IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004930
First-tier Tribunal No: HU/01397/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

17th January 2024

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

ALEXANDER MISINSKY
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Solomon, Counsel, instructed by TMC Solicitors
For the Respondent: Mr D Clarke, Senior Presenting Officer

Heard at Field House on 21 December 2023

DECISION AND REASONS

Introduction

1. The appellant appeals an adverse decision of Judge of the First-tier Tribunal Aziz ('the Judge') sent to the parties on 19 July 2023.

2. The respondent has concluded that the appellant is a foreign criminal for the purposes of the UK Borders Act 2007, having been sentenced to

a custodial term of over twelve months. The respondent has further concluded that the appellant's deportation is conducive to the public good.

3. A deportation order was issued on 25 August 2022. Accompanying the order was a notice of decision, dated the same day, refusing the appellant leave to remain in this country on human rights grounds. It is against this decision that the appellant appeals.

Relevant Facts

4. The appellant is a national of Slovakia and is presently aged 23. He states that he entered the United Kingdom in 2008, when aged 8, to join his mother who had been residing in this country since 2005. He attended primary and secondary school in this country.

5. Since 2017 he has accumulated several convictions: common assault, assault occasioning actual bodily harm, resist/obstruct police constable, battery (x 2), criminal damage (x 4), theft shoplifting and possession of cannabis (x 2). Additionally, he has convictions for failure to surrender to custody, breach of conditional discharge (x 2), and failure to comply with the community requirements of a suspended sentence.

6. On 4 February 2022 the appellant was sentenced at Reading Crown Court in respect of three counts of possession of a class A drug (crack cocaine) with intent to supply, three counts of possession of a class A drug (heroin) with intent to supply and possession of a controlled class B drug (cannabis). Several of these offences were committed whilst on bail. He was sentenced to four years' imprisonment.

First-tier Tribunal Decision

7. The appellant's appeal was heard by the Judge sitting at Birmingham. The appellant attended with his mother and partner, all three of whom gave evidence. He was represented by Mr Holt, counsel.

8. Section 117C(6) of the Nationality, Immigration and Asylum Act 2002 applies to the appellant consequent to his having been sentenced to a period of four years or more imprisonment. The statutory provision stipulates that the public interest in deporting an offender will only be outweighed where there are very compelling circumstances over and above the family and private life exceptions set out at section 117C(3) of the Act.

9. The Judge noted that one of the "central planks" of the appellant's case in respect of very compelling circumstances was his very difficult

upbringing resulting in him voluntarily agreeing to be taken into care when he was aged 16 and which he considers a foundation for his mental health and self-harm issues.

10. In respect of medical evidence relied upon by the appellant the Judge concluded that the weight that he could give to a report from Dr Lodhi had to be tempered by the fact that neither the First-tier Tribunal nor indeed the expert had been provided access to the appellant's medical records.

11. The Judge made relevant findings of fact from [32] of the decision onwards. Core elements of the appellant's case were accepted, including that the relationship between his parents had broken down shortly after his birth and that he does not have any contact with his father or his father's side of the family.

12. It was accepted that the appellant attended school in this country, leaving without passing any exams. It was observed that the appellant may have been adversely impacted by dyslexia when in education. The Judge accepted that the appellant's unstable background may have had an adverse impact upon his education. It was further accepted that the appellant's mother, with whom he lived, had difficulties with alcohol. It was due to this unstable family background that social services became more and more engaged with the appellant from 2013 onwards and he was placed in temporary care between 2017 and 2018. The appellant was accepted to have developed alcohol and drug abuse problems.

13. The Judge accepted that the appellant's descent into antisocial behaviour and criminal offending between 2017 and 2021 could be explained, though not excused, by a difficult and unstable upbringing.

14. The public interest in the deportation of foreign criminals was noted. As for the seriousness of the offence committed, the Judge observed the sentencing remarks and the aggravating features of the offences, as well as the OASys filed with the First-tier Tribunal with the appellant assessed to be a medium risk to the public.

