether the person concerned had already come to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult."

Relevance of offending and imprisonment

60. What then in principle is the relevance to the assessment of the offences committed by a "foreign criminal" and the period(s) of imprisonment to which he or she has been sentenced? In the first place, it is clear that the person facing deportation cannot place positive reliance on associations with criminals or pro-criminal groups to demonstrate social and cultural integration. Thus, in *Binbuga v Secretary of State for the Home Department* [2019] EWCA Civ 551, paras 49-60, the Court of Appeal held that it was an error of law to regard the appellant's involvement in gang culture as a good example of his integration into life in the UK, for the reason that social and cultural integration in the UK connotes integration as a law-abiding citizen.
61. Criminal offending and time spent in prison are also in principle relevant in so far as they indicate that the person concerned lacks (legitimate) social and cultural ties in the UK. Thus, a person who leads a criminal lifestyle, has no lawful employment and consorts with criminals or pro-criminal groups can be expected, by reason of those circumstances, to have fewer social relationships and areas of activity that are capable of attracting the protection of "private life". Periods of imprisonment represent time spent excluded from society during which the prisoner has little opportunity to develop social and cultural ties and which may weaken or sever previously established ties and make it harder to re-establish them or develop new ties (for example, by finding employment) upon release. In such ways criminal offending and consequent imprisonment may affect whether a person is socially and culturally integrated in the UK.
62. Clearly, however, the impact of offending and imprisonment upon a person's integration in this country will depend not only on the nature and frequency of the offending, the length of time over which it takes place and the length of time spent in prison, but also on whether and how deeply the individual was socially and culturally integrated in the UK to begin with. In that regard, a person who has lived all or almost all his life in the UK, has been educated here, speaks no language other than (British) English and has no familiarity with any other society or culture will start with much deeper roots in this country than someone who has moved here at a later age. 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. No doubt it is for this reason that the current guidance ("Criminality: Article 8 ECHR cases") that Home Office staff are required to use in deciding whether the deportation of a foreign criminal would breach article 8 advises that:

"If the person has been resident in the UK from a very early age it is unlikely that offending alone would mean a person is not socially and culturally integrated."

27. I am satisfied that the judge's assessment at paragraph 41 of the decision as to whether the appellant is socially and culturally integrated in the UK is adequate. I reach this conclusion for the following reasons.
28. First, the judge did not ignore the appellant's criminal history or treat it as immaterial, as the judge explicitly stated in paragraph 41 that the appellant committed very serious offences and has conducted himself in an anti-social way.
29. Second, the fact that the judge did not set out the appellant's criminal history or specifically refer to the offences committed in 2016 does not mean these were overlooked, or that she did not take account of the nature and seriousness of the offences. The judge referred to serious offences, not to a serious offence, and there is nothing in the decision to indicate that the judge was unaware that the appellant committed offences in 2016 as well as in subsequent years.
30. Third, it was not necessary for the judge to refer to the sentencing remarks. Those remarks show that the offence was serious. Plainly, the judge appreciated the seriousness of the appellant's offending because in paragraph 41 she stated that the appellant had committed "very serious offences".
31. Fourth, the fact that the appellant continues to use cannabis and was dishonest about this was not overlooked by the judge, as it was explicitly mentioned in her findings.
32. Fifth (and most significantly), it is clear from considering *Binbuga* and *CI* that the judge focused on the correct issues and approached the question of whether the appellant is socially and culturally integrated consistently with those authorities. As is made plain in *Binbuga* and *CI*, although criminal offending and consequent imprisonment can affect whether a person is socially and culturally integrated in the UK, the central question for the judge to ask was not how many crimes the appellant had committed or how serious they were, but rather how deeply he is socially and culturally integrated into law abiding UK society despite his criminal conduct. This entails consideration being given to his education, employment, friendships and family relationships, as well as to his familiarity with and participation in the culture, traditions and norms of UK society. See *Binbuga* at [56] and *CI* at [58]. See also *CI* at [62], where it is stated:

[A] person who has lived all or almost all his life in the UK, has been educated here, speaks no language other than (British) English and has no familiarity with any other society or culture will start with much deeper roots

in this country than someone who has moved here at a later age. 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.

