Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03656/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 August 2019	**On 22 August 2019**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ALEX ANTONIO EVANS
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr S Clark, Counsel, instructed by J M Wilson

DECISION AND REASONS

1. This is an appeal against the decision dated 15 May 2019 of First-tier Tribunal Judge Fowell which allowed the appeal of Mr Evans on human rights grounds in the context of deportation.

2. For the purposes of this decision, I refer to Mr Evans as the appellant and to the Secretary of State for the Home Department as the respondent, reflecting their positions before the First-tier Tribunal.

3. Mr Evans is a national of Jamaica, born on 2 September 1998.

4. Mr Evans came to the UK in 2002 at the age of 4. He came on a visit visa with his father and overstayed. His status was regularised in August 2010 when he was granted leave to remain as a dependant of his mother. He was granted a further period of three years' discretionary leave to remain.

5. By the time of the second grant of leave, Mr Evans had been convicted of the first of a number of criminal offences. On 23 December 2013 he was convicted at Birmingham Juvenile Court of robbery and on 21 January 2014 he was given a twelve month referral order for twelve months.

6. On 7 November 2014 the sentence was varied to a youth rehabilitation order and a curfew requirement for three months with tagging.

7. Also in 2014, Mr Evans was excluded from school.

8. On 17 October 2014 the appellant was convicted of attempt/theft of a cycle and on 7 November 2014 he was sentenced to a youth rehabilitation requirement and a curfew requirement for three months of tagging.

9. On 23 January 2015 he was convicted of failing to surrender to custody at an appointed time and of theft – shoplifting. He was fined a total of £70.

10. On 4 December 2015 the appellant was convicted at Birmingham and Solihull Juvenile Court of theft from a person and on 8 January 2016 was given a supervision requirement for twelve months, a youth rehabilitation order for twelve months and a curfew requirement for twelve weeks with electronic tagging.

11. On 5 April 2016 he was convicted of robbery at Birmingham Crown Court and on 6 May 2016 at the same court was sentenced to a youth rehabilitation order with ISSP for eighteen months and curfew requirement for six months with electronic tagging.

12. On 26 July 2017 he was convicted at Birmingham Crown Court of robbery and on 7 December 2017 was sentenced to 21 months' detention in a Young Offender Institution.

13. On 22 November 2018 Mr Evans was convicted at Birmingham and Solihull Magistrates' Court of possessing a controlled drug – class B – cannabis/cannabis resin. He was given a conditional discharge for twelve months.

14. In light of those matters the respondent commenced deportation proceedings against the appellant. He was informed on 15 December 2017 that he was liable to deportation under Section 32 of the UK Borders Act 2007. On 7 February 2019 the respondent wrote to the appellant informing him that he was the subject of a deportation order and finding that the decision to deport him did not breach his rights under Article 8 of the ECHR.

15. The appellant appealed to the First-tier Tribunal and appeared before First-tier Tribunal Judge Fowell in Birmingham on 1 May 2019.

16. In paragraph 32 of the decision, Judge Fowell found that the Appellant did not have a relationship with a qualifying partner. He also found that the question was academic as the claimed relationship had been formed whilst the appellant's immigration status was precarious. The First-tier Tribunal judge concluded that the appellant did not meet the provisions of paragraph 399(b)(i) of the Immigration Rules.

17. In paragraph 33 of the decision the First-tier Tribunal found that the Appellant had not shown that his daughter was British. As a result he could not meet the provisions of paragraph 399(a)(i) of the Immigration Rules.

18. Further, in paragraphs 34 to 36 of the decision, the judge went on to consider whether, even if it had been shown that the child was British, the evidence showed that the appellant's deportation would be "unduly harsh" for her. The First-tier Tribunal concluded that the evidence did not support such a finding, an additional reason why paragraph 399(a)(i) was not met.

19. The First-tier Tribunal then turned in paragraphs 37 and 38 to consideration of paragraph 339A of the Immigration Rules. The judge found that the appellant had not been lawfully resident in the UK for most of his life. In paragraph 37 he identified that by the date of the decision under challenge, the appellant has been lawfully resident for 44% of his life, had spent 80% of his life in the UK and that the period of unlawful residence was whilst he was a child.

20. In paragraph 38 he found that the appellant was socially and culturally integrated in the UK, stating:

> "The second aspect is that he is socially and culturally integrated in the UK. Although it is said that his record of offending shows that he is not, the test is only ever applied to those who have committed at least one offence. That is not therefore a good reason to find against him. Given the length of his stay in the UK and the lack of any strong claim from any other society or culture, I have no difficulty in concluding that this test is met."

