Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09525/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 June 2019	**On 28 August 2019**

Before

LORD BOYD OF DUNCANSBY
(sitting as a Judge of the Upper Tribunal)
DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

QUINCY [L]
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Mr S Muquit, counsel instructed by Barar & Associates

DECISION AND REASONS

1. The Secretary of State appeals with permission against a decision of First-tier Tribunal Judge Swaney promulgated on 17 April 2019. We shall refer to the parties as they appeared before the First-tier Tribunal. On 11 April 2018 the respondent made a decision to refuse the appellant his human rights claim and maintain a decision to deport him. The appellant appealed against that decision to the FTT who allowed the

appeal. The respondent argues that decision cannot stand because of a material error of law.

Background

2. The appellant is a citizen of Trinidad and Tobago. He was born on 27 July 1981. He arrived in the United Kingdom on 28 June 1988, a month short of his 17th birthday, on a six month visitor visa. He was subsequently granted leave to remain as the child of a spouse of a British citizen until 17 February 2002.

3. On 2 August 2002 the appellant was convicted of robbery and sentenced to 45 months in a Young Offenders' Institution. An application for indefinite leave to remain was subsequently refused. An appeal was dismissed. The appellant was arrested on 19 December 2007 and served with a notice of liability for removal as an overstayer. He was required to report to the Home Office but failed to do so and was recorded as an absconder until 1 December 2015.

4. On 14 July 2010 the appellant was convicted of travelling on the railway without paying a fare and was fined £350.

5. Attempts were made in 2010 and 2012 to notify the appellant of his liability for deportation. A decision to deport was made on 18 April 2012 but could not be served on the appellant as his whereabouts were unknown.

6. On 15 December the appellant made an application for leave to remain on the basis of his family and private life. A decision to deport was served on him on 10 May 2017. On 15 May the appellant's solicitor provided the respondent with evidence in support of his claim under Article 8 ECHR.

The First-tier Tribunal decision

7. In a careful and well-constructed decision FTTJ Swaney allowed the appeal on Article 8 grounds holding that the circumstances could be held to be very compelling over and above the exceptions to deportation.

8. The appellant lives with his sister and her husband and teenage son in Kent. His sister, [D], moved there approximately 10 years ago. The appellant has not worked since then but he helps his sister in her beauty business. After the shop is closed he cleans it and does the stocktaking. He lives rent free and his sister gives him approximately £60 per week. His sister suffers from systemic lupus which gives her extreme fatigue and pain. She goes to bed early to try and conserve her energy.

9. The appellant's nephew is 13 years old. His brother in law is a soldier in the British Army. He is away during the week and comes home at the weekend. Because of his sister's illness and his brother in law's absence during the week the appellant plays a significant role in his nephew's life. He takes him to cadets, karate and the cinema and helps him with his homework. His sister told the FTTJ that he does everything that her husband would do. She also told the FTTJ that she believed that her son

would be devastated if the appellant could not remain in the UK. He would not be able to participate in activities as there would be no-one to take him and he would lack a male role model in the absence of her husband.

10. The appellant submitted that there were obstacles to him returning to Trinidad and Tobago. He had not been there for 20 years. His father had passed away and the only family that was left were distant aunts and uncles whom he had no contact with.

11. The FTTJ rejected a submission by the respondent that, as a result of his conviction, the appellant was not socially and culturally integrated into the United Kingdom. Under reference to **Bossade [2015] UKUT 00415 (IAC)** she found that while social and cultural integration can be broken by criminal offending it can also be regained. The offence was 17 years ago. The appellant had not committed another similar offence since then - she did not put any weight on the conviction for not paying a rail fare – and the significant period of time since the index offence without further adverse conduct demonstrated that he could properly be said to have regained his social and cultural integration.

12. Having analysed the evidence in respect of obstacles to returning to Trinidad and Tobago the FTTJ found that the appellant would be able to gain an understanding of how life operates there and begin developing the kind of ties that would give substance to his private and family life within a reasonable period of time. She found that he would not face very significant obstacles to his integration in Trinidad and Tobago [72].

13. The appellant enjoyed a private life in the UK. He arrived as a minor and had been here for more than 20 years. The appellant's sister, because of her health difficulties, relied on the appellant to a significant extent. The FTTJ found that her dependence on the appellant for assistance in her business and in caring for her son went beyond the normal emotional ties to be expected between adult siblings [73]. The respondent's decision engaged article 8.

