



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2021-000218
First-tier Tribunal No:
[PA/01090/2020]

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 July 2024

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

HEL CAR PEDRO DA SILVA COSTA
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D. Sellwood, Counsel instructed by Riverway Law
For the Respondent: Ms A. Nolan, Senior Home Office Presenting Officer

Heard at Field House on 17 June 2024

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Angola, born in 1986. He is said to have arrived in the UK in about 1994 when he was eight years of age. He was granted Indefinite leave to remain (“ILR”) in July 2002.
2. On 10 October 2016 he was convicted of wounding with intent for which he was sentenced to seven years’ imprisonment. The appellant has a number of other criminal convictions.
3. On 20 January 2020 the respondent made a decision to make a deportation order. The appellant appealed to the First-tier Tribunal (“FtT”)

against that decision and his appeal came before First-tier Tribunal Judge Easterman on 13 August 2020. Judge Easterman dismissed his appeal on asylum, humanitarian protection and human rights grounds.

4. Permission to appeal Judge Easterman's decision was granted by a judge of the Upper Tribunal ("UT"). Thus, the appeal comes before me.

Judge Easterman's decision

5. The following is a summary only of parts of Judge Easterman's decision. He noted that the appeal was no longer pursued on asylum and humanitarian protection grounds, but only in terms of Article 8 in relation to private and family life. S.72 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act")(presumption of serious crime and danger to the community) did not require further consideration, Judge Easterman concluded, in the light of the fact that the appellant was not pursuing his asylum claim.
6. Judge Easterman summarised the appellant's Article 8 case, including in terms of his claim that he was trafficked from Czechoslovakia, and was placed with an aunt in the UK who abused and ill-treated him. He was placed in foster care, returned to the care of his mother, and again placed in foster care with a different foster carer. His foster carer made a witness statement on his behalf for the appeal.
7. Judge Easterman referred to the appellant's claim that he did not know that he was a British citizen and only discovered this when he sought to go abroad. He summarised the appellant's involvement with the Angolan embassy to obtain a passport, his education, employment, and family and other relationships.
8. Judge Easterman made a number of detailed findings of fact. He noted that there was no dispute but that the appellant was a foreign criminal within the meaning of the 2002 Act and that he was sentenced to a term of imprisonment of more than four years.
9. He found that there was clear evidence that the appellant was at school in the UK in 1995 and there was no evidence to contradict his claim that he spent about two years in Czechoslovakia before coming to the UK. At [85] he found that the appellant had spent most of his life in the UK and had been lawfully resident for most of that time.
10. He found that the appellant had been educated in the UK and understands how society works here and concluded that he "might be said to be socially and culturally integrated".
11. At [87] he referred to factors against the contention that he was socially and culturally integrated, in particular in terms of his offending. In the next paragraph he summarised the competing considerations in terms of social and cultural integration.

12. He considered the issue of very significant obstacles to integration in Angola. As regards his visit to Angola for six weeks in 2014 and said that he found the appellant's evidence on this "less than believable" and his account "unlikely", referring to the detail of his account in this respect. At [92] he said again that he found his account on that issue implausible.
13. At [95] he concluded that, against the appellant's background, it was unlikely that he would not regain the use of Portuguese very quickly on return to Angola.
14. Judge Easterman questioned the appellant's account of whether he knows people in Angola, in particular in terms of his desire to obtain an Angolan passport and his having visited Angola in 2014. At [100] he said that the appellant's account of his trip to Angola was another example of his being prepared to do what was necessary to achieve what he wanted because he must have been aware that he was paying for what would have been an unofficially issued passport from someone in the Angolan embassy.
15. He concluded at [102] that the appellant had not established that there would be very significant obstacles to integration in Angola, that he does not speak Portuguese or that he would not be able to acquire facility in the language reasonably quickly. I return to a consideration of [102] later in this decision.
16. Judge Easterman rejected the contention that the appellant's mental health would mean that he could not integrate in Angola. He found that he would be able to obtain appropriate treatment there. He rejected the Article 3 claim.
17. As regards his relationship with his former foster carer, he concluded at [112] that the appellant had not established that there is family life between them, albeit that he accepted that they have a close relationship. He also found that there was no protected family life between the appellant and his mother.
18. On the question of very compelling circumstances over and above the Exceptions to deportation within s.117C of the 2002 Act, Judge Easterman concluded that there were no such circumstances, for the several reasons that he gave.
19. He considered the several factors indicating rehabilitation on the part of the appellant but also noted the conclusions in the OASys report that he represents a medium risk to children and to the public at large, and a high risk to a known adult, although noting some ambiguity in that assessment. He concluded that the public interest in the appellant's deportation outweighed the appellant's Article 8 rights.

