IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No.: UI-2023-003674

First-tier Tribunal No: HU/58097/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 14th of December 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BRION COLINGFORD GRAHAM
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Ms K McCarthy, Counsel instructed by Liberty & Co Solicitors

Heard at Field House on 30 November 2023

Although the Secretary of State is the appellant in this appeal to the Upper Tribunal, for convenience I will hereafter refer to the parties as they were before the First-tier Tribunal.

DECISION AND REASONS

1. The Secretary of State has been granted permission to appeal against the decision of First-tier Tribunal Judge Oxlade promulgated on 30 March 2023 ("the Decision"). By the Decision, Judge Oxlade allowed the appeal of the appellant, a foreign criminal facing deportation, on the ground that there were very compelling circumstances over and above the exceptions

identified in sections 117C(4) and (5) of the 2002 Act, such that despite the strong public interest in the appellant's deportation as a foreign criminal who had been sentenced to a term of 4 years' imprisonment, the refusal of his human rights claim amounted to a disproportionate breach of his rights under Article 8 ECHR.

Relevant Background

2. The appeal hearing in the First-tier Tribunal took place at Hatton Cross on 27 March 2023. Both parties were legally represented, and the Judge received oral evidence from the appellant; the appellant's partner; the appellant's two step-daughters; the appellant's biological daughter; and his cousin's wife, Caron Theobalds, who is a solicitor.

3. In the Decision, the Judge followed a structured approach whereby she began by analysing the position under section 117C(4) of the 2002 Act; moved on to analyse the position under section 117C(5); and then, in order to resolve the question raised in section 117C(6), identified the factors identified as relevant by *HA (Iraq)* which had not yet been addressed in her discussion thus far.

4. The Judge's reasoning with regard to the private life exception was that the appellant had been lawfully resident in the UK for most of his life, having entered the UK legally in 1994 when aged 22/23, and having been granted ILR in 1996. Although he had accrued 9 convictions for 18 offences, commencing in 1996, culminating in a conviction on 25 September 2020 for battery of and threats to kill his former partner on 1 April 2019 - in respect of whom he had been convicted of assault 3 times before, in 2014 and 2015, giving rise to a deportation warning - the Judge held at [12] that, when looking at the appellant in the round, he was socially and culturally integrated in the UK, had very strong and positive relationships with his daughter Shanayi, his cousin and his family; and he had a positive attitude to work and contributing to society, whereas by contrast he did not have any residual cultural ties with his country of origin (St Vincent), nor any family there.

5. At [13] the Judge addressed the appellant's claim that there would be very significant obstacles to his re-integration into St Vincent. Although challenged by the respondent, the Judge found on the balance of probabilities that this claim was made out. Part of the Judge's reasoning was as follows:

> "I accept the oral evidence of Caron Theobalds (who is from St Vincent, visited very recently, and a Solicitor), that he would be regarded as a foreigner there, would find it hard to get work - which is thin on the ground - and he is likely to become destitute. This is because the existing poor economy, opportunity and infrastructure was further damaged by the volcano in 2021, which gave rise to mass evacuation from the countryside, into the towns, and there was damage to fertile agricultural land, spiralling food costs, and there is now a high poverty rate, with many beggars and

> people sleeping in the streets, and the only option is “day work”; [and] he would be at the end of the pecking order. She and her husband already support family members there. There was no cross-examination to contradict her account, which was given in a measured, clear, informative way.”

6. At [14] and [15], the Judge gave her reasons for finding that the family life exception was not met. She held that the effect of removal on the appellant’s partner would not be unduly harsh, and that he did not have a parental relationship with the only child of his who was still under the age of 18, and hence the effect on this child of his removal would not be unduly harsh either.

7. At [17] to [19], the Judge addressed the factors identified as relevant by *HA (Iraq)* that she had not previously addressed when dealing with the family and private life exceptions.

8. At 18], the Judge attached positive weight to the fact that the appellant’s Probation Officer had written on 15 March 2023 that he had shown exemplary compliance with his licence and supervision (which remains in force until September 2024), full engagement with interventions, that he had engaged well with the ‘Building Better Relationships’ programme, and that she had re-assessed his risk of offending from high to medium.

9. At [19], the Judge said that, as to the nationalities of the various persons concerned, the appellant’s children and partner were British citizens, and his partner was likely to encounter some difficulties in adapting to life in St Vincent, never having lived there - being from Trinidad, and having lived for over 40 years in the UK - and she would be very dependent on the appellant in St Vincent.

10. At [20], the Judge reached the following conclusion:

> “On considering all the factors in this case, the appellant meets section 117C(6). He has demonstrated very compelling circumstances over and above Exceptions 1 and 2 arising from his likely destitution on return, which I have explained at paragraph [13].”