14. There was no evidence that the appellant had ever been dependent on public funds and he was likely to be financially independent if allowed to remain in the UK. These were neutral factors. The appellant has been in the UK unlawfully since 2004. Judge Swaney found that as his presence had been precarious she was required to place little weight on the appellant's private life [76].

15. The FTTJ then moved on to consider whether or not the appellant's circumstances could be considered very compelling over and above the exceptions to deportation such that they outweigh the public interest in deportation. She applied the dicta of the Court of Appeal in **NA (Pakistan) [2016] EWCA Civ 662** at [30] and had regard to what the Court of Appeal said in respect of very compelling circumstances in **SSHD v Garzon [2018] EWCA Civ 1225**.

16. The FTTJ then considers the position of the appellant's nephew. She had regard to a witness statement prepared by him. It was clear that he valued the relationship with his uncle, particularly since his father was away from home during the week. He

relied on him to a certain extent to help him access social activities. His mother would not be able to do this because of her health [83]. The best interests of the appellant's nephew were met by the appellant remaining part of the family unit of which the appellant is an important part [84]. The appellant's deportation would be a significant loss to the whole family. That however was an inevitable result of deportation and was not a factor that carried significant weight [85].

17. The FTTJ found that the appellant's relationship with his sister amounted to family life because of the mutual dependencies on each other. She suffered from systemic lupus and carpal tunnel syndrome. This impacted on her physical ability to work and care for her son. She accepted that the appellant played a significant role in helping his sister in the business and a significant role in helping her with her son [87]. The FTTJ considered whether there were any other family members who could fulfil this role but concluded that there was no one to fill the gap {88].

18. The appellant had deliberately not maintained contact with the respondent and this frustrated the respondent's ability to remove or deport him. Although the FTTJ commented that at best the respondent is responsible for the delay between 2004 and 2007 she found that this was not a weighty factor [90]. The appellant had demonstrated that there was a very low risk that he will re-offend and a very low risk of harm. She found that the lapse of time since the offending had reduced somewhat the importance of all of the elements of the public interest [92].

19. Judge Swaney finally listed all the factors and concluded at [93] as follows:

> "I have considered the appellant's conviction and the fact that it must have been relatively serious given the sentences imposed for a first offence; the appellant's poor immigration history and deliberate evasion of immigration control for a number of years; the establishment (and more particularly the development) of his private and family life while [his] status has been precarious and/or unlawful; and the fact that he does not satisfy either of the exceptions to deportation and have weighed them against the best interests of the appellant's nephew; his family life with his sister [D]; the length of time since his conviction and good (save for one indiscretion) conduct since then; the fact that it was one offence, which although serious was not of the most serious in nature; his social and cultural integration in the United Kingdom; the role he plays within his family and in particular in the upbringing of his nephew. I find that on the particular facts of this case, the appellant's circumstances can properly be described as very compelling over and above the exceptions to deportation."

Submissions for Respondent

20. The respondent's grounds of appeal were supplemented by a skeleton argument and oral submissions. The respondent submitted that the finding that the appellant was socially and culturally integrated into the United Kingdom was flawed. The appellant had accepted that he could not satisfy the terms of section 117C(4)(i) of the Nationality Immigration and Asylum Act 2002 and IR 399A(i). This acceptance was

absent from the FTTJ's consideration of his social and cultural integration. One of the material aspects of integration was that it is law abiding **Binbuga (Turkey) v SSHD [2019] EWCA Civ 551**, at [58]. The FTTJ had failed to note that the appellant's residence from 2004 was as the status of an overstayer – a criminal offence under section 24(1)(b)(i) of the Immigration Act 1971. The FTTJ had also failed to consider that the appellant was an absconder from 19 December 2007. The FTTJ had also given positive weight to the appellant's private rights on the basis of his illegal working in the UK (in his sister's business). This was a serious countervailing factor in favour of removal; **ZS (Jamaica) v SSHD [2012] EWCA Civ 1639**, at [27].

21. The FTTJ had given weight to the fact that the appellant had not offended since 2003, other than the failure to pay the train fare. It had also reduced the weight to the public interest on the justification that the passage of time since the offence had reduced the strength of the public interest. These two lines of reasoning constituted material mis-directions and were perverse: **RA (s117C: "unduly harsh: offence: seriousness) Iraq [2019] UKUT 123 (IAC)**, endorsed by the Court of Appeal in **Binbuga**.

