Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04082/2018

THE IMMIGRATION ACTS

Heard at Royal Court of Justice	**Decision & Reasons Promulgated**
On 7 October 2019	**On 14 October 2019**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

JE
ANONYMITY DIRECTION MADE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Bexson, Counsel
For the Respondent: Mr Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant has appealed against a decision of the First-tier Tribunal ('FTT') sent on 9 July 2019, dismissing his appeal on Article 8 grounds.

2. The appellant had appealed to the FTT against the respondent's decision to make a deportation order dated 30 January 2018, following his conviction and

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sentence of 90 months imprisonment, for possessing a firearm with intent to cause violence on 14 April 2016.

Summary of FTT's decision

3. The FTT summarised the evidence relevant to the appellant's claimed relationship with A (his child born in 2014) and B (A's mother), and concluded that these were not genuine or subsisting – see [26-32] of the FTT's decision. The FTT also found at [33], that having been born in 1994, and having entered the United Kingdom ('UK') in 2012, the appellant had not been in the UK "for most of his life". Although the FTT did not explicitly say so, it clearly found that the appellant could not benefit from Exceptions 1 and 2 of the Nationality Immigration and Asylum Act 2002 ('the 2002 Act').

4. As the appellant was sentenced to four years or more imprisonment, the critical issue before the FTT was whether there were very compelling circumstances over and above Exceptions 1 and 2 in order to meet the requirements in s. 117C(6) of the 2002 Act. The FTT did not explicitly address this critical issue, but dismissed the appeal on, inter alia, human rights grounds.

Legal framework

5. In order to correctly determine that critical issue, the FTT was obliged to apply paragraphs 399 and 399A of the Immigration Rules. These are reflected within s. 117C of the 2002 Act, which states as follows:

> "(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.
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> (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.
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> (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.
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> (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."

6. In MS (s. 117C(6); "very compelling circumstances") Philippines [2019] UKUT 122 (IAC) the President (sitting in a panel with UTJs Gill and Coker) considered the correct approach to s. 117C(6) with the benefit of the guidance provided in KO (Nigeria) v SSHD [2018] UKSC 53 and NA (Pakistan) v SSHD [2017] 1 WLR 207; [2016] EWCA Civ 662, and said this:

> "16. By contrast, the issue of whether "there are very compelling circumstances, over and above those described in Exceptions 1 and 2" is not in any sense a hard-edged question. On the contrary, it calls for a wide-ranging evaluative exercise. As NA (Pakistan) holds, that exercise is required, in the case of all foreign criminals, in order to ensure that Part 5A of the 2002 Act produces, in each such case, a result that is compatible with the United Kingdom's obligations under Article 8 of the ECHR.
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> 17. Viewed in this light, it can readily be seen that the ascertainment of what constitute "very compelling circumstances", such as to defeat the public interest, requires a case-specific analysis of the nature of the public interest. The strength of the public interest, in any particular case, determines the weight that must then be found to lie on the foreign criminal's side of the balance in order for the circumstances to be properly categorised as very compelling. It would, frankly, be remarkable if a person sentenced to four years' imprisonment for fraud had to demonstrate the same circumstances as a person sentenced to life imprisonment for multiple murders.
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> 18. To say this is not to seek to introduce a "balancing exercise" into Exceptions 1 and 2 and the test of "unduly harsh". The words "over and above", as interpreted by Jackson LJ in NA (Pakistan), underscore the difference in the tasks demanded by, on the one hand, section 117C(4) and (5) and, on the other, section 117C(6).
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> …
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> 20. For these reasons, despite Ms Patyna's elegant submissions, we find the effect of section 117C is that a court or tribunal, in determining whether there are very compelling circumstances, as required by subsection (6), must take into account the seriousness of the particular offence for which the foreign criminal was convicted, together with any other relevant public interest considerations. Nothing in KO (Nigeria) demands a contrary conclusion."

7. The wide-ranging evaluative exercise required under s. 117C(6) clearly includes an application of the principles in the Strasbourg authorities. As NA (Pakistan) (supra) holds, the s. 117C(6) exercise is required to ensure compatibility with the UK's obligations under Article 8 of the ECHR. In addition, the judgment in NA (Pakistan), given by Jackson LJ, reads:

> "29. …The phrase used in section 117C (6), in para. 398 of the 2014 … 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'. … [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."

Appeal to the Upper Tribunal ('UT')

8. Ms Bexson relied upon her three written grounds of appeal. FTT Judge O'Brien had granted permission to appeal on all grounds in a decision dated 7 August 2019. I turn to each of the three grounds of appeal in turn, including the submissions made by both parties at the hearing before me.

Ground 1

9. Ms Bexson submitted that the FTT was not entitled to find at [26] that the appellant had been convicted of an offence "*relating to domestic violence against*" B or that their relationship was "*characterised by violence at times*". In support of that submission, Ms Bexson submitted that that the FTT misdirected itself regarding the appellant's antecedents in 2014, which she claimed involved no violence whatsoever, and was limited to the appellant sending an abusive text message to B. As Mr Lindsay pointed out at the hearing, this submission entirely fails to address material evidence before the FTT including the following:

   (i) B's evidence before the FTT, recorded at [14], that she called the police because there had been an argument and she was afraid that the appellant would hurt A, who was a baby at the time;

   (ii) the antecedent criminal history demonstrates that the appellant was convicted of three offences on 20 November 2014, which all came under the umbrella description of 'domestic abuse' – sending threatening messages, causing nuisance on school premises and resisting or obstructing an officer.

