IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002641

First-tier Tribunal No: HU/01982/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 18 November 2024

Before

UPPER TRIBUNAL JUDGE BULPITT

Between

KUPA CARMEL MUYONGE

Applicant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Radford – Counsel instructed by Turpin Miller Solicitors
For the Respondent: Mrs A Nolan – Senior Home Office Presenting Officer

Heard at Field House on 22 October 2024

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Easterman (the Judge) dated 10 April 2024. In that decision the Judge dismissed the appellant's appeal against the respondent's decision to refuse his human rights claim. The appellant had made that human rights claim after being told of the respondent's intention to deport him because of his criminality.

2. I have concluded that the Judge's decision did contain errors of law such that it must be set aside and remitted to the First-tier Tribunal for a fresh hearing. My reasons for this conclusion and directions for the future management of the appeal follow.

Background

3. The appellant is 22 years old and an Italian national. He has been lawfully resident in the United Kingdom since he moved to the country with his family aged 13 in 2015. In anticipation of the United Kingdom leaving the European

Union, on 7 July 2019 the appellant applied for leave to remain in the United Kingdom under the European Union Settlement Scheme (EUSS).

4. Before the respondent decided that application, but after the United Kingdom left the European Union, on 2 August 2021 the appellant committed an offence of wounding with intent to inflict GBH, though he was not convicted of that offence until more than a year later. On 23 September 2021 he was arrested in possession of a knife, cocaine and cannabis. He was later convicted of being concerned in supplying heroin and crack cocaine, possessing cocaine and cannabis with the intent to supply them to others and possessing a bladed article. He was sentenced for these latter offences on 23 November 2021 when he was ordered to serve a total of 36 months in a young offenders institute.

5. On 12 February 2022 the respondent served the appellant with a "stage one" notice of decision to deport pursuant to the Immigration Act 1971 and the UK Borders Act 2007. This stage one notice is sometimes referred to as a notice of intention to deport and the notice stated that "If a deportation order is made against you then you will be required to leave the United Kingdom". The notice invited the applicant to submit representations as to why he should not be deported and in response the appellant raised a human rights claim on the basis of the private and family life he had established in the United Kingdom. That human rights claim was to remain under the consideration of the respondent for the next fifteen months.

6. On 21 March 2023 the respondent issued a decision refusing the appellant's application for leave to remain under the EUSS. The decision states that the appellant's application was refused on the grounds of suitability "because you are subject to a decision to make a deportation order which was made on 12 February 2022". It is said that there is no right to seek an administrative review of the decision but the right to appeal against the decision is not mentioned.

7. On 30 November 2022 the appellant was sentenced to a further three years imprisonment for the wounding with intent offence he had committed on 2 August 2021.

8. On 3 May 2023 the respondent issued a deportation order pursuant to section 3(5)(a) of the Immigration Act 1971 and section 32 of the UK Borders Act 2007. On 16 May 2023 the respondent issued the decision refusing the appellant's human rights claim which was the subject of this appeal. The appellant appealed against the refusal of his human rights claim and on 7 March 2024 at Hendon Magistrates Court the Judge heard that appeal.

The First-tier Tribunal Hearing and the Judge's Decision

9. Both parties were represented at the hearing and both had served bundles of evidence on which they relied, though neither party served written arguments in advance of the hearing. The hearing proceeded on the basis that the deportation order made on 3 May 2023 was a lawful order and that in those circumstances the issue to be determined was whether, by reference to Part 5A Nationality Immigration and Asylum Act 2002 (the 2002 Act) the private and family life established by the appellant outweighed the public interest in his deportation.

10. Accordingly the Judge heard oral evidence from the appellant, his mother and his brother before hearing submissions from the representatives and reserving his decision.