22. The FTTJ had effectively rewarded the appellant for his persistent dishonesty and flagrant disinterest in immigration law in the UK. Once the appellant had lost his appeal against refusal of ILR he should have left the UK. It was not accepted that there was any egregious delay on the part of the respondent between 2004 and 2007 and it was in any event irrelevant and inconsistent with authority; **R (on the application of Shou Lin Xu) v Secretary of State for the Home Department (Legacy cases – "conclusion" issue) [2014] UKUT 375 (IAC); Patel v Secretary of State for the Home Department [2013] UKSC 72; RLP (BAH revisited – expeditious justice) Jamaica [2017] UKUT 00330 (IAC).** The comment that the offence was not the most serious was inconsistent with the approach laid out in authority such as **NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662,** at [22]**.**

23. The FTTJ had erred in failing to explain how the relationship between the appellant and his nephew could be material to the overall conclusion of very compelling circumstances. The FTTJ found that the care duties could be absorbed by the family as a whole thereby militating against the adverse impact on his sister. Social services would if required step in **BL (Jamaica) v Secretary of State for the Home Department [2016] EWCA Civ 357,** [53]. Even a genuine and subsisting parental relationship was not enough to outweigh the public interest in the very compelling circumstance test; see e.g. **WZ (China) v Secretary of State for the Home Department [2017] EWCA Civ 795,** at [14].

24. In oral submissions Mr Melvin submitted that the decision was irrational and in effect rewarded the appellant for having evaded immigration control for a very substantial period of time.

Submissions for Appellant

25. The appellant was culturally and socially integrated into the UK. The mere fact that he had a serious conviction was not a barrier to holding that social and cultural integration: **Bossade [2015] UKUT 00415 (IAC)**, at [25]. Length of residence, lawful or otherwise is plainly taken account of as indicative of, rather than irrelevant to, social and cultural integration as is an individual's ability to speak English, having family ties here, financial independence and moving away from criminal conduct. The FTTJ had considered **Bossade** and the decision of the Court of Appeal in **Binbuga**, which endorsed the reasoning in **Bossade.**

26. The suggestion that the FTTJ had failed to take into account the fact that the appellant had been working illegally was an entirely new ground not focussed in the grounds of appeal. In any event the FTTJ clearly comprehended that the appellant was an overstayer and with his history of evading the authorities.

27. The respondent submitted that the FTTJ had failed to give clear reasons as to how the appellant had met the threshold of very compelling circumstances. None of these points suggested that the FTTJ had misdirected itself in law. Ultimately that was a rationality challenge and a disagreement with the outcome. The situation was similar to that in **Secretary of State for the Home Department v Garzon [2018] EWCA Civ 1225.** In that case the Court of Appeal acknowledged that the tribunal had addressed its mind to the great weight that must be afforded the public interest and the high threshold to be implied in the phrase "very compelling circumstances". The court noted that while another specialist tribunal might have reached a different conclusion it could not be said that the decision was perverse, paragraphs [28] and [30]. (See also **Secretary of State for the Home Department v JG (Jamaica) [2019] EWCA Civ 982,** paragraphs [30] – [34]).

28. In oral submissions Mr Muquit responded to the criticism that the FTTJ was rewarding the appellant for evading immigration control. He pointed to paragraphs [89] and [90] of the FTTJ's decision. He noted that the FTTJ found that the appellant's actions in failing to report as required or to notify the respondent as to his whereabout was responsible for frustrating the respondent's ability to remove or deport him at an earlier stage. Accordingly the FTTJ had fully considered the issue and had weighed it in the balance with the other factors.

Decision

29. It is worth reminding ourselves of the function of the UT, particularly in the light of the recent Court of Appeal authority; **UT v Secretary of State for the Home Department [2019] EWCA Civ 1095.** Describing the function of the UT Floyd LJ said;

> "If the UT finds an error of law, the UT may set aside the decision of the FTT and remake the decision: section 12(1) and (2) of the 2007 Act. If there is no error of law in the FTT's decision, the decision will stand. Secondly, although "error of law" is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or

> because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter. Baroness Hale put it in this way in *AH (Sudan) v Secretary of State for the Home Department* at [30]: "Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

30. Although we do not consider that the FTTJ has been in error in the manner in which she set out her reasoning it is also worth reminding ourselves of the *dicta* of Lord Hope in **R (Jones) v First Tier Tribunal and Criminal Injuries Compensation Authority [2013] UKSC 19**, quoted in **UT** at [26]

> "It is well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it."

31. Similar dicta can be found in **Garzon,** a case to which the FTTJ had regard in respect of the approach to very compelling circumstances [79].