11. At [21], she said that she gave considerable weight to the public interest in his deportation. However, as one of the stated aims of deportation was to prevent his re-offending, the weight of the public interest was likely to be tempered by the risk of re-offending being reduced by the professional assessment that there had been a positive and real shift in attitude, his positive engagement with prison life and probation, the re-assessment of the risk of re-offending to medium, the lifetime restraining order, his pro-social relationships with his partner and daughter, and his ability to work and contribute.

12. At [22], the Judge said she gave greater weight to the problems that he would have on return to St Vincent. This was in view of his age when he

left, the length of time that he had been away, the length of time that he had been in the UK - and so was integrated here - and the lack of any support for him in St Vincent, him being an outsider, the lack of work and accommodation, which was likely to give rise to his destitution and being on the streets, because of the current environmental factors arising there.

The Grounds of Appeal to the Upper Tribunal

13. Afroditi Obafemi of the Specialist Appeals Team settled the grounds of appeal to the Upper Tribunal on behalf of the Secretary of State.

14. Ground 1 was that the Judge had made a material misdirection of law in concluding that the appellant met section 117C(6) of the 2002 Act because of his likely destitution on return to St Vincent and/or the Judge had not given adequate reasons for this conclusion.

15. She submitted that the Judge had failed to take into account that the claimed destitution must be made out by clear evidence, as set out in *MA (Proved destitute) Jamaica* [2005] UKIAT 00013 at [11]. There was no financial documentary evidence submitted to show that the appellant's relatives and friends in the UK - including the witnesses who gave evidence at the hearing, and relatives in Canada - would be unable to remit money to the appellant in St Vincent following his deportation from the UK. Neither was any mention made in the skeleton arguments that had been filed on behalf of the appellant on 18 January 2023 and 23 March 2023 respectively of an assertion that the appellant's deportation to St Vincent would render him destitute.

16. The assertion made by Caron Theobalds that the appellant was likely to become destitute was her personal opinion and was not supported by any independent country evidence. The documentary evidence filed by the appellant's representatives did not include any country expert report or country evidence about such matters as societal attitudes towards returning nationals, the cost of living, employment and accommodation prospects, welfare provision, or the effect of the April 2021 volcanic eruption.

17. Ground 2 was that the Judge had materially misdirected herself in law when addressing the public interest. The Judge had erred in referring to the appellant's risk of re-offending having been reduced. The reduction referred to by the Probation Officer in the letter dated 15 March 2023 was a reduction from high to medium of the risk of serious harm to a known adult. There was no reduction in the probability of violent-type re-offending as far as the general public was concerned, which remained at the same level as it was previously, which was a medium probability of violent-type re-offending.

18. In any event positive rehabilitation should have been afforded less weight, given that it had been achieved within the terms of the appellant's

sentence, in a controlled environment and under supervision when out on licence.

19. It was further submitted that the Judge had failed to have regard to the wider public interest considerations as set out in *OH (Serbia)* [2008] EWCA Civ 694, by Wilson LJ at [77], where he identified three different facets of the public interest which were engaged in the deportation of a foreign criminal - namely (a) the risk of re-offending by the person concerned; (b) the need to deter foreign nationals from committing serious crimes by leading them to understand that, whatever the other circumstances, one consequence of them might well be deportation; and (c) the role of deportation as an expression of society's revulsion of serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes.

The Reasons for the Eventual Grant of Permission to Appeal

20. Permission to appeal was refused by the First-tier Tribunal, but following a renewed application for permission, Upper Tribunal Judge Rintoul granted permission, holding that both grounds were arguable:

> "It is arguable that the Judge erred in her assessment of the risk the appellant poses both in terms of the OASyS report and the factors to be taken into account in *OH (Serbia).* It is to be recalled that in an OASyS report "Serious Harm" is "an event which is life-threatening and/or traumatic and from which recovery, whether physical or psychological, can be expected to be difficult or impossible" (see HMPPS's risk of serious harm guidance 2020, v. 2 March 2022).
>
> The first ground is also arguable, although the Secretary of State will need to demonstrate that she put the issue of the availability of the Facilitated Return Scheme (and its value) to the FtT."

The Rule 24 Response

21. In a Rule 24 Response dated 23 November 2023, the appellant's solicitors gave reasons as to why no error of law was made out.

22. Caron Theobalds gave evidence of a natural disaster which occurred in the year 2021 which was public knowledge. The Judge went out of her way to research this evidence from reliable internet sources and confirmed the difficulties faced by the country and the impact it would have upon the appellant should he be deported there.

23. The appellant was not required to provide expert evidence that he would be destitute, as was stated by Judge Leeney on 23 August 2023 when he refused permission to appeal.

24. It was open to the Secretary of State to challenge the evidence given by the appellant's witness at the hearing before the First-tier Tribunal, but the Secretary of State failed to do so.