11. In his decision issued shortly after the hearing, the Judge set out his findings of fact with clarity and care. The Judge identified that the length of the appellant's sentences of imprisonment were such that the two Exceptions to deportation in s117C(4) and (5) of the 2002 Act were relevant. The Judge noted that the appellant could not meet the requirements of Exception 2 as he did not a have subsisting relationship with either a qualifying partner or child. The Judge then considered Exception 1 and concluded that the appellant could not meet any of the requirements of the Exception finding that the appellant (a) had not been lawfully resident in the United Kingdom for most of his life, (b) was not culturally and socially integrated in the United Kingdom and (c) would not face very significant obstacles to integration in Italy.

12. Finally the Judge considered s117C(6) of the 2002 Act and whether there were very compelling circumstances over and above the two Exceptions which meant the appellant's private and family life outweighed the public interest in his deportation. Whilst noting that the witnesses had given credible evidence and that he had no difficulty with the report about the appellant that has been prepared by a psychologist the Judge found that there were no such very compelling circumstances when weighed against the appellant's offending. Consequently the Judge found the interference with the appellant's private and family life to be proportionate and dismissed the appeal.

The appeal to the Upper Tribunal

13. Permission to appeal against the Judge's decision was sought from the First-tier Tribunal. The grounds of appeal at that stage took issue with the Judge's assessment of Exception 1 and the Judge's assessment of whether there were very compelling circumstances to outweigh the public interest in deportation. Permission was refused by a First-tier Judge on 15 May 2024.

14. In the renewed grounds of appeal submitted with an application for permission to appeal made to the Upper Tribunal, the appellant's representatives raised for the first time the lawfulness of the respondent's decision to deport the appellant. The grounds identified that the respondent's decision to refuse the appellant's EUSS application on 21 March 2023 was now subject to an appeal in the First-tier Tribunal and argued that the Judge should have adjourned the human rights appeal so that it could have been consolidated with the appeal against the EUSS decision. The grounds of appeal also maintained the challenges to the Judge's consideration of Exception 1 and whether there were very compelling circumstances to outweigh the public interest in deportation. Permission to appeal was granted by Upper Tribunal Judge O'Brien primarily on the basis of the latter complaints but on all grounds.

15. At the hearing before me, Ms Radford acknowledged that the lawfulness of the respondent's actions when issuing a deportation order were not challenged in the First-tier, but argued by reference to Secretary of State for the Home Department v AA (Poland) [2024] EWCA Civ 18 and Abdullah & Ors (EEA; deportation appeals; procedure) [2024] UKUT 00066, that consideration of whether the respondent's actions were "in accordance with the law" was a necessary part of a human rights assessment and that the Judge's failure to identify that the respondent's actions were not in accordance with the law was an error of law, notwithstanding the fact the Judge was not addressed on the issue in the hearing.

16. Ms Radford informed me that the appellant has additionally lodged out of time appeals against the respondent's notice of decision to deport dated 12 February

2022 and the deportation order issued on 3 May 2023. The appellant argues that the process adopted by the respondent when issuing the stage 1 notice in February 2022, refusing the appellant's EUSS application in March 2022 and issuing a deportation order in May 2023 was not in accordance with the law. As such any interference with the appellant's article 8(1) Convention right to respect for his private and family life could not be justified under article 8(2) of the Convention and the appellant's appeal should have been allowed in this basis.

17. Ms Radford also pursued the remaining renewed grounds of appeal. She argued that the Judge's assessment of whether the appellant was socially and culturally integrated in the United Kingdom was flawed because he determined the issue sole by reference to the appellant's criminality and without the full assessment of the appellant's circumstances required by CI (Nigeria) v SSHD [2019] EWCA Civ 2027 (ground three). She further argued that the Judge's assessment of whether there are very compelling circumstances was also flawed because it did not include a balancing exercise weighing all the appellant's circumstances including his family life with his mother and brothers against the public interest in deportation and instead appeared incorrectly to apply a test of exceptionality (grounds two and three).

18. Ms Nolan did not concede that the respondent's deportation decision making was not in accordance with the law. She pointed out that no such argument was pursued before the Judge and argued that issues surrounding the refusal of the EUSS application and the making of the deportation order can be resolved by the First-tier following argument from both parties in the appeals that are currently outstanding in that Tribunal.