33. The evidence before the First-tier Tribunal is that the appellant has lived the vast majority of his life in the UK, attended school (including a pupil referral unit) in the UK, has undertaken some employment training in the UK (in bricklaying), and has formed his social and cultural identity in the UK. The evidence also shows that he has relationships with law abiding British citizens which have been maintained despite his imprisonment and despite his autism which, according to the report of clinical psychologist Dr McNicholas dated 17 November 2015 (that was before the First-tier Tribunal), causes him to struggle with personal responsibility, independence, social relationships and managing emotions. This is not a case where the appellant relies on relationships with criminals (or criminal gangs) or time spent in prison to establish that he is socially and culturally integrated: rather, his social and cultural integration arises from legitimate activity in the UK (primarily education) and relationships with law abiding British citizens.
34. For these reasons, I am satisfied that it was open to the judge, for the reasons she gave in paragraph 41 of her decision, to find that the appellant is socially and culturally integrated in the UK.

Very significant obstacles to integration in St Lucia

35. The meaning of very significant obstacles to integration is not defined in the 2002 Act. A clear explanation of how integration should be understood, however, was given by Sales LJ in paragraph 14 of *Kamara v Secretary of State for the Home Department* [2016] EWCA Civ 813 (cited with approval in paragraph 58 of *Akinyemi v The Secretary of State for the Home Department* [2019] EWCA Civ 2098). He stated:

"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."

36. In *Parveen v The Secretary of State for the Home Department* [2018] EWCA Civ 932 at paragraph 9 the Court of Appeal commented on what is meant by "very significant". It is stated:

“It is fair enough to observe that the words "very significant" connote an "elevated" threshold, and I have no difficulty with the observation that the test will not be met by "mere inconvenience or upheaval". But I am not sure that saying that "mere" hardship or difficulty or hurdles, even if multiplied, will not "generally" suffice adds anything of substance. The task of the Secretary of State, or the Tribunal, in any given case is simply to assess the obstacles to integration relied on, whether characterised as hardship or difficulty or anything else, and to decide whether they regard them as ‘very significant’”

37. The judge correctly identified that the test to apply was whether the appellant would face very significant obstacles integrating in St Lucia. She directed herself to the guidance given in paragraph 14 of *Kamara* and the focus of her assessment was on the difficulties the appellant would face fitting into, and functioning effectively within, society in St Lucia. There is therefore no merit to the contention made in the grounds that the judge applied the wrong threshold or assessed the challenges to integration with reference to “UK standards”.
38. Nor is there merit to the argument that the judge failed to consider the appellant’s relationship with his son when assessing his capacity to effectively integrate and form relationships in St Lucia. This is because the fact that the appellant has a good relationship with his son, who may also be autistic (see paragraph 33 of the decision), is immaterial to the relevant issue, which is his capability to establish and maintain relationships with adults who are not family members and who he has not known previously. On this issue, the judge was entitled to rely on the evidence before him, in particular the report of Dr McNicholas, which indicated that the appellant has significant difficulties with social interaction and building relationships.
39. The respondent argues that the judge failed to consider the support that the appellant’s family could provide from the UK. The difficulty with this argument is that the judge found that one of the key reasons the appellant would face obstacles integrating in St Lucia is that because of his autism he has problems with social interaction and building relationships. This being the case, even if his family in the UK were able to send him some funds and visit him regularly, that would not change the appellant’s difficulty with social interaction and building relationships in a society where he has no connections and no one he can turn to for practical day to day support. Nor would the assistance of his family in the UK be likely to improve his prospects of finding employment, given that they, too, lack connections in St Lucia. For these reasons, it was not necessary for the judge to consider support from family in the UK as this was not a material consideration. In any event, I am in no doubt that even if the judge had considered support from the UK, this would not - for the reasons given above - have changed her conclusion on whether the appellant would face very significant obstacles to

integration. Therefore, if the judge did err by failing to consider family support from the UK (which I do not accept) the error was not material.

Decision

40. The Secretary of State's appeal is dismissed. The decision of the First-tier Tribunal stands.

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 their 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.

Signed

Daniel Sheridan
Upper Tribunal Judge Sheridan

Dated: 31 January 2021