IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14047/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 February 2020	**On 20 April 2020**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

OSIME [B]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Rai of Counsel, Lawmans Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Jamaica born on 15 October 1998. He entered the UK with his mother in December 2002, aged 4. On 3 August 2018 he was convicted of robbery, attempted robbery and commission of acts with intent to pervert the course of public justice and sentenced to five years' detention in a young offender's institution. He had previously committed robbery and other offences. On 14 August 2019 the respondent issued a notice of decision to deport the appellant to Jamaica.

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2. In the respondent's decision it was stated that:

> "It is accepted that you are socially and culturally in the UK to some extent because of the length of your residence here. As you have been in the UK since your arrival in 2002, you will have spent your youth and part of formative years in the UK. You will have been entirely educated in the UK and are likely to have developed personal relationships during your residence here. Evidence has been submitted to demonstrate that you have the support of relatives, friends and acquaintances with whom have developed and maintained personal relationships which constitute a part of your private life in the UK."

3. The appellant's human rights claim was nonetheless refused because, inter alia, it was not accepted that there would be very significant obstacles to his integration into Jamaica or that there would not be adequate medical treatment in Jamaica for Asperger's syndrome and depression, which he had informed the respondent he suffers from.

4. The appellant appealed to the First-tier Tribunal where his appeal was heard by Judge of the First-tier Tribunal Lodge ("the judge"). In a decision promulgated on 15 November 2019 the judge dismissed the appeal. The appellant is now appealing against that decision.

Decision of the First-tier Tribunal

5. The judge found, at paragraph 28, that:

> "Having regard to his demonstrable criminality over a considerable period of time, I cannot find he is 'socially and culturally' integrated into UK society."

6. The judge accepted that the appellant has a number of health problems, including depression, and that he has Asperger's syndrome. At paragraph 39 the judge stated:

> "The reality in this case boils down to whether the appellant's mental health problems mean that he meets the criteria of very compelling circumstances over and above the exceptions."

7. In order to support his claim to suffer from significant mental health and other medical and developmental problems, the appellant relied on a psychological report prepared by child and educational psychologist John Hall dated 29 October 2019. Mr Hall stated that the appellant has extremely low general intelligence and literary skills. He stated at paragraph 122 of the report:

> "I considered the possibility that [the appellant] might be 'faking low' but this did not appear likely given the genuine effort he made on certain tasks and in particular his much better number skills score and the fact that he said he was good at this subject."

8. Mr Hall's concluding remarks were that the appellant continues to self-harm and is in a very depressed state; and that in addition to autism he has been diagnosed with a number of mental health difficulties and has general and specific learning disabilities.

9. The judge did not attach weight to Mr Hall's report. He commented that there appeared to be an overreliance on the evidence of the appellant's mother who, the judge stated, "has very much an axe to grind in these matters". The judge stated that he was not persuaded on the basis of Mr Hall's report that the appellant is learning disabled. At paragraph 51 the judge stated:

> "More significantly, Mr Hall is of the opinion that the appellant is not 'faking it' during the tests that he undertook. He does not however, on the face of it, positively excluded that possibility".

10. The judge concluded at paragraph 58 that the appellant did not meet the test of "very compelling circumstances over and above the exceptions" and the appellant had not raised compelling circumstances which amount to a very strong Article 8 claim.

Grounds of Appeal

11. The first ground of appeal submits that it was procedurally unfair for the judge to find that the appellant is not socially and culturally integrated into the UK without putting the appellant on notice that this was an issue, given that this point had been conceded by the respondent.

12. The second ground argues that the judge erred by finding that the appellant was not culturally and socially integrated into the UK solely because of his criminality.

13. The third ground of appeal submits that the judge fell into error by treating as significant that Mr Hall had not "positively excluded" the possibility that the appellant was "faking" when it is clear that Mr Hall's opinion was that the appellant was not faking.

14. There are two further grounds of appeal but it is not necessary to consider these given that (for the reasons explained below) I have decided, on the basis of the first three grounds of appeal, to set aside the decision.