19. With regards ground two Ms Nolan argued that the Judge's assessment of whether the appellant was socially and culturally integrated was not flawed but that the Judge had plainly had regard to the appellant's circumstances. Ms Nolan referred to the Court of Appeal decision in Binbuga v SSHD [2019] EWCA Civ 551 in which LJ Hamblen had stated that cultural integration refers to the acceptance and assumption of values such as the rule of law and that membership of a pro-criminal gang shows a lack of such acceptance. In relation to the Judge's assessment of whether there were very compelling circumstances to outweigh the public interest, Ms Nolan argued that the Judge set out the appellant's case with great care, had regard for the psychological report and took into account the appellant's family life before concluding that there were no very compelling circumstances. In these circumstances she argued the assessment did not contain an error of law.

The Legal Framework

20. The approach to be taken in a human rights appeal was definitively set out by Lord Bingham at [17] of R (Razgar) v SSHD [2004] UKHL 24. It involves a decision maker answering the questions:

> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8 ?
>
> (3) If so, is such interference in accordance with the law?

> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

The challenge to the Judge's decision relates to questions (3) and (5) identified in Razgar.

Q 3 - In accordance with the law?

21. While the United Kingdom was in the European Union there were two separate regimes by which a Deportation Order could be made under s5(1) of the Immigration Act 1971 (the 1971 Act).

22. For EEA citizens and their family members deportation was considered pursuant to the Immigration (EEA) Regulations 2016 (the 2016 Regulations) which transposed into United Kingdom law Directive 2004/38/EC "the Citizens Directive." By virtue of regulation 23(6)(b) a person could be removed from the United Kingdom if that removal was justified on grounds of public policy, public security or public health. Regulation 32(3) of the 2016 Regulations provided that a decision to remove a person under regulation 23(6)(b) is to be treated as a deportation order under section 5 Immigration Act 1971.

23. For all other foreign criminals, deportation was considered pursuant to s3(5) of the 1971 Act on the grounds that the Secretary of State deems deportation is conducive to the public good. In doing so the Secretary of State was required by s32 UK Borders Act 2007 to make a deportation order on this basis in respect of a foreign criminal sentenced to a term of imprisonment of at least 12 months, subject to exceptions listed in s33 UK Borders Act which included where doing so would breach a person's Convention rights

24. The United Kingdom left the EU on 31 January 2020 and after a "transition period" the 2016 Regulations were generally revoked at 11pm on 31 December 2020 as the right of free movement ended, meaning that deportation could only be considered pursuant to the 1971 Act in conjunction with the 2007 Act. The 2016 Regulations were preserved however by The Citizens Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 ("Grace Period Regulations"), with some amendments including the addition of Regulation 27A, in respect of a person who made an application for EUSS leave before 30 June 2021, until that application has been finally determined.

25. Whether considering an order pursuant to the 1971 Act or the 2016 Regulations, the respondent adopts a two stage process to the making of a deportation order. Stage 1 involves a decision to deport that the respondent communicates by a letter which is accompanied by a "section 120 Deportation - One-Stop Notice" inviting the person to make representations as to why they should not be deported. A Deportation Order is not made at this stage in the process. Where no representations are made in response to the stage one notice or where representations are raised but refused, the respondent will proceed at stage 2 to issue a Deportation Order pursuant to section 5(1) of the 1971 Act either by virtue of s3(5) of the 1971 Act or regulation 32(3) of the 2016 Regulations. There is no right of appeal against a Deportation Order made

pursuant to the 1971 Act but there is a right of appeal against a deportation order made by virtue of the 2016 Regulations.

26. By virtue of paragraph EU15 of Appendix EU to the Immigration Rules, an EUSS application will be refused where the applicant is subject to a deportation order. A deportation order is defined in Annex 1 to Appendix EU as (a) an order made under section 5(1) of 1971 Act by virtue of regulation 32(3) of the EEA Regulations; or (b) an order made under section 5(1) of the 1971 Act by virtue of section 3(5) of that Act in respect of conduct committed after 30 December 2020.

