



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/18257/2018 (P)

THE IMMIGRATION ACTS

Decided under rule 34
On 17th July 2020

Decision & Reasons Promulgated
On 27th August 2020

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR N M N
(ANONYMITY DIRECTION MADE)

Respondent

DECISION AND REASONS (P)

1. The appellant in the appeal before me is the Secretary of State for the Home Department (“SSHHD”) and the respondent to this appeal is Mr NMN. However, for ease of reference, in the course of this decision I adopt the parties’ status as it was before the First-tier Tribunal (“FtT”). I refer to Mr NMN as the appellant, and the SSHHD as the respondent.
2. On 28th April 2020 directions were sent to the parties setting out my provisional view that in this case it would be appropriate to determine whether the making of the First-tier Tribunal’s decision involved the making of an error of law, and if so,

whether that decision should be set aside, without a hearing. I set out directions giving the SSHD an opportunity to submit further submissions in writing to support the assertion that the decision of the First-tier Tribunal is vitiated by an error of law. The directions also provided an opportunity for the appellant to respond in writing, and, for the respondent to file and serve any further reply.

3. In response to the directions issued by me, the SSHD filed and served submissions in support of the grounds of appeal, dated 14th April 2020. The appellant's representatives filed a response dated 26th May 2020.
4. Rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008 provides that the Upper Tribunal may make any decision without a hearing. The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider a matter, and the form of any such hearing. The respondent did not express any view as to whether the Tribunal should make its decision without a hearing. The appellant's representatives request an oral hearing. They accept that in the current circumstances during the restrictions imposed by the government in response to the pandemic, such a hearing would most likely have to be conducted by remote means. Neither party identifies any procedural unfairness that arises in the event that a decision is made without a hearing. Having carefully considered the submissions made by the parties in writing, I am satisfied that it is in accordance with the overriding objective and the interests of justice for there to be a timely determination of the question whether there is an error of law in the decision of the FtT, and that it is entirely appropriate for the error of law decision to be determined on the papers, to secure the proper administration of justice. For the avoidance of doubt, in reaching my decision I have taken into account the matters set out in the grounds of appeal and the written representations made by the parties in response to the directions. I am grateful to the parties for their positive engagement with the directions issued.

Background

5. On 28th February 2017, the appellant, a national of Botswana, was convicted at Woolwich Crown Court of possession of a controlled drug – Class A – Cocaine, with intent to supply. He was sentenced to 3 years imprisonment in a young offender’s institution. He was also convicted of possession of a controlled drug – Class A – MDMA, with intent to supply for which he received a concurrent three-year sentence of imprisonment and possession of a controlled drug – Class B – Cannabis, with intent to supply, for which he received concurrent a six-month sentence of imprisonment.
6. On 1st April 2017 the appellant was informed that in light of his convictions he is liable automatic deportation in accordance with s32(5) of the UK Borders Act 2007, unless one of the exceptions apply. The appellant made representations on 20th April 2018 and on 19th August 2018, a deportation order was signed. The appellant was also served with a decision to refuse his human rights claim dated 20th August 2018. The appellant’s appeal against that decision was heard by First-tier Tribunal Judges Freer and Swaney on 4th October 2019 and allowed for reasons set out in a decision promulgated on 15th October 2019.
7. The judges set out the evidence received by the Tribunal from the appellant, his father and Mr Zulu at paragraphs [15] to [44] of their decision. The judges’ findings and conclusions are set out at paragraphs [57] to [74] of the decision. The appellant accepted that the family and private life exceptions set out in the immigration rules and s117C Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) are not met by the appellant.
8. Insofar as the appellant’s private life is concerned, it was common ground between the parties that the appellant has not been lawfully resident in the UK for most of his life and he could not therefore benefit from paragraph 399A of the immigration rules

or Exception 1 set out in s117C(4) of the 2002 Act. The Tribunal was however satisfied for the reasons set out at paragraphs [63] and [64] of its decision that the appellant is socially and culturally integrated in the UK, and, for reasons set out at paragraphs [65] to [68], that there would be very significant obstacles to the appellant's integration into Botswana.