15. Though not determinative of the human rights appeal before him, consequent to the length of custodial sentence imposed, the Judge considered the two exceptions to the public interest established by statute and additionally by the Immigration Rules.

16. When considering Exception 1 the Judge noted the respondent's concession that the appellant has been lawfully resident in the United Kingdom for most of his life. He found the appellant to be socially and culturally integrated into the United Kingdom. The Judge did not accept

that the appellant was open as to the level of support that would be available to him upon return to Slovakia in respect of his maternal grandparents, considering both the appellant and his mother to be evasive in addressing the potential support available. The Judge found that there would not be a complete absence of support from his maternal family on return. However, the Judge confirmed at [58] of his decision that he was "just persuaded" that having lived in this country since the age of 18 and with limited ties to his home country that there were very significant obstacles to the appellant's integration into Slovakia. Consequently, the Judge was "just" satisfied that the private life exception had been met. I observe that "just" is not a limitation. The Exception is either met or it is not.

17. In respect of Exception 2 the Judge did not find that the appellant's relationship with his partner and his partner's child established a family life, observing that the couple were not living together and that the partner was the child's only primary carer. It was accepted to be a stable relationship and I observe that the appellant's partner, Ms King, is pregnant with their child. Ms King attended before this Tribunal to support the appellant and her due date is within the next month or so.

18. Turning to the assessment of very compelling circumstances from [65] of the decision onwards, the Judge observed relevant authority from the Court of Appeal and the Supreme Court. Noting the grant of permission to appeal in this matter, I observe that the Judge specifically referenced *CI (Nigeria) v Secretary of State for the Home Department* [2019] EWCA Civ 2027, [2020] Imm AR 503, at [112]:

> "112. Secondly, as I have indicated, the distinction of principle drawn in the case law of the European Court is between the expulsion of a person who has no right of residence in the host country on the one hand and, on the other hand, expulsion which involves the withdrawal of a right of residence previously granted. There is no such distinction of principle between a person who has spent most of their childhood lawfully in the UK and someone who has spent part but less than half of their childhood living in the country lawfully. The difference is one of weight and degree. Such a difference is compatible with adopting the condition specified in section 117C(4)(a) that a foreign criminal has been lawfully resident in the UK for most of his life as a *prima facie* requirement. But it would not be consistent with the test of proportionality under article 8, which involves a balancing exercise, to treat the principles stated in the *Maslov* case as inapplicable to a settled migrant with a right of residence just because the individual concerned, although present in the country since early childhood, has not had a right of residence for a particular length or proportion of their time in the host country."

19. Relevant to the appeal before the Upper Tribunal the Judge set out at [69] of his decision the factors that the appellant asserted established very compelling circumstances (either individually or collectively):

    a. The young age at which the Appellant entered the UK.

    b. The difficult circumstances witnessed by the Appellant at around 10 years of age wherein his mother became aggressive and abusive of alcohol following the end of her relationship.

    c. The abuse witnessed by the Appellant at 14 years old, wherein he witnessed his mother being assaulted by a partner.

    d. The abuse suffered by the Appellant at the hands of the same person.

    e. The fact that after leaving college the Appellant entered the care system as a looked after child.

    f. The fact that the Appellant has suffered depression and self-harm since this time.

    g. The Appellant's young age, both presently and especially at the time at which the offences were committed.

    h. The Appellant's exemplary behaviour in custody.

    i. The Appellant's low risk of reoffending.