25. The Judge was right to reach a finding that the appellant would be destitute, as the Secretary of State had failed to cross-examine the appellant as to any enquiries he had made as to the Facilitated Return Scheme.

26. As to Ground 2, the present case was distinguishable from that of *OH (Serbia)* where the First-tier Tribunal Judge had made no reference to the public interest at all.

The Hearing in the Upper Tribunal

27. At the hearing before me to determine whether an error of law was made out, Ms McCarthy informed me that her instructing solicitors had obtained a witness statement from Counsel who had appeared on behalf of the appellant at the hearing in the First-tier Tribunal, in order to address (among other things) the query raised by Judge Rintoul when granting permission. Likewise, Mr Tufan informed me that he had obtained a detailed minute of the hearing which had been made by the Presenting Officer who had represented the Secretary of State on that occasion.

28. Although neither document had been filed in compliance within the stipulated time limit, neither representative objected to late service of the document sought to be relied on by their opponent, and I considered that it was in accordance with the overriding objective to admit both documents. So, copies were handed up for my perusal. I thus ascertained that there was no material disagreement between the Presenting Officer and Ms Fisher, Counsel for the appellant, as to how the hearing had proceeded, including what Caron Theobalds had said in her oral evidence.

29. Mr Tufan proceeded to develop the case put forward in the grounds of appeal. He submitted that it was not reasonably open to the Judge to find that the appellant would face destitution. It was well known that the Facilitated Return Scheme would be available, and it had been referred to at the beginning of the refusal letter sent to the appellant. A separate point, which Mr Tufan acknowledged had not been raised in the grounds, was that the Judge had overlooked the fact that it was possible for an individual to lose his integrative links through persistent criminal offending, as (he submitted) had occurred in this case.

30. In reply, Ms McCarthy acknowledged that a claim under Article 3 ECHR had not been raised. It was unfortunate that the Judge had made a finding of destitution, when it had not been argued. Following *Forester* [2018] EWCA Civ 2653, it was possible for an appeal to succeed under section 117C(6) where a sufficiently strong case was made out under either section 117C(4) or (5). The instant case was an example of this. On

analysis, the Judge had found no more than that there would be such serious hardship faced by the appellant in re-integrating into his home country that this tipped the balance in his favour.

31. After hearing from the representatives as to future disposal, in the event that an error of law was made out under Ground 1, I reserved my decision.

Discussion and Conclusions

29. Before turning to my analysis of this case, I remind myself for the need to show appropriate restraint before interfering with the decision of the First-tier Tribunal, having regard to numerous exhortations to this effect emanating from the Court of Appeal in recent years, including in *T (Fact-finding: second appeal)* [2023] EWCA Civ 485 and in *Volpi & another -v-Volp*i [2022] EWCA Civ 464.

Ground 1

30. In the refusal decision the respondent expressly asserted that the appellant would be able to adjust and settle into the way of life in his country of return "*with financial support from your relatives and friends in the UK*." In addition, but of less materiality, there was a notice about the Facilitated Return Scheme on page 2 of the refusal letter dated 12 October 2022.

31. The availability of financial support for the appellant in the country of return was thus a material issue that the Judge needed to resolve as part of her analysis of the private life exception. It is apparent from her line of reasoning in [13] that she completely ignored this consideration. This was despite the fact that in the same paragraph she recorded that Caron Theobalds said in her oral evidence that she and her husband were already supporting family members there. As I explored with Mr McCarthy in oral argument, this raises the obvious question as to why it would not be feasible for her and her husband to support the appellant – who is also a family member of theirs - on his return to St Vincent, so as to ensure that he does not become destitute.

32. It is apparent from the Presenting Officer's minute that the availability of financial support from abroad was not explored by her in cross-examination of any witnesses, including the appellant, but this did not relieve the Judge of her duty to resolve the issue, particularly as the potential availability of financial support had been flagged up by the oral evidence of Caron Theobalds on which the Judge placed decisive weight.

33. Another respect in which the Judge materially erred was in treating Caron Theobalds as if she was an independent and disinterested Country Expert witness. This was both procedurally irregular and unfair.

34. In her statement dated 24 March 2023, Ms Theobalds said that she was a British citizen who had been born and raised in the UK. She said that she was a close family friend of the appellant, having known him through her husband, as they were both paternal cousins having originated from St Vincent. She confirmed that the appellant was an integral part of her family, visiting frequently and spending weekends with them on occasion.

35. At paragraph 10 of her statement, she said that, at this point in his life, she was of the view that it would be *"wholly unjust*" to return the appellant to his country of origin, St Vincent. At paragraph 11, she said that, from her perspective, it would be difficult for him to assimilate himself back into life in his country of origin where there was little prospect of him being able to find work or earn a living. Because the cost of living was currently high in St Vincent and because of the lack of job security, the appellant would be destitute and suffer extreme hardship.