Q 5 – Proportionate?

27. Part 5A (sections 117A – 117D) of the 2002 Act provides the Tribunal with structure for ascertaining whether the deportation of a particular individual in the light of their particular circumstances is proportionate to the public interest. Its purpose is to promote consistency, predictability and transparency in decision making and to reflect the Government's and Parliament's view of how as a matter of public policy, the balance between an individual's right to a private and family life and the state's right to remove foreign criminals should be struck.

28. Section 117C sets out the considerations applicable where an appellant's deportation is proposed. Subsection (1) provides that the deportation of foreign criminals is in the public interest and subsection (2) that the more serious the offence the greater the public interest. Subsections (4) and (5) contain two Exceptions to the public interest in deportation which apply in the case of foreign criminals who have been sentenced to less than four years imprisonment. Exception 1 focuses upon an appellant's private life and provides that deportation is not required for a foreign criminal sentenced to less than four years imprisonment if the person (i) has been lawfully resident in the United Kingdom for more than half their life; (ii) is socially and culturally integrated in the United Kingdom and (iii) there would be very significant obstacles to his integration into the country to which it is proposed to deport him. Exception 2 focuses on the effect of the proposed deportation upon those with whom the person enjoys family life and applies where a person has a genuine and subsisting relationship with a British child or a British partner and the effect of deportation on that child or partner would be "unduly harsh".

29. Section 117C(6) of the 2002 Act provides the context for conducting the overarching proportionality assessment, balancing the appellant's right to respect for their private and family life against the public interest in deportation, which is required in all cases where the Exceptions are either not made out on the evidence or cannot apply because of the length of the sentence passed. The sub-section provides that the public interest requires deportation unless "there are very compelling circumstances over and above those described in Exceptions 1 and 2".

Analysis

30. I begin my analysis with the issues that were raised before the Judge and the complaints made about his proportionality assessment in grounds 2 to 4, noting that these were the grounds that Judge O'Brien considered the most meritorious when he granted permission to appeal and that these submissions reflect the hearing before the Judge and the issues he was asked to resolve.

Ground three – socially and culturally integrated assessment

31. The Judge considered whether the appellant was socially and culturally integrated in the United Kingdom at [67] of his decision as part of his assessment of whether the appellant met the requirements of Exception 1 in s117C(4) of the 2002 Act. The Judge begins his assessment of the question with the comment: *"It is frequently said that those who commit crime show by the commission of it that they are not culturally and socially integrated in the United Kingdom as crime is not yet a majority activity"*. Having expressed sympathy for the appellant for his falling in with people who may not be suffering the same consequences the Judge then says: *"the fact is that socially and culturally integrated persons do not carry knives, supply drugs to others and when having been punished for doing just those things, continue to do them."* The Judge then moves immediately on to then consider the third limb of the Exception and the question of whether the appellant would face very significant obstacles to integration in Italy.

32. I agree with Ms Radford that this paragraph gives the impression that the Judge has considered the question of the appellant's social and cultural integration in the United Kingdom solely by reference to his criminality and that for this reason the assessment undertaken falls short of the approach which Lord Justice Leggatt said a Tribunal should take in CI (Nigeria). In his judgment Leggatt LJ noted that the purpose of the assessment whether someone was socially and culturally integrated was to assess the extent to which deportation would involve an interference with the person's private life rather than an assessment of the strength of the public interest in deportation. At [62] of his judgment Leggatt LJ stated that *"the impact of offending and imprisonment upon a persons 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."* At [77] Leggatt said that *"the judge should simply have asked whether - having regard to his upbringing, education, employment history, history of criminal offending and imprisonment, relationships with family and friends, lifestyle and any other relevant factors – [the appellant] was at the time of the hearing socially and culturally integrated in the UK. The judge should not, as he appears to have done, have treated [the appellant's] offending and imprisonment as having severed his social and cultural ties with the UK through its very nature, irrespective of its actual effects on [the appellant's] relationships and affiliations - and then required him to demonstrate that integrative links had since been 're-formed.'"*