Analysis

15. It is well established that where a point is expressly conceded by one party it will usually be unfair to disregard the concession unless the tribunal indicates that it is minded to take that course and gives the other party an opportunity to make submissions on the point: *Secretary of State for the Home Department v Balasingham Maheshwaran* [2002] EWCA Civ 173.

16. The respondent conceded in the reasons for refusal letter that the appellant was socially and culturally integrated in the UK to some extent.

See above at paragraph 2 where the relevant paragraph is cited. In the absence of either this concession being withdrawn by the respondent or the judge informing the parties that he intended to disregard the concession it was, in my view, procedurally unfair – and an error of law – for the judge to find against the appellant on this point.

17. The judge also fell into error in the approach taken to assessing whether the appellant had "socially and culturally" integrated into the UK. The only reason given by the judge for concluding that the appellant was not socially and culturally integrated was that he had engaged in criminality over a considerable period of time. However, as is made clear in *CI (Nigeria) v The Secretary of State for the Home Department* [2019] EWCA Civ 2027, absence of social and cultural integration cannot be determined solely by reference to a person's criminality and factors such as a person's upbringing, education and employment history must be considered. At para. 77 of *CI (Nigeria)* it is stated:

> 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 – CI 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 CI'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 CI's relationships and affiliations – and then required him to demonstrate that integrative links had since been "re-formed".

18. Mr Lindsay argued that even if the judge erred by finding that the appellant was not socially and culturally integrated into the UK the error was not material because the appellant had been sentenced to 5 years imprisonment and therefore he could not succeed by meeting the conditions of Exception 1 in s117C(4) of the Nationality Immigration and Asylum Act 2002.

19. Section 117C provides that:

> (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.
>
> (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) ...

(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.

20. As highlighted by Mr Lindsay, the appellant committed an offence for which he was sentenced to imprisonment of over four years. Accordingly, Section 117C(6) applies and the appellant needed to show that there were "very compelling circumstances, over and above those described in Exceptions 1 and 2". Exception 2 concerns relationships with a partner and/or child, and is irrelevant in this case. Exception 1 requires consideration to be given, inter alia, to whether the appellant is socially and culturally integrated in the United Kingdom.

21. Although the appellant could not succeed by showing that he met the conditions of Exception 1, whether or not he met them was nonetheless relevant to the assessment of whether there were "very compelling circumstances, over and above those described in the Exception". As explained in *NA (Pakistan) v Secretary of State for the Home Department & Ors* [2016] EWCA Civ 662 at 37:

> "... [I]t will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are 'very compelling circumstances, over and above those described in Exceptions 1 and 2' as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within the Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6)."

22. Accordingly, the errors relating to whether the appellant is socially and culturally integrated into the UK are material because the appellant's social and cultural integration is relevant to the assessment required under section 117C(6).

23. A further material error arises from the judge's approach to the expert evidence of Mr Hall. It appears from paragraph 51 of the decision (cited above at paragraph 9) that one of the reasons the judge did not attach weight to Mr Hall's report was that Mr Hall did not positively exclude the possibility that the appellant was "faking" but instead merely expressed the opinion that he was not faking. However, it is difficult to see how any expert can ever "positively exclude [the] possibility" that a person is "faking" as in virtually all cases it remains a possibility, even if only a very

small one. The judge gave several sustainable reasons for not attaching weight to Mr Hall's report but it was not reasonably open to the judge to give as a reason for not attaching weight to the report that Mr Hall gave a measured and balanced opinion (as set out above at paragraph 7) as to whether the appellant was "faking" rather than a positive exclusion of the possibility.

24. For the reasons set out above, I have decided to set aside the decision. In the light of the nature of the errors of law identified, I do not consider it appropriate to preserve any findings of fact. Given the extent of fact finding that will be required in order for the decision to be remade, having regard to paragraph 7.2(b) of the Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal, I consider this an appeal which should be remitted to the First-tier Tribunal to be heard afresh.

Notice of Decision

1. The appeal is allowed.

2. The decision of the First-tier Tribunal contains an error on a point of law and is set aside.

3. The appeal is remitted to the First-tier Tribunal to be heard afresh by a different judge.

Signed

Upper Tribunal Judge Sheridan Dated: 24 March 2020