32. The FTTJ starts her consideration noting that deportation is in the public interest [59]. She notes that the appellant does not satisfy the immigration rules and accordingly in order to succeed he must demonstrate that his circumstances are very compelling over and above the exceptions to deportation [63]. She correctly adopts the approach desiderated by the Court of Appeal in **NA (Pakistan) v SSHD [2016] EWCA Civ 662** at [37].

33. The FTTJ was entitled to reject the submission from the respondent that the appellant is not culturally and socially integrated into the UK. In **Bossade** the UT stated in terms that "merely being a foreign criminal cannot preclude a person from showing the necessary integration" [25]. The reasons for her conclusion are set out in paragraphs [64] to [67]. The facts in both **Bossade** and perhaps more particularly **Binbuga** are significantly different to those that pertain here. In **Binbuga** the appellant was a member of a gang and the evidence pointed to no real disengagement in criminal activity. In this case, apart from the minor matter of failing to pay a rail fare, the appellant has not engaged in any other criminal activity. In particular there is no evidence to suggest that he is a member of a gang or associates with criminals.

34. At [92] the FTTJ states that the offence can now be described as historic and continues "I consider that the lapse of time reduces somewhat the importance of all of the elements of public interest. i.e. public protection, deterrence and public confidence/social revulsion". There is of course a strong public interest in the maintenance of strong immigration controls. If by that statement the FTTJ is taken to imply that she considers that the maintenance of immigration control is not a public interest then we consider that she is in error. However we consider that read in

context she is dealing with the public interest arsing out of the historic offending and not an overall assessment of the public interest. She deals separately with the question of immigration control and we deal with that below.

35. We are not persuaded that the FTTJ was wrong to suggest that the public interest was lessened by the passage of time. It cannot be said that there is a substantial public interest in removing a criminal from the UK on the grounds of public protection when the offence occurred 17 years before, the appellant has served his sentence and to all intents and purposes has not re-offended. While there may be issues of deterrence and public confidence we consider that the weight to be attributed to these elements is also weakened by the passage of time and the lack of offending since then. Indeed it might be argued that public confidence in the criminal justice system is strengthened by seeing that someone who had received a substantial prison sentence was able to stay away from criminal activity on release.

36. By far the most serious criticism that is made of the FTTJ's decision is that it rewards the appellant for having effectively evaded immigration control. We take the view that no substantial criticism can be made of the respondent's actions in attempting to remove the appellant from the UK. In **Patel [27]** Lord Carnwath JSC giving the judgement of the Supreme Court said that there was no obligation on the Secretary of State to make removal directions in any case. They were simply part of the armoury available to her for the enforcement of immigration control. In **Shou Lin Xu** the UT held that the Secretary of State is entitled to proceed on the basis that those unlawfully in the UK will leave of their own accord [13].

37. There is a public interest in the maintenance of immigration control: **Nationality, Immigration and Asylum Act 2002, s.117B(1).** We consider that this is a strong public interest and the great weight should be given to need to enforce and maintain effective immigration controls. It will in our view seldom be the case that a person who has effectively evaded immigration control will get the benefit of that evasion. To do so would be to reward the illegal immigrant and undermine confidence in the maintenance of immigration controls.

38. Nevertheless it cannot be said that the FTTJ was not seized of this issue. At [90] she records that the appellant agreed that he had deliberately failed to maintain contact with the Home Office. She found that the appellant's actions in failing to report as required or to notify the respondent of his whereabouts frustrated the respondent's ability to remove or deport him. In [93] she weighs in the balance the appellant's poor immigration history and deliberate evasion of immigration control.

39. In **Hesham Ali v Secretary of State for the Home Office [2016] UKSC 60,** Lord Reed noted that great weight should generally be given to the public interest in the deportation of offenders [38]. He continued,

> "but that it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed, as Laws LJ put it in the **SS (Nigeria) case [2014] 1 WLR 998.** The countervailing

considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State. The Strasbourg jurisprudence indicates relevant factors to consider, and paragraphs 399 and 399A provide an indication of the sorts of matters which the Secretary of State regards as very compelling. As explained at para. 26 above, **they can include factors bearing on the weight of the public interest in the deportation of the particular offender, such as his conduct since the offence was committed, as well as factors relating to his private or family life**" (our emphasis)

40. The FTTJ was engaged in a proportionality assessment of the respondent's decision. In our opinion she had regard to all of the factors that are required to be made in the carrying out of that exercise and followed the relevant authorities. She noted at [94] that this was a finely balanced case. We have no doubt that is correct; a differently constituted FTT might have reached a different conclusion. But we cannot say that there was a material error of law in the FTTJ's reasoning.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Date 27 August 2019

Deputy Upper Tribunal Judge Froom