10. Ms Bexson also sought to submit that the FTT mistakenly recorded the evidence provided by the appellant and B in this regard. There was no witness statement to support this claim attaching a note of proceedings. The grounds of appeal make the broad submission that there was no evidence of the appellant being violent toward A or B. As Mr Lindsay pointed out, domestic violence is not limited to physical violence. The FTT was entitled to find that the relationship was characterised by violence at times including to the extent that B was afraid for the safety of A, when he was just a baby. In addition, the text messages were threatening and abusive, and could be said to be characterised by an element of violence. Ms Bexson did not seek to reply to this submission and was unable to reconcile her first ground of appeal with the evidence I have particularised.

11. I am also satisfied that the FTT was entitled to find the report of the independent social worker ('ISW') of limited value for the reasons provided at [27] of the decision. The ISW was only able to say that deportation would deprive A of his father, when the appellant's lengthy imprisonment had already done that and A's parents had taken the decision not to bring A to the prison to visit his father.

12. Ground 1 also submits that the FTT failed to consider A's best interests. This is not a material error of law because the FTT was entitled to find a complete absence of any genuine and subsisting relationship between the appellant and A.

Ground 2

13. Ms Bexson submitted that the FTT's conclusion that the appellant and B were not in a subsisting relationship was contrary to the "*consistent and unequivocal*" evidence that they had been in a relationship since 2012 and had never separated. This submission entirely fails to grapple with the appellant's own ISW report dated 10 December 2018. This states that B "*describes herself as single*" and refers to B as the appellant's "*ex-partner*". The witness statements are unclear regarding the nature and extent of the claimed relationship. Indeed, the appellant's statement says: "*we have been <u>friends</u> since.*" B does not provide any detail on how she (or B) continue to have a relationship with the appellant when he has been in prison since being caught fleeing from police officers in possession of a gun in October 2015. The ISW refers to the appellant as having declined visitors whilst in prison. In these circumstances, the FTT was entitled to find that B's witness statement "*strongly suggests that their relationship is no more than as parents…*" and that their live evidence was not trusted beyond this. Although the appellant's father, step-mother and brother state that the appellant and B have a close relationship, there has been no attempt to particularise this or reconcile this with the ISW's report including the evidence that the appellant has not been visited in prison.

Ground 3

14. Mr Lindsay accepted that the FTT failed to address the critical issue in the appeal: whether the appellant could benefit from the "very compelling circumstances" provision in s. 117C(6) of the 2002 Act. This is a surprising omission given the focus of the submissions before the FTT and the uncontentious fact that as a foreign criminal who had been sentenced to four years or more imprisonment, the appellant could only succeed in his appeal if he met the requirements in s. 117C(6). In addition, at [38] the FTT carelessly and erroneously referred to a concession on the part of the appellant regarding Article 8, when it is clear from the skeleton argument and the remainder of the decision that Article 8 was very much relied upon. Mr Lindsay acknowledged that these failures constitute clear errors of law but submitted that they are immaterial because on any legitimate view of the relevant factual matrix, the appeal was bound to fail under s. 117C(6).

15. It is regrettable that the FTT's decision was promulgated five months after the hearing and fails to address the critical issue in the appeal. However, for the reasons I have already provided, there is no error in law in the factual findings as to the absence of a genuine relationship between the appellant and A and / or B. In those circumstances, I invited Ms Bexson to explain how the appeal could possibly succeed under s. 117C(6). She was only able to emphasise that the appellant has a close relationship with his extended family in the UK. This comes nowhere close to the high threshold that must be reached, as explained in MS (supra) and NA (supra). After all, the appellant has not been visited in prison, and he has been there since late 2015. He is an adult and did not provide any evidence of particular dependency on his extended family members. Absent some other very compelling reason based upon strong evidence, the FTT's findings regarding Exceptions 1 and 2 meant that any claim to meet the requirements in s. 117C(6) was hopeless, and on any legitimate view would fail. After all, Exceptions 1 and 2 were not met by a very large margin indeed. As to Exception 2, there was no genuine and subsisting relationship with a qualifying child or partner and it was therefore unnecessary to consider whether the effect of deportation would be unduly harsh. As to Exception 1, the appellant fell at the first hurdle. There is nothing compelling about the appellant's relationship with extended family members.

16. I note that there appears to have been an argument before the FTT (recorded at [18]) that the appellant's neurological symptoms following a car accident in 2014 explain his offending in 2016, and this amounts to very compelling circumstances. I entirely fail to see how this in itself can amount to very compelling circumstances for the purposes of s. 117C(6). At best it might have been mitigation in relation to the offence itself, but I was not taken to any evidence that the sentencing judge took this into account. In any event, that is not a submission that was pursued in the grounds of appeal or at the hearing before me. I was not taken to any evidence available to the FTT that the appellant's symptoms could not be treated in Jamaica.

17. In any event, Mr Lindsay relied upon MS (supra) to support his submission that s. 117C(6) requires the Tribunal to balance any compelling circumstances with the seriousness of the index offence. The offence in this case attracted a sentence significantly in excess of the four year marker, which indicates the seriousness of the offence.

18. I entirely accept Mr Lindsay's powerful submission that this is one of those rare cases in which the FTT's failure to deal with the critical legal issue in the appeal does not give rise to a material error of law. The FTT was entitled to make the factual findings it did regarding Exceptions 1 and 2. When this is considered together with the remaining evidence taken at its highest and the appellant's very serious criminal offending, the high threshold required by s. 117C(6) could not be met on any legitimate view of the evidence. It is noteworthy that having completed his submissions including this particular submission, Ms Bexson declined to make any reply whatsoever.

Decision

19. The FTT's decision does not contain a material error of law and is not set aside.

Signed: *UTJ Plimmer*
Upper Tribunal Judge Plimmer

Date:
8 October 2019