9. The Tribunal found the evidence received to be credible and although the appellant could not benefit from paragraphs 399 and 399A of the immigration rules, found the appellant enjoys a family and private life in the UK. It found the ties between the appellant and his father go beyond the normal emotional ties between a parent and an adult child, because of the care needs of the appellant's father which are met in a significant way by the appellant. At paragraph [69] of its decision the Tribunal refers to the medical evidence regarding the health of the appellant's father. The Tribunal found that since December 2012, the appellant's father has been in a long-term situation of poor health and disability. The Tribunal accepted the appellant's evidence that the time after his father's stroke was very difficult for him and although there was a financial element to the appellant's offending, the offending arose from the difficult circumstances the appellant found himself in as an adolescent struggling to cope with his father's circumstances. The Tribunal found the appellant provides the main emotional support needed in his father's life. The Tribunal considered the availability of alternative care for the appellant's father and having heard evidence from Mr Zulu, found that Mr Zulu could not replace the care provided by the appellant. The Tribunal noted there is a specific bond between the appellant and his father which is irreplaceable and accepted the evidence of Mr Zulu regarding the degree to which the appellant's father relies on the appellant for intangible care that carers simply cannot provide in the form of love and emotional support that only a family member can provide.
10. The Tribunal noted, at paragraph [71], the relevant public interest factors, and for reasons set out at paragraphs [72] to [73] concluded that there are very compelling circumstances over and above the exceptions to deportation set out in s117C of the 2002 Act such that the public interest does not require deportation, and, the decision

to deport the appellant would be contrary to the appellant's Convention rights under the ECHR.

The appeal before me

11. The respondent claims the appellant is unable to bring himself within paragraphs 399 or 399A immigration rules and the reasons given by the Tribunal for its conclusion that there are very compelling circumstances over and above the exceptions to deportation set out in s117C of the 2002 Act, fall short of establishing the very high threshold that must be met. The respondent submits the FtT erroneously found there would be very significant obstacles to the appellant's integration into Botswana. It is said the Tribunal referred to the decision in SSHD -v- Kamara [2016] EWCA Civ 813, but failed to have regard to the subsequent decision of the Court of Appeal in Mwesezi -v- SSHD [2018] EWCA Civ 1104, in which Sales LJ said at paragraph [26] that in Kamara, there were particular reasons why the individual could not be expected to integrate if removed to Sierra Leone, as the Tribunal had been entitled to conclude on the evidence before it in that case.
12. Permission to appeal was granted by FtT Judge Macleman on 3rd February 2020. In doing so, he noted the FtT clearly identified the matters which it held to constitute "very significant obstacles to integration" and, crucially, "very compelling circumstances, over and above" the exceptions in the immigration rules, but it is arguable whether the matters identified met either of those high tests.
13. In the further submissions filed on behalf of the respondent dated 14th April 2020, the respondent adopts the grounds of appeal and submits that although the appellant's father may prefer to receive the care provided by the appellant, that is not to say that the consequences of the appellant's deportation would be unduly harsh. The respondent draws attention to the appellant's evidence set out at paragraph [27] of the decision that carers come to the house three times a day. The respondent submits the FtT impermissibly considered, at paragraph [73] of its decision, that if the appellant's father were a qualifying partner or child the appellant's deportation

would have a particularly harsh effect on his father. The immigration rules do not refer to a relationship with a parent when considering whether the deportation would be contrary to the UK's obligations under Article 8 ECHR.

14. In response, the appellant submits that contrary to what is said in the respondent's submissions, the claim made by the appellant was not that the appellant's father would essentially prefer the appellant to care for him. The appellant submits the FtT clearly had in mind the high threshold applicable in reaching its conclusion that there are very compelling circumstances over and above those described in Exceptions 1 and 2 set out in s117C of the 2002 Act. The appellant submits the grounds of appeal and submissions relied upon by the respondent amount to no more than a disagreement with findings that were open to the Tribunal. The appellant submits the Upper Tribunal should be slow to substitute a different assessment of the evidence where the panel of the FtT had the benefit of hearing all the evidence and considering the extensive medical evidence relied upon.