20. The Judge concluded, at [70] to [71]:

    "70. As the case law makes clear, decision-makers must approach the question holistically, considering whether circumstances exist 'by themselves or in conjunction with other factors relevant to the application of Article 8': NA (Pakistan) v SSHD & Ors [2016] EWCA Civ 662 (para 30). I have done so. Looking at everything in the round I come to an overall conclusion that the appellant does not meet the 'very compelling circumstances test' to persuade me that the public interest is outweighed and the proportionality exercise under Article 8 ECHR should be tipped in his favour. This has not been an easy decision for me to arrive at because the appellant has displayed a genuine desire to mend his ways and to rebuild a new life for himself. At this early stage, there is evidence that he is taking positive steps to move away from his previous life of crime. However, the test which Parliament has set before his appeal can be allowed is a stringent one. If the threshold that needed to be met was lower, it may be that I would have arrived at a different decision (for example, I have noted that the appellant does meet the private life exception). However, I am bound by the test set by

Parliament and I am afraid that even taking the appellant's case at its highest, I would not be persuaded that he is able to establish that there are 'very compelling circumstances' in this case. For the avoidance of doubt, I do not accept Mr Holt's key submission set out at paragraph 16 of his skeleton argument (and referred to above), that the nine factors which he sets out in this paragraph either individually or collectively meet the 'very compelling circumstances test'. I agree with Mr Evans, that these factors do not meet the very high bar set by the test.

71. On a final note, deportation appeals provide some of the most difficult and challenging work in this jurisdiction. I recognise the impact that this decision will have, not only on the appellant, but also on his immediate family members. In reaching this decision I have taken into account all of the arguments raised on his behalf with regard to the family and private life he has established in this country. However, I am also rightly obliged to take into account the rights of the state. In particular, the public interest in the removal of foreign criminals who are involved in serious drugs-related crimes. The appellant's appearance before me has not occurred overnight. He has had to travel down a long path before he got to this appeal hearing. The fact that he had a troubled and unstable background only seeks to provide an explanation and not an excuse for his offending. I simply point out that before he got to this appeal hearing, where statute dictates that a very high bar needs to be met before an appeal can be allowed, the appellant did have opportunity to mend his ways and take a different course. In particular, when he was first arrested and then bailed for dealing in crack cocaine and heroin in 2020. However, even with this first set and then later a second set of criminal proceedings hanging in the background, warning him of the seriousness of his situation, he continued to be involved in the supply of crack cocaine and heroin before he was again arrested for the final time. If he now feels aggrieved at the decision made by this Tribunal, I am afraid that he only has himself to blame. Parliament has dictated that there must be 'very compelling circumstances' for the appellant's appeal to succeed under Article 8 ECHR and for the reasons given above, I am not persuaded that this test has been met."

Appeal to the Upper Tribunal

21. The appellant relies upon grounds of appeal drafted by Mr Holt. It is appropriate to observe that the document is helpfully concise. The core of the appellant's appeal is that each of the nine factors identified at [19] above were at least capable of amounting to very compelling circumstances.

22. Judge of the First-tier Tribunal O'Garro granted permission to appeal by a decision dated 24 October 2023. The reasoning is short:

> "3. In light of guidance given by the Court of Appeal in *CI (Nigeria) v. SSHD* [2019] EWCA Civ 2027, on meeting the very compelling circumstances threshold, I consider that there is arguable merits in the grounds and permission to appeal."

Analysis

23. At the outset I express my gratitude to Mr Solomon and Mr Clarke for their helpful submissions. I am also grateful to Mr Holt whose grounds of appeal are a model of conciseness.

24. Ultimately, the core of the challenge advanced is identified at paras. 8 and 9 of the grounds, with reliance placed upon the nine factors detailed at [19] above:

> "8. In the instant case, the FTTJ has, at §70 of the decision, simply concluded, without providing adequate, (or indeed any) reasoning, that none of the 9 proposed circumstances "meets the 'very compelling circumstances' test'.
>
> 9. The duty to give reasons is especially important where those reasons relate to the core of the decision. It is submitted that the reasoning behind the FTTJ's negative determination is the 'very compelling circumstances' test is absolutely vital to any understanding of the outcome. As this reasoning is lacking, it is submitted that this amounts to an error of law as per the *Iran* principles."

