IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003375

First-tier Tribunal No: HU/52348/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 18th of December 2024

Before

UPPER TRIBUNAL JUDGE NEVILLE

Between

ADRIAN IRENEUSZ JURA
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Smith, counsel instructed by Birnberg Peirce
For the Respondent: Ms S Nwachuku, Senior Home Office Presenting Officer

Heard at Field House on 22 October 2024

DECISION AND REASONS

1. The appellant is a citizen of Poland who is presently 36 years old and, on his account, has lived in the United Kingdom since the age of 19. After a number of other convictions, on 8 July 2022 he was sentenced to 15 months' imprisonment for assault occasioning actual bodily harm. That assault was committed against his former partner. On 31 July 2022, the respondent notified the appellant that she had decided to make a deportation order, and invited any representations as to why deportation would not be contrary to his human rights. Those representations were made by the appellant, after which the respondent made a decision dated 23 September 2022 to refuse a human rights claim. This attracts a right of appeal to the First-tier Tribunal, which the appellant duly submitted.

2. The appeal was heard by First-tier Tribunal Judge Hussain who dismissed it in a decision dated 24 May 2024. The appellant applied for permission to appeal to the Upper Tribunal, and was granted permission by First-tier Tribunal Judge Curtis on two grounds: first, that the judge had failed to properly apply the decision-making structure at section 117C of the Nationality, Immigration & Asylum Act 2002; and second, that some material factors personal to the appellant had not been properly considered.

3. At the hearing before me, Ms Nwachuku conceded on behalf of the respondent that the Judge had erred in the way described in the first ground. That concession was sensible. The appellant was sentenced to between 1 and 4 years' imprisonment so was a "medium offender". The Judge was therefore first required to address the two statutory exceptions at section 117C(4)-(5):

> (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.

4. As held in *HA (Iraq) v SSHD* [2022] UKSC 22 at [47]:

> (A) In the cases covered by the two Exceptions in subsections (4)-(5), which apply only to medium offenders, the public interest question is answered in favour of the foreign criminal, without the need for a full proportionality assessment. Parliament has pre-determined that in the circumstances there specified the public interest in the deportation of medium offenders does not outweigh the article 8 interests of the foreign criminal or his family: they are, given, so to speak, a short cut. The consideration of whether those Exceptions apply is a self-contained exercise governed by their particular terms.

5. In this case the Judge found there to be no evidence that could establish Exception 2, and that conclusion is unchallenged. As to Exception 1, he correctly noted that all three elements must be established, before holding as follows:

> 89. […] It seems to me that there is no requirement to analyse whether the appellant is able to meet the second and third criteria because he fails on the first, that is to say, he is unable to

> demonstrate that he has lawfully resided in this country most of his life, as seems to be conceded by his counsel in her skeleton argument.

6. As neither Exception was established, the Judge next had to consider whether there existed the "very compelling circumstances" required by section 117C(6) before the public interest in the appellant's deportation would be outweighed. This is a full Article 8 proportionality assessment, as the Supreme Court in *HA (Iraq)* at [47] goes on to describe:

> (B) In cases where the two Exceptions do not apply - that is, in the case of a serious offender or in the case of a medium offender who cannot satisfy their requirements - 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. In conducting that assessment the decision-maker is required by section 117C(6) (and paragraph 398 of the Rules) to proceed on the basis that 'the public interest requires deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2'.

7. In the Appeal Skeleton Argument submitted to the First-tier Tribunal, Ms Smith had argued proportionality by first addressing the matters listed in Exception 1. This approach did not find favour with the Judge:

> 86. Unless I have misunderstood her submissions, I am unable to reconcile paragraph 24 of the skeleton argument with paragraph 29. In paragraph 24 the learned counsel submits that the appellant has to demonstrate very compelling circumstances over and above those described in exceptions 1 and 2 to be found in sub sections (4) and (5) of section 117C of the 2002 Act. From this, in paragraph 29, she invites the tribunal to consider the concept of "integration" in sub section (4)(c) of section 117C. In my view sub section 4 and 5 are free standing as is sub section 6, in that, the latter is concerned with foreign criminals who have been sentenced to a period of imprisonment of at least 4 years, whereas, the former is concerned with those that have not been sentenced to period of imprisonment of four years and more. In other words, sub-section applies to those whose sentence exceeds four years and sub sections 4 and 5 apply to those whose sentences below that period.