The grounds of appeal

20. The grounds of appeal are threefold. Ground 1 argues that there is a misdirection in law in terms of social and cultural integration in the UK. It is asserted that there is no clear finding by Judge Easterman as to whether or not the appellant is socially and culturally integrated. It is pointed out that no authorities on this issue were cited by the judge. The grounds rely on *CI (Nigeria) v Secretary of State for the Home Department* [2019] EWCA Civ 2027, in particular at [58].
21. Had Judge Easterman properly considered all of the appellant's circumstances and applied the correct principles, he would have concluded decisively that the appellant was socially and culturally integrated, it is argued.
22. Ground 2 asserts a misdirection in law on the question of very significant obstacles to integration in Angola. It is again pointed out that no authorities were cited on the issue. What is said at [9] of *Parveen v The Secretary of State for the Home Department* [2018] EWCA Civ 932 is relied on in terms of the need to assess the obstacles to integration.
23. Instead of applying the relevant principles, it is argued that Judge Easterman focused almost exclusively on the fact that the appellant returned to Angola for a six-week period on one occasion since having left Angola at the age of six. Furthermore, at [114] he appears to have suggested that the assessment is one of comparing the appellant with someone else with similar circumstances, as opposed to determining whether as a fact there are very significant obstacles to integration.
24. Ground 3 challenges the approach to very compelling circumstances. It is argued that the erroneous approach to Exception 1 materially infects the assessment of very compelling circumstances. The grounds draw attention to a number of other factors which, it is said, render the judge's conclusion on this issue unsustainable. These are said to include the absence of any reference to authorities or principles, and the erroneous conclusion that meeting Exception 1 alone cannot constitute very compelling circumstances.
25. Other matters argued in relation to the very compelling circumstances assessment include an asserted erroneous conclusion that engagement with probation can only be a 'neutral' factor, despite such engagement being relevant to the risk of reoffending and rehabilitation, the judge's approach to rehabilitation, the conclusion in relation to family life with the appellant's foster mother, and a failure by the judge to consider at all the appellant's arrival as a child 26 years ago, his having been trafficked via Czechoslovakia, abused by his aunt, and then placed into foster care.

Submissions

26. I summarise the parties' oral submissions. Mr Sellwood relied on the grounds of appeal. He submitted that if I found that any of the grounds were made out, that would be sufficient for the FtT's decision to be set aside.

27. It was submitted that the extent to which the appellant met Exception 1 is relevant to the issue of very compelling circumstances. Mr Sellwood relied on *NA (Pakistan) v Secretary of State for the Home Department & Ors* [2016] EWCA Civ 662. Judge Easterman's conclusions on the issue of social and cultural integration were equivocal, it was submitted. The respondent's 'rule 24' response to the grounds of appeal does not answer the arguments advanced on behalf of the appellant, it was submitted.
28. Mr Sellwood accepted that there will be a spectrum of social and cultural integration in the UK and accepted that Judge Easterman had factored in a number of matters. However, what was missing was a final conclusion on the issue of social and cultural integration.
29. In relation to ground 2, it was submitted that the question of very significant obstacles to integration was a matter that was key to the outcome of the appeal. Mr Sellwood reiterated that Judge Easterman had not cited any authority on the issue. *Parveen* (cited above) and *Secretary of State for the Home Department v Kamara* [2016] EWCA Civ 813 are authorities which consider the appropriate test to be applied, it was submitted. Mr Sellwood also drew my attention to *Sanambar v Secretary of State for the Home Department* [2021] UKSC 30 on the same issue.
30. As regards the appellant's trip to Angola, this was a single trip after a number of years for a period of six weeks when he went to get a passport. Mr Sellwood submitted that it was one thing to make such a visit and another to be considered enough of an insider to be able to integrate. It was further submitted that features of UK integration are relevant to integration in Angola.
31. Mr Sellwood accepted that the mere failure to cite authority would not vitiate a decision provided the principles are adhered to. It was also accepted that there were a lot of 'moving parts' in the appeal and the judge had much to deal with. However, it was submitted that there needed to be a clear focus on the principles to be applied.
32. As regards ground 3, there was again an absence of reference to authority in the judge's decision. Mr Sellwood did accept, however, that in the case of very compelling circumstances, there would need to be a very strong case to outweigh the public interest. However, at [116] Judge Easterman wrongly suggested that merely meeting Exception 1 would not be sufficient to establish very compelling circumstances, he argued.
33. In relation to rehabilitation, the conclusion at [118] that the appellant's engagement with probation services is a neutral factor is contrary to what was said by the Supreme Court in *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22 at [53]-[59].
34. In relation to the issue of family life with his foster carer, it was submitted that Judge Easterman's conclusion as to a lack of family is contrary to what was decided in *Uddin v The Secretary of State for the Home Department* [2020] EWCA Civ 338 to the effect that such relationships can