33. Mrs Nolan was right to point out that the Judge had recorded the appellant's history in some detail. However there is nothing in the Judge's reasoning to indicate that having done so the Judge has gone on to consider the appellant's upbringing, his education in the United Kingdom from the age of 13, his relationships with his family and any other relevant factors in the way envisaged by Leggatt LJ to determine whether the appellant was socially and culturally integrated. Ms Nolan was also correct to refer to the passage from Binbuga in which Lord Justice Hamblen said that membership of a pro-criminal gang was a factor pointing away from and not towards social and cultural integration as had initially been suggested by the First-tier Tribunal Judge in that case. The decision in Binbuga (which was considered by Leggatt LJ in CI (Nigeria)) however does not detract from the overall assessment of all the relevant factors and not just the criminal offending which Leggat LJ said was required in CI (Nigeria).

34. I am satisfied therefore that the Judge's consideration of whether the appellant was socially and culturally integrated in the United Kingdom involved an error of

law. The Judge was required to undertake a full assessment of all the appellant's circumstances to answer this question and it was insufficient to say as the Judge did that *"it is a fact that socially and culturally integrated persons do not carry knives..."* It does not necessarily follow however that this was a material error of law since even if he were found to be socially and culturally integrated in the United Kingdom there was no way the appellant could have met all the requirements of Exception 1 because he had not lived in the United Kingdom for more than half his life, and the Judge's unchallenged finding was that the appellant would not face very significant obstacles to integration in Italy.

35. Whether the error of law the Judge made when considering whether the appellant was socially and culturally integrated in the United Kingdom was material depends therefore on the effect it had on the Judge assessment of the "very compelling circumstances test". That assessment is challenged in grounds two and four which I turn to next.

Grounds two and four – the very compelling circumstances test

36. In part 4 of the Supreme Court decision in HA (Iraq) v SSHD [2022] UKSC 22 Lord Hamblen analysed the effect of s117C(6) and the very compelling circumstance test it contains. Quoting from Lord Justice Underhill's judgment when the Court of Appeal considered the same case the Court recognised at [47] that *"a full proportionality assessment is required, weighing the interference with the Article 8 rights of the potential deportee and his family against the public interest in his deportation."*

37. At [50] of his judgment in HA (Iraq), this time quoting from Jackson LJ's judgment in NA (Pakistan) v SSHD [2016] EWCA Civ 662, Lord Hamblen records that features of a kind described in Exceptions 1 and 2 will in principle be relevant to the assessment required in the very compelling circumstances test and that the tribunal dealing with that test must look at all the matters relied upon collectively in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation. Still quoting from NA (Pakistan) Lord Hamblen continues to recognise in the same paragraph that *"although there is no exceptionality requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare"*.

38. At [51] of his judgment Lord Hamblen identified that all relevant factors need to be considered and weighed against the very strong public interest in deportation as part of the very compelling circumstances test, including those factors that had previously been identified by the European Court of Human Rights as relevant, one of which is the *"solidity of social, cultural and family ties with the host country and with the country of destination"*.

39. It is clear from this analysis that amongst the relevant factors the Judge was required to weigh against the very strong public interest in deportation when considering the very compelling circumstances test, was the extent of the appellant's social and cultural integration in the United Kingdom. This requirement means that the error in the Judge's assessment of whether the appellant is socially and culturally integrated in the United Kingdom must be material not only to the assessment of whether the appellant meets the requirements of Exception 1 but also to his consideration of the very compelling circumstances test.