8. Rather than misunderstanding Ms Smith's submissions, which were entirely clear, the Judge instead misunderstood the relevant authorities. It was held in *NA (Pakistan) v SSHD* [2016] EWCA Civ 662 that section 117C(6) applied not only to those who had been sentenced to more than four years' imprisonment, but also to those with a lesser sentence who could not meet either Exception. It was further held that the subject matter of the Exceptions could also be relevant to whether there very compelling circumstances, and in some cases might even establish them:

> 32. Similarly, in the case of a medium offender, if all he could advance in support of his article 8 claim was a 'near miss' case in which he

> fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that there were 'very compelling circumstances, over and above those described in Exceptions 1 and 2'. He would need to have a far stronger case than that by reference to the interests protected by article 8 to bring himself within that fall back protection. But again, in principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to article 8 but not falling within the factors described in Exceptions 1 and 2. The decision-maker, be it the Secretary of State or a tribunal, 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.

9. Ms Smith's submissions to the Judge concerning the depth of the appellant's social and cultural integration were entirely consistent with her concession that he could not meet the first element of Exception 1. Representatives' submissions in such cases, and Tribunal decisions, are now commonly and usefully structured around the Exceptions' discrete requirements so that their weight can then be properly carried forward to the subsequent proportionality assessment. If the Judge had nonetheless gone on to consider social and cultural integration in the UK as part of that assessment, discarding the issue at an earlier stage would be unobjectionable, but while the Judge's treatment does set out the time for which the appellant has lived in the UK and concludes that he would have built up a private life, it does not engage with the particular submissions Ms Smith had made and which the Judge had peremptorily dismissed as irrelevant.

10. A conclusion that the Judge failed to take account of the relevant factors when assessing proportionality is strengthened by his own self-direction:

> 91. Since neither of the exceptions to deportation applies and according to paragraph 25 of the appellant's skeleton argument, the statutory framework is a "complete code" and the entirety of the proportionality assessment required by Article 8 can and must be considered within it: see *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176, it is not apparent what further considerations are required to be taken into account in deciding whether the appellant should be deported.

11. What further considerations are required to be taken into account had been made apparent in the case cited, the Court of Appeal explaining that they were those contained in the Exceptions, as well as that:

> 28. It follows that the Strasbourg case-law about the application of article 8 in cases of this kind must and can be accommodated within the statutory structure. Important guidance about removals generally is given in *Jeunesse*, to which I have already referred, and there are three well-known cases concerning foreign criminals

– *Boultif v Switzerland* (2001) 33 EHRR 50, *Ùner v Netherlands* (2007) 45 EHRR 14, and *Maslov v Austria* [2009] INLR 47.

12. Moreover, by the time of the hearing before the Judge, the Court of Appeal's decision had already been considered by the Supreme Court; the *Boultif* and *Ùner* considerations are listed at [51]. They include "the solidity of social, cultural and family ties with the host country".

13. The failure to consider relevant factors is also behind the second ground upon which the appellant was granted permission to appeal. This was that the Judge failed to consider that the appellant had been subjected to violent abuse as a child, the tragic death of his younger brother, and the connection between those matters and the appellant's mental health difficulties and his abuse of alcohol. This ground was not conceded by the respondent, but I am satisfied that it is well-founded. While the Judge set out the appellant's evidence at length, his own findings and reasoning is much more brief. It is difficult to see whether he accepted the appellant's account of his childhood or, if he did, what he made of it.

14. Taking the grounds together, I am satisfied that the Judge's proportionality assessment was vitiated by an error of law. It cannot be said that the same outcome would be inevitable if the Judge had been familiar with the authorities to which he had been referred.

15. The parties did disagree on the consequences of finding that error of law. While both agreed that the decision should be set aside, Ms Nwachuku argued that the findings that the appellant does not meet the Exceptions should be preserved and the decision re-made in the Upper Tribunal. Ms Smith argued that no findings should be preserved and that the appeal should be remitted to the First-tier Tribunal. Applying the principles set out in the Practice Direction, according to the guidance given in Begum (Remaking or remittal) Bangladesh [2023] UKUT 46 (IAC), I agree with Ms Smith. Very few facts were found by the Judge, and realistically this is an appeal that must be heard against from scratch. Bearing in mind the evaluative nature of Article 8, the extent of the fact-finding required in this case, and that the appellant has not yet had a fair hearing of his appeal and ought not to be unfairly deprived of the two-tier decision-making structure, the appropriate forum is the First-tier Tribunal.

Notice of Decision

(i) The decision of the First-tier Tribunal contains a material error of law and is set aside.
(ii) The case is remitted to the First-tier Tribunal for re-hearing with no findings of fact preserved, to be heard by any judge other than M B Hussain.

J Neville

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9 December 2024