constitute family life. Mr Sellwood did accept, however, that there would need to be more than normal emotional ties between them in order for there to be family life.

35. Lastly, it was submitted that the assessment of very compelling circumstances needed to have taken into account matters such as the circumstances in which the appellant arrived in the UK and the other circumstances set out in the grounds in terms of his background.
36. Ms Nolan relied on the respondent's 'rule 24' response. She submitted that Judge Easterman had done what he needed to do as regards the matters relied on in ground 1. He found that the appellant has lawfully resided in the UK for most of his life. He had considered the factors supportive of social and cultural integration in the UK and those against, including the commission of other offences than the one that resulted in the decision to make a deportation order. His conclusion at [109] was that the appellant was not 'fully' socially and culturally integrated in the UK. He found that there was some integration but not full integration, it was submitted. He had repeated that conclusion at [115].
37. In any event, submitted Ms Nolan, the argument on social and cultural integration is immaterial given the judge's conclusion that there were no very compelling circumstances over and above the exceptions.
38. As regards ground 2, although Judge Easterman had not referred to authority, it is the principles that are important, it was submitted. He had concluded that the appellant's explanation of his visit to Angola was not plausible. He found that he would be able to speak Portuguese. He also considered the appellant's mental health.
39. Ms Nolan took me to various paragraphs of Judge Easterman's decision in support of her submission that he had considered all relevant factors on the issue of very compelling circumstances (ground 3).
40. In reply, Mr Sellwood submitted that considering that Judge Easterman said at [115] that the appellant may or may not meet Exception 1, there was no consideration of the extent to which the appellant was socially and culturally integrated. In relation to ground 2, the '*Kamara test*' was again relied on, and it was submitted that factors such as how long the appellant would take to secure employment or establish relationships needed to be considered.

Assessment and Conclusions

41. Judge Easterman's decision is characteristically thorough in terms of its analysis of the evidence. It was acknowledged by Mr Sellwood that there was much for him to consider.
42. I start by setting out the legislative provisions that are at the heart of the appeal. S.117 of the 2002 Act provides as follows:

“117C Article 8: additional considerations in cases involving foreign criminals

- (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.
- (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.”

43. As we shall see, Judge Easterman resolved s.117C(4)(a) in the appellant's favour (lawfully resident for most of his life). The findings in relation to s.117C(4)(b) (social and cultural integration) are more problematic, however.
44. There is no doubt at all that Judge Easterman was cognisant of all the factual matters both in favour of, and against, a conclusion of social and cultural integration in the UK. At [85], undoubtedly correctly, he said that this was a complex matter. He set out the relevant facts in detail. His settled conclusion on the point, however, is rather elusive. The following paragraphs are his conclusions in relation to social and cultural integration, but I have also included his findings in relation to lawful residence (s.117(4)(a)):

“...might be said to be socially and culturally integrated” [86].

“...the appellant may meet (a) of Exception 1 and may or may not meet (b) although my findings are that his continuing offending does indicate a lack of social and cultural integration...” [102].