21. In paragraphs 39 to 43 the First-tier Tribunal concluded that the appellant could not show that there would be very significant obstacles to his reintegration in Jamaica.

22. In paragraphs 45 to 57 the judge went on to consider whether there were very compelling circumstances shown over and above those set out in paragraphs 399 and 399A, the same provisions being reflected in Exceptions 1 and 2 of Section 117C of the Nationality, Immigration and Asylum Act 2002.

23. In paragraph 46 of the decision, the First-tier Tribunal sets out paragraphs 30 and 31 of NA (Pakistan) v SSHD and Others [2016] EWCA Civ 662. It is not wholly clear why paragraph 30 is included as it concerns the approach to serious offenders, that

is, someone who has a sentence of 4 years or more, rather than a "medium" offender such as this appellant with his 21 month sentence.

24. The judge went on in paragraphs 47 to 51 to return to the provisions of paragraph 399A and Exception 1 of s.117C. In paragraph 47 he states that if those provisions were not met "an exception may be allowed to someone who narrowly failed one of them, or even two, but did outstandingly well in the other." It is not clear where he draws that principle from. He found that the appellant's length of residence andnot being responsible for his illegal residence as a child should be weighed in his favour. He found that ther would be "significant" obstacles to reintegration even if they would not be "very significant". He went to conclude in paragraph 51:

> "Mr Evans abundantly meets the substance, if not the letter, of the first limb of the test about length of residence, abundantly meets the second requirement of being integrated, and there would at least be significant obstacles to his integration in Jamaica. Given the weight that has to be given to the First-tier aspects, I conclude that the shortfall in the third aspect is counterbalanced, and so there are the necessary compelling circumstances here."

25. The judge goes on in paragraph 52 to find "the Rules are met." He then states that although "It is not strictly necessary to go on to consider the wide balancing exercise under Article 8, but I shall do so briefly for completeness." What follows is a further consideration of the "very compelling circumstances" test. The judge considered the requirements of Section 117B of the Nationality, Immigration and Asylum Act 2002 but considered they had little impact. He placed weight on the appellant's family life with his parents and his mother who was "desperately anxious" that the appellant remained in the UK and also referred to his relationship with his daughter. In paragraph 56 of the decision the judge referred to the appellant having committed all of the offences as a juvenile and referred to the principles in the case of Maslov v Austria [2008] GC ECHR 1638/03. He concluded in paragraph 57 that "deportation would be disproportionate."

26. The respondent was granted permission to appeal against the decision of the First-tier Tribunal in a decision dated 5 June 2019.

27. The respondent's grounds argued that having found that the appellant could not meet any of the provisions of paragraphs 399 or 399A or the mirroring provisions in Exceptions 1 and 2 of Section 117C of the Nationality, Immigration and Asylum Act 2002, that was, without anything significant, fatal to the very compelling circumstances test. The appellant's relationship with his parents and his offending having occurred mainly whilst he was a juvenile simply could not show very compelling circumstances sufficient to outweigh the public interest.

28. Further, the Respondent challenged the finding at paragraph 38 concerning social and cultural integration which appeared to have been made on the basis that the appellant's offending behaviour was not a relevant factor.

29. As set out above, the First-tier Tribunal found that the appellant could not meet the provisions of paragraphs 399 and 399A or the Exceptions in s.117C. The correct

approach in the "very compelling circumstances assessment" that follows for someone with a 21 month sentence is set out in paragraph 32 of NA (Pakistan) v SSHD [2016] EWCA Civ 662:

> "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."

30. Having failed to meet the provisions of Exception 1 and Exception 2, the appellant had to show features that "have such great force" that they could amount to very compelling circumstances. This appellant was not even at the "near miss" level identified in paragraph 32 of NA (Pakistan). He did not meet the residence requirements and could not show very significant obstacles to reintegration in Jamaica. Following paragraph 32 of NA (Pakistan), he therefore had to show "a far stronger case" than is required by paragraphs 399 and 399A and Exceptions 1 and 2 of Section 117C in order to meet the "very compelling circumstances" test. There are cases, in principle, which might meet those criteria but this was not one of them. Two of the qualifying provisions from paragraph 399A were not met. He was found to "have a reasonable opportunity to be accepted and to operate on a day-to-day basis" in Jamaica. Even allowing for the appellant's illegal residence having occurred whilst he was a minor and not responsible, this was not the "a far stronger case" required to amount to very compelling circumstances. That remains so even if his profile under paragraphs 399 and 399A is taken together with a close relationship with his parents and his having offended as a child. It was irrational of the First-tier Tribunal to find otherwise in paragraphs 53 to 57.