40. I am also persuaded that the Judge has erred in his consideration of the very compelling circumstances test by appearing to introduce an exceptionality requirement, which as the above analysis demonstrates is not part of the test. At [74] of his decision, when setting out his conclusions on the very compelling circumstances test the Judge says *"Nonetheless, in my view he does not meet the exceptions in section 117C, nor do I find his circumstances are very compelling circumstances, when weighed against this offending, nor do I find his circumstances to be exceptional, indeed they are all too common".* As Ms Radford submitted this comment does give the impression that the Judge was looking for something exceptional to satisfy the very compelling circumstances test rather than balancing all the relevant factors to see if they outweigh the very strong public interest in deportation. That impression is strengthened by the Judge's earlier reference at [59] to section 117C imposing *"severe constraints on the Tribunal's decision making."*

41. The errors in the Judge's assessment of whether the appellant is socially and culturally integrated in the United Kingdom are such that his decision must be set aside. I have considered whether I should proceed to remake the decision in the Upper Tribunal however the appellant has at least one outstanding related appeal listed in the First-tier Tribunal it is clear that the rehearing of this appeal should be consolidated with that appeal, not least because that appeal is directly relevant to the question of whether the refusal of the appellant's human rights claims that led to this appeal is "in accordance with the law."

Ground one – not in accordance with the law

42. As previously noted this was not raised as an issue before the Judge and it was only after the hearing before the Judge that the appellant challenged the refusal of his EUSS claim and has sought to challenge the issuing of the stage one deportation notice and the making of the deportation order. I am far from persuaded that the Judge can be said to have made an error of law by failing to consider a matter that was not raised before him. Even after the Judge's decision was promulgated the appellant's argument on this issue has evolved and at the hearing before me continued to evolve. This is largely the result of the complex and varied legal provisions that apply in respect of the deportation of EEA nationals following the United Kingdom's exit from the EU, but this serves only to demonstrate that it was not an issue the Judge could have been expected to raise himself in what was of course, an adversarial process.

43. Because I have determined that the errors already identified mean the appeal must be remitted for a fresh hearing in the First-tier Tribunal it is not necessary for me to resolve this ground of appeal. I agree with Mrs Nolan's submission that whether the deportation decision was in accordance with the law is inextricably linked to the outstanding appeal against the refusal of the appellant's EUSS application which is waiting to be heard in the First-tier Tribunal. The first step is therefore for the First-tier to consider the lawfulness of the respondent's actions within the context of that outstanding appeal. In all these circumstances it is clearly in the interests of justice and consistent with the Tribunal's overriding objective that the two appeals are consolidated and the issues resolved together.

44. It is clear that before any consolidated hearing in the First-tier Tribunal takes place, this is a case which would benefit from the respondent reviewing her various decisions about the appellant and his applications. In particular there are now challenges to the respondent's decisions:

i. On 12 February 2022 to issue a stage one notice of deportation applying the 1971 and 2007 Act rather than the 2016 Regulations despite the fact that at that time the appellant had an in-time EUSS application outstanding.

ii. On 21 March 2023 to refuse the appellant's EUSS application on the grounds of suitability despite the fact that at that time no deportation order had been made under section 5(1) of the 1971 Act.

iii. On 3 May 2023 to issue a deportation order under section 3(5)(a) of the 1971 Act rather than the 2016 Regulations as amended by the Grace Period Regulations.

45. If following review those decisions are maintained, the respondent should submit written legal argument dealing with the submissions that have been belatedly raised by the appellant about the lawfulness of these decisions. To this end I make directions below for the case management of this appeal once remitted to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal contain a material error in law and is set aside.

The appeal is remitted for a fresh hearing in the First-tier Tribunal where it will be heard by a Judge other than Judge Easterman.

The following directions are made:

1. This appeal is to be consolidated with the appellant's appeal against the refusal of his EUSS application (EA/00929/2024).

2. The appellant's two appeals are to be listed for a Case Management Hearing in the First-tier Tribunal not before 13 December 2024.

3. 14 days before the Case Management Hearing the appellant is to provide an appeal skeleton argument which sets out the appellant's case in respect of both appeals

4. 7 days before the Case Management Hearing the respondent is to provide a respondent's review

Luke Bulpitt
Upper Tribunal Judge Bulpitt

Judge of the Upper Tribunal
Immigration and Asylum Chamber

13 November 2024