“...I find that while he may have some social and cultural integration, weighed against that is his criminal offending, which suggests that he is not fully socially and culturally integrated. [109].

“...so while the appellant may meet (a) of Exception 1 and may or may not meet (b) although my findings are that his continuing offending does indicate a lack of social and cultural integration...” [115].

“...he has to show very compelling circumstances in addition or over and above Exception 1 and 2. It is not suggested that the appellant can meet Exception 2 but even if he does meet Exception 1 although my findings are that he does not, there are no further particular circumstances that can in my view be described as very compelling” [116].

“...balance sheet approach, in the appellant’s favour is that he has been in the United Kingdom lawfully for most of his life...”[117].

“Thus, for the avoidance of doubt I do not find that the appellant meets all the requirements of Exception 1, but even if I am wrong about that, I do not find that there are very compelling circumstances...” [128].

45. So far as s.117(4)(a) is concerned, notwithstanding the judge’s use of the phrase “may meet” in relation to that part of Exception 1, seen in the context of his findings overall, it is apparent that his conclusion was that the appellant met that part of Exception 1. At [102] and [115] he used the word “may” in relation s.117(4)(a) but “may or may not” in relation to s.117(4)(b). At [117] the finding in relation to s.117(4)(a) is more emphatic and is consistent with the clear finding on this issue at [85]. The lawful residence finding is also incontrovertible on the evidence, purely on an arithmetical basis, and is not a matter that is in dispute.
46. I had considered the possibility that in relation to social and cultural integration Judge Easterman could be said to have come to his final conclusion on what may be described as an incremental basis, with a definitive conclusion being the result of a stepped analysis. However, on careful scrutiny it is apparent that there is no clear finding by him on the question of social and cultural integration. It is not possible to deduce whether he concluded that the appellant is or is not socially and culturally integrated in the UK notwithstanding his detailed analysis of the facts.
47. Accordingly, I am satisfied that ground 1 is made out.
48. I shall now consider ground 3.
49. A clear finding in relation to social and cultural integration is crucial to the assessment of very compelling circumstances over and above the Exceptions, as Mr Sellwood rightly submitted. It is not sufficient, as it might be in other scenarios, for a judge to make an alternative finding on an ‘even if I am wrong’ basis, as here in stating that even if the appellant

does meet all the requirements of Exception 1 there are no very compelling circumstances over and above the exceptions. The extent to which a person does, or does not, meet any of the Exceptions must inform the assessment of very compelling circumstances. The following paragraphs from *NA (Pakistan)*, cited above, make the point clear.

- “28. The next question which arises concerns the meaning of "very compelling circumstances, over and above those described in Exceptions 1 and 2". 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.
30. In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an Article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute "very compelling circumstances, over and above those described in Exceptions 1 and 2", whether taken by themselves or in conjunction with other factors relevant to application of Article 8.
31. An interpretation of the relevant phrase to exclude this possibility would lead to violation of Article 8 in some cases, which plainly was not Parliament's intention. In terms of relevance and weight for a proportionality analysis under Article 8, the factors singled out for description in Exceptions 1 and 2 will apply with greater or lesser force depending on the specific facts of a particular case. To take a simple example in relation to the requirement in section 117C(4)(a) for Exception 1, the offender in question may be someone aged 37 who came to the UK aged 18 and hence satisfies that requirement; but his claim under Article 8 is likely to be very much weaker than the claim of

an offender now aged 80 who came to the UK aged 6 months, who by dint of those facts satisfies that requirement. The circumstances in the latter case might well be highly relevant to whether it would be disproportionate and a breach of Article 8 to deport the offender, having regard to the guidance given by the ECtHR in *Maslov v Austria* [2009] INLR 47, and hence highly relevant to whether there are "very compelling circumstances, over and above those described in Exceptions 1 and 2."