36. Ms Theobalds did not put herself forward as an impartial witness whose primary duty was to the Court. On the contrary, she made it very plain in her witness statement that she was an advocate for the appellant: she made it plain that she regarded the appellant's proposed deportation to St Vincent as wholly unjust.

37. It is apparent from both the Presenting Officer's minute and Ms Fisher's witness statement that when Ms Theobalds was called as a witness, a considerable amount of additional evidence was elicited from her by Counsel and also by the Judge on the topic of how she believed the appellant would fare in St Vincent on return, having regard to the impact of the volcanic eruption in 2021.

38. But the economic situation in St Vincent following the volcanic eruption was not a matter which had ever been raised before. It was not foreshadowed in Ms Theobalds' witness statement, and it was not mentioned in either of the two skeleton arguments that had been filed.

39. It is no answer to say that the Presenting Officer should have challenged the evidence by way of cross-examination. There was no reason to question Mr Theobalds' personal integrity, and so there was no basis for the Presenting Officer to cross-examine her to the effect that her opinion as to the appellant's likely fate was not honestly held.

40. As to the factual basis for that opinion, the particular problems which were said to flow from the volcanic eruption had not been foreshadowed in a Country Expert report or in country background evidence that had been filed sufficiently far in advance of the hearing so that the Secretary of State could give it proper consideration. So, the Presenting Officer did not have the necessary advance notice or the tools available to effectively cross-examine Ms Theobalds on the evidential foundation for her opinion. Although Ms Theobalds had expressed the belief in her witness statement that the appellant would be destitute, Ms McCarthy accepts that it was not

the appellant's case going into the hearing that he was likely to become destitute. It follows that the Presenting Officer had not prepared for the hearing on the basis that the risk of destitution would be a live issue.

41. According to the minute, the Presenting Office addressed the gist of Ms Theobalds' evidence in her closing submissions in answer to a specific enquiry by the Judge. She submitted that there was no documentary evidence provided to corroborate the economic situation, and that the appellant would be in the same position as those who were currently living there, and also that he would have the support of family in the UK on his return.

42. The Judge failed to engage with the case that, even if the economic situation in the country of return was dire (which the Presenting Officer did not accept as the evidence of Ms Theobalds was not supported by documentary evidence), the appellant would have the support on return of his family in the UK so as not to be at risk of being homeless or destitute.

43. The Judge also misdirected herself in treating Ms Theobalds as an authoritative witness because she came from St Vincent. In fact, as she said in her statement, she had been born and brought up in the UK and it was her husband - the appellant's cousin - who came from St Vincent.

44. For the above reasons, Ground 1 is made out.

Ground 2

45. I accept the Secretary of State's argument that the risk reduction stated by the Judge is not as significant as she appears to suggest, as it is only a reduction of risk from high to medium in respect of the risk of harm to a known adult. There is no reduction in the risk of harm to the general public, which is still medium. However, on a holistic assessment of the Judge's reasoning on the public interest question, I consider that the Judge directed herself appropriately, and that no material error of law is made out.

Summary

46. Although only Ground 1 is made out, it goes to the heart of this appeal, and therefore the decision of the First-tier Tribunal must be set aside.

Future Disposal

47. I explored with the representatives whether, if Ground 1 was made out, it would be appropriate to retain the appeal in the Upper Tribunal for remaking, with the unchallenged findings of Judge Oxlade being preserved, or whether it should be remitted to the First-tier Tribunal for a *de novo* hearing, with none of the findings of Judge Oxlade being preserved.

48. Ms McCarthy submitted that the latter course would be by far the most preferable one, as the appellant might wish to adduce Country Expert evidence about the prospects for the appellant on return to St Vincent, and also documentary evidence about the financial circumstances of family members in the UK or elsewhere going to the issue of their ability to support the appellant financially in St Vincent.

49. Given the extent of fact-finding which will be required to remake the decision, I am persuaded by Ms McCarthy that the appropriate course is for the appeal to be remitted to the First-tier Tribunal at Hatton Cross for a *de novo* hearing, with none of the findings of fact made by Judge Oxlade being preserved.

Notice of Decision

The decision of the First-tier Tribunal involved the making of a material error of law, and so the Secretary of State's appeal is allowed. The decision of the First-tier Tribunal is set aside in its entirety, with none of the findings of fact being preserved.

Directions

The appeal shall be remitted to the First-tier Tribunal at Hatton Cross for a *de novo* hearing before any Judge apart from Judge Oxlade.

Anonymity

The First-tier Tribunal did not make an anonymity direction, and I do not consider that such a direction is required for these proceedings in the Upper Tribunal.

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
6 December 2023