Discussion

15. Section 32 of the UK Borders Act 2007 defines a foreign criminal, as a person not a British citizen who is convicted in the UK of an offence and, inter alia, sentenced to a period of imprisonment of at least 12 months. Section 32(4) of the 2007 Act sets out the clear proposition that deportation of a foreign criminal is conducive to the public good. That is a statement of public policy enacted by the legislature, which the courts and tribunals are obliged to respect. Section 32(5) of the 2007 Act requires the Secretary of State to make a deportation order in respect of every foreign criminal, subject to the exceptions set out in section 33. Insofar as is relevant that is:

“(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach–

(a) a person's Convention rights, or

...

...

(7) The application of an exception –

- (a) does not prevent the making of a deportation order;
- (b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good;

but section 32(4) applies despite the application of Exception 1 or 4."

16. Part 5A of the Nationality, Immigration and Asylum Act 2002 NIAA 2002 informs the decision making in relation to the application of the section 33 exceptions. Section 117A in Part 5A provides that, when a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article 8, and, as a result, would be unlawful under section 6 of the HRA 1998, the court, in considering the public interest question, must (in particular) have regard to the considerations listed in section 117B and, additionally, in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
17. Applying s117C(3) of the 2002 Act, the public interest required the appellant's deportation unless Exceptions 1 or 2 set out in s.117C(4) and (5) apply. The appellant was unable to establish that Exceptions 1 or 2 apply, essentially for the reasons given by the FtT for concluding that paragraphs 399 and 399A of the immigration rules do not apply.
18. In NA (Pakistan) -v- SSHD [2016] EWCA Civ 662, Lord Justice Jackson held that the fall back protection set out in s117C(6) also avails those who fall outside Exceptions 1 and 2 and that on a proper construction of section 117C(3), the public interest requires the person's deportation unless Exception 1 or Exception 2 applies or unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2. As to the meaning of "very compelling circumstances" over and above those described in Exceptions 1 and 2, Lord Justice Jackson said:

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

29. In our view, the reasoning of the Court of Appeal in *JZ (Zambia)* applies to those provisions. The phrase used in section 117C(6), in para. 398 of the 2014 rules and which we have held is to be read into section 117C(3) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that “there are very compelling circumstances, over and above those described in Exceptions 1 and 2”. As we have indicated above, a foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paras. 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.

19. Whether there are “very compelling circumstances” is a demanding test, but nonetheless requires a wide-ranging assessment, so as to ensure that Part 5A produces a result compatible with Article 8. At paragraph [73] of its decision the FtT set out the factors that make the appellant’s circumstances very compelling. The judges noted that although the appellant had not lawfully been resident in the UK for most of his life, he is socially and culturally integrated in the UK and there would be very significant obstacles to his integration into Botswana. The FtT found that the appellant has a lack of any meaningful ties to Botswana other than his entitlement to citizenship.

20. It is convenient to start with the respondent’s claim that the FtT erroneously found there would be very significant obstacles to the appellant’s integration into Botswana. The respondent refers to the decision of the Court of Appeal in *Mwesezi - v- SSHD* [2018] EWCA Civ 1104. There, the FtT held that there would be very significant obstacles to integration for a Ugandan national who came to the UK with his mother and brother when he was aged two, and who was subsequently diagnosed as suffering from bipolar affective disorder. The appellant had committed serious firearms offences when aged 23 for which he was sentenced to six years’ imprisonment. The Court of Appeal held the Upper Tribunal was right to hold that the FtT’s conclusion that the appellant had made out “very compelling circumstances” for the purposes of s117C(6) of the 2002 Act was not one reasonably open to it. At paragraph [26] of the judgment Sales LJ said that in *Kamara*, there were particular reasons why the individual could not be expected to integrate if removed

to Sierra Leone. To put that in context, it is necessary to consider the decision in Kamara in a little more detail.