50. The absence of a definitive finding in relation to Exception 1, in particular social and cultural integration, undermines the legal basis for the conclusions in relation to very compelling circumstances. It may be said that the judge's perhaps rather ambiguous conclusions in relation to social and cultural integration are nevertheless sufficient to mean that only a weak case under Exception 1 has been made out, thus meaning that little in that respect could contribute to the very compelling circumstances assessment. However, such a contention is unsustainable in the absence of a clear finding on the important issue of social and cultural integration. That is quite apart from the fact that the judge did not clearly factor in his findings on Exception 1, in the very compelling circumstances assessment as was necessary.
51. There is a further reason for concluding that the conclusion in relation to very compelling circumstances is flawed. That is in terms of a failure to take into account the circumstances of the appellant's arrival in the UK, involving an account of being trafficked, abused by a relative, and his circumstances in foster care before being placed with his final foster carer. These are matters that ought to have been part of the assessment of very compelling circumstances over and above the Exceptions.
52. I am not satisfied that Judge Easterman's conclusions in relation to rehabilitation are flawed on the basis that he concluded that the appellant's positive engagement with probation services was only a neutral factor. That is not the conclusion he came to. He found that not much weight could be attached to that matter in the overall assessment ([118] and [121]). His conclusions in this respect are in line with authority.
53. Similarly, I am not satisfied that there is any merit in the contention that Judge Easterman's conclusion in relation to family life with his foster carer is legally flawed. Judge Easterman considered the facts and came to a conclusion consistent with the facts. It is to be noted that he referred at [112] to the appellant having left his foster carer's home aged 17½ years, and that in the intervening period had employment, had lived on his own and spent a considerable period of time in custody. Those facts are not necessarily inconsistent with family life between adults but they are matters that the judge was entitled to take into account. It was open to him to find that the strong affection between them was no more than a strong element of private life.
54. Nevertheless, for the reasons I have otherwise given, I am satisfied that ground 3 is made out.

55. As regards ground 2, it is true that Judge Easterman put particular emphasis on the credibility of the appellant's account of his visit to Angola for a six week period in 2014, but he was entitled to do so given the significance of that matter. It is apparent that he found his account in that respect devoid of credibility. He concluded that the appellant would be able to acquire or improve his Portuguese sufficiently for language not to present an obstacle to integration. The judge did not express a concluded view about whether the appellant knows people in Angola [101], although that was not necessarily essential.
56. However, I consider that there is merit in Mr Sellwood's contention that flawed findings in relation to social and cultural integration (ground 1) have an impact on the consideration of very significant obstacles to integration in Angola.
57. In the circumstances, I am also satisfied that ground 2 is made out. In any event, my conclusions in relation to grounds 1 and 3 are in themselves sufficient to mean that that the FtT's decision must be set aside.
58. I have considered paragraph 7.2 of the Senior President's Practice Direction in relation to whether the appropriate course is for the appeal to be remitted to the FtT or retained in the Upper Tribunal for the decision to be re-made.
59. Notwithstanding that Judge Easterman made clear findings on certain issues, for example the lack of credibility of the appellant's account of his trip to Angola, and in relation to the lack of family life in the UK, I am satisfied that the appropriate course is for the appeal to be remitted to the FtT for a fresh hearing with no findings of fact preserved.
60. The reason I have concluded that no findings can be preserved is that there are significant matters upon which fresh findings are required. To preserve any aspect of Judge Easterman's findings would be to complicate the task of the FtT unnecessarily and in circumstances where a very significant reappraisal of the facts is required. In addition, the nature of an Article 8 evaluation is such that the up-to-date circumstances will require consideration.
61. There is one last matter that I should mention, albeit that neither party raised it as an issue. That is the s.72 certificate (serious crime and presumption of danger to the community). Judge Easterman, having canvassed the matter with the parties, concluded that in the light of the fact that the asylum claim was not pursued, the matter of the s.72 certificate did not need to be considered [11]. I respectfully disagree with that approach. This is a matter of law that does require adjudication, not least because of s.72(10)(a) of the 2002 Act: the tribunal "must begin substantive deliberation on the appeal by considering the certificate". Although the asylum appeal was not pursued, Judge Easterman

nevertheless formally dismissed the appeal on asylum grounds. The certificate also needed to be addressed.

Decision

62. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the appeal is remitted to the First-tier Tribunal for a hearing *de novo* with no findings of fact preserved, to be heard by a judge other than First-tier Tribunal Judge Easterman .

A.M. Kopieczek
Judge of the Upper Tribunal
Immigration and Asylum Chamber

22/07/2024