31. Further, the respondent's submission that the reasoning in paragraph 38 of the decision on the appellant having shown social and cultural integration in the UK has merit. Numerous cases from the higher courts have indicated that criminal offending is a relevant matter when considering social and cultural integration; see, for example, AM (Somalia) v SSHD [2019] EWCA Civ 774 at paragraphs 70 to 75. Criminal offending is not determinative of being unable to establish social and cultural integration but it remains a relevant factor in that assessment. The First-tier Tribunal here was in error in proceeding on the basis that the appellant's criminal offending was not a relevant factor when assessing his social and cultural integration. That conclusion is in error and must be set aside. It also further

undermines the findings in paragraph 51 that the appellant could show very compelling circumstances as it is not correct that the appellant could show "abundantly" that he was socially and culturally integrated.

32. For these reasons, it is my conclusion that the decision of the First-tier Tribunal must be set aside for the decision on the provisions of paragraph 399A(b) concerning social and cultural integration and the very compelling circumstances assessment to be remade.

33. The presumption in paragraph 7 of Part 3 of the Senior President's Practice Statement dated 25 September 2012 is that any re-making will take place in the Upper Tribunal. I found nothing to displace that presumption here and decided that the re-making of appeal should take place in the Upper Tribunal.

34. Prior to the hearing the appellant was sent a direction indicating that, in the event of an error of law being found, the Tribunal would proceed to remake the decision. Nothing was received from either party suggesting any other course of action was appropriate.

35. Further, there was no cross appeal or Rule 24 response from the appellant. There is therefore no challenge to the findings of the First-tier Tribunal on paragraph 399 and they are preserved; Smith (appealable decisions; PTA requirements; anonymity) [2019] UKUT 00216 (IAC) applied.

36. The legal representatives were without all of the materials that were before the First-tier Tribunal. They were provided with the full materials and afforded time to consider those documents. They then made oral submissions and the decision was reserved.

37. It is clear from the matters set out above that the appellant cannot show that he meets the residence requirements of paragraph 399A(a). He has not been lawfully resident in the UK for most of his life.

38. Further, it is my view that this appellant cannot not show that he is socially and culturally integrated into the UK. His criminal history, for someone of such a young age, is properly described by the respondent as persistent. It began when the appellant was aged 15. The index offence was committed when he was an adult. Even after having been sentenced to imprisonment in a Young Offenders' Institution for 21 months for robbery, he went on to obtain a further conviction for possession of cannabis. His behaviour shows disregard for the social and cultural values and wellbeing of those living in the UK. The appellant seeks to rely on having been educated in the UK in order to show social and cultural integration but he was excluded from school in 2014. This was a further indication that he was not socially and culturally integrated into the UK.

39. As above, the appellant cannot show that he will face very significant obstacles to reintegration in Jamaica.

40. He therefore does not meet the provisions of paragraph 399A and Exception 2 of s.117C by some margin. He does not meet the provisions of paragraph 399 and Exception 1 of s.117C by some margin. He cannot show a "near miss" regarding those provisions. It is my conclusion that there are no other circumstances here which could amount to "a far stronger case" that could amount to very compelling circumstances. In reaching that conclusion I place weight in his favour given that he was a minor when he was here unlawfully and cannot be held responsible for that. I accept that his deportation will be hard for him, his parents. However, the material here does not show a seriousness for any of those concerned that could amount to a finding of very compelling circumstances, certainly not one capable of meeting the high threshold for a finding of very compelling circumstances.

41. I also accept that most of the appellant's offences were committed whilst he was a minor and that some weight attracts to his case where that is so. It is of concern, however, that having been convicted of robbery whilst aged 17 years' old he committed the same offence as an adult less than a year later. The criminal court clearly viewed this as very serious where he was given a lengthy custodial sentence. Following s. 117C(2), the seriousness of the offence adds weight to the public interest in his deportation. His previous offences also weigh against him as does the further, albeit minor, offence that followed the serious index offence.

42. In my judgment, the factors weighing in the appellant's favour, even taken at their highest and cumulatively, are not sufficiently strong so as to outweigh the public interest in deportation.

43. For these reasons, it is my conclusion that the evidence here is not capable of showing that very compelling circumstances over and above the provisions of paragraphs 399 and 399A or the Exceptions in s.117C will arise if the appellant is deported. The appeal must therefore be refused.

Notice of Decision

The decision of the First-tier Tribunal disclosed an error on a point of law and is set aside to be remade.

The appeal is dismissed.

Signed  Date 20 August 2019

Upper Tribunal Judge Pitt