21. In Kamara, the Upper Tribunal had found there would be very significant obstacles to Mr Kamara's integration into Sierra Leone, if deported there for the reasons summarised by Sales LJ at paragraph [12] of his decision. The Upper Tribunal had found Mr Kamara had no family, familial links or friends in Sierra Leone. There were no other relevant factors such as social or cultural ties of a nature which would provide him with the basis for establishing a private life and thus integration in Sierra Leone. Mr Kamara did not speak any of the local languages and the Upper Tribunal found that Sierra Leone is a highly contextualised society, many things in the language are not expressed, but are instead interpreted through non-verbal cues or cultural norms, with which Mr Kamara would have no familiarity. Furthermore the evidence before the Upper Tribunal showed that there were continuing hardships experienced by the population in Sierra Leone in relation to the country's fight against Ebola, which would make it still more difficult for an outsider like Mr Kamara. At paragraph [14] of the judgment, Sales LJ said:

“14. In my view, 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.”

22. I reject the claim by the respondent that there is nothing in the appellant's circumstances here, that can lead to a rational conclusion that there would be very significant obstacles to the appellant's integration into Botswana. The respondent claims the appellant comes from a 'Botswanan background' and he would have some awareness of its society and culture. The respondent submits many people move to a new country and are quite capable of starting up a new life.

23. The FtT's reasons for its finding are to be found at paragraphs [66] to [68] of its decision. Although I accept that there are many migrants who seek a new life in countries other than their own, here, the FtT noted the appellant has never been to Botswana apart from a brief visit to attend a funeral when he was a young child. The Tribunal noted that the appellant was born and brought up in Zimbabwe, until he came to the UK and accepted the appellant's evidence that he has no meaningful connection with Botswana at all. The FtT accepted the appellant has no relatives either in Botswana, or with connections in Botswana who would be able, in any practical sense, to assist him. The FtT noted the appellant has no knowledge whatsoever of how life in society in Botswana is carried on. The FtT identified other difficulties the appellant would face and noted that although English may be widely spoken, day-to-day interactions are conducted in local languages and the appellant lacks knowledge of any local languages. Although the FtT was satisfied the appellant has the capacity to learn another language, it noted that would take time and found the appellant would face very significant obstacles to building up the kind of ties that will give substance to his private and family life within a reasonable time. In my judgement the conclusion reached by the FtT that there are very significant obstacles to the appellant's integration into Botswana, is neither irrational nor unreasonable in the *Wednesbury* sense, or a conclusion that was wholly unsupported by the evidence. In fact many of the factors referred to by the FtT are the sort of factors that were considered by the Court of Appeal to be relevant in Kamara. It is in my judgment a conclusion that was properly open to the FtT.
24. In considering whether there are any compelling circumstances over and above those described in Exceptions 1 and 2 of s117C of the 2002 Act, the FtT found that the United Kingdom is the only country in which the appellant has any family members with whom he enjoys a relationship and his close relationship with his father, taken together with his father's dependence on the appellant for emotional and practical support is likely to have a particularly harsh effect on his father.
25. Having found the appellant is socially and culturally integrated in the United Kingdom and there would be very significant obstacles to the appellant's integration

into Botswana, in the final analysis, the FtT reminded itself of the strong public interest in the deportation of foreign offenders who commit serious offences but found that on the particular facts, the strong public interest is outweighed for the reasons set out in paragraph [73]. The FtT concluded that the very substantial weight to be attached to the public interest in removing foreign criminals is, exceptionally, outweighed on the particular facts of this case. If the Tribunal judge applied the correct test, and that resulted in an arguably generous conclusion, it does not mean that it was erroneous in law.

26. In my judgement the decision of the First-tier Tribunal Judges was one that was open to them on the evidence. The findings and conclusions reached by the FtT were neither irrational nor unreasonable in the *Wednesbury* sense and it follows that in my judgement there is no error of law and the appeal is dismissed.

NOTICE OF DECISION

27. The appeal is dismissed

V. Mandalia

Upper Tribunal Judge Mandalia

17th July 2020