25. Mr Solomon properly conceded that there is no basis for the submission advanced by the written grounds that the Judge gave no reasons in respect of the nine factors. The factors were identified at [69] of the decision. Additionally, relevant findings of fact were made as to the factors within the body of the decision. The Judge confirmed at the outset of [70] that he considered "everything in the round" and was aware that the appellant was displaying a genuine desire to mend his ways, to rebuild his life and move away from his previous life of crime. The appellant's circumstances were clearly identified as being taken at their highest. The reasons in respect of the appellant not meeting the requisite test are encapsulated at the conclusion of [70]:

> "70. ... For the avoidance of doubt, I do not accept Mr Holt's key submission set out at paragraph 16 of his skeleton argument (and referred to above), that the nine factors which he sets out in this paragraph either individually or collectively meet the 'very compelling circumstances test'. I agree with Mr Evans, that these factors do not meet the very high bar set by the test."

26. The Court of Appeal re-affirmed in *Simetra Global Assets Ltd v. Ikon Finance Ltd* [2019] EWCA Civ 1413, [2019] 4 WLR 112, at [46], that it is unnecessary to deal expressly with every point advanced, but enough must be said to show that care has been taken and that the evidence had been properly considered. Whilst it would have aided an uninformed reader for the relevant submissions of the Presenting Officer, Mr Evans, to be detailed in writing by the Judge, it is clear the appellant and Mr Holt, who both attended the hearing, were aware of the scope and substance of Mr Evan's submissions on behalf of the respondent. The importance is not that the decision is itself required to be understood without external knowledge of the case, but that the sense of the reasoning is understood by the parties who were present and are informed as to the respective cases being advanced.

27. I note Lord Phillips MR in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 W.L.R. 2409, at [118]:

> "118. There are two lessons to be drawn from these appeals. The first is that, while it is perfectly acceptable for reasons to be set out briefly in a judgment, it is the duty of the judge to produce a judgment that gives a clear explanation for his or her order. The second is that an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the judge has reached an adverse decision."

28. The reasons for agreeing with the respondent's submissions are permissibly succinct. The Judge considered that when considered with other evidence in the round the nine factors relied upon by the appellant did not meet the very high bar set by the relevant statutory test: *NA (Pakistan) v. Secretary of State for the Home Department* [2016] EWCA Civ 662, [2017] 1 W.L.R. 207. The overall inadequacy of the factors was cogently addressed by the respondent before him and to both the appellant and his counsel.

29. The appellant's case at the hearing was directed towards the weight given to the nine factors by the Judge. I consider this challenge is very much one of disagreement with judicial findings and does not identify a material error of law for the reasons detailed below.

30. The written grounds do not positively identify where the application of weight in respect of the factors was materially erroneous in law. In expanding this point reliance was placed upon the judgment in *CI (Nigeria) v. Secretary of State for the Home Department* [2019] EWCA Civ 2027, [2020] Imm AR 503, at [119]:

> “119. The third matter is the impact of CI's criminal offending on his private life in the UK. As discussed, his offending fell in the medium category and comprised a number of offences, some of which involved violence. However, all the offences were committed at a young age ending (with the exception of the assault in prison in 2015) when he was 20 years old, since when – so far as the evidence showed – CI had not re-offended. Importantly, the offending needs to be seen in the context of the abuse and neglect which CI suffered throughout his childhood and, apart from a period of a year or so during which he was in foster care, his grossly deficient parenting. Save for one reference in passing to CI's "troubled childhood history", it does not seem to me that, in assessing whether there were very compelling circumstances, the judge took this into account.”

31. Mr Solomon submitted that this passage of the judgment was relevant to four of the factors relied upon:

    i. The difficult circumstances witnessed by the Appellant at around 10 years of age wherein his mother became aggressive and abusive of alcohol following the end of her relationship.

    ii. The abuse witnessed by the Appellant at 14 years old, wherein he witnessed his mother being assaulted by a partner.

    iii. The abuse suffered by the Appellant at the hands of the same person.

    iv. The fact that after leaving college the Appellant entered the care system as a looked after child.

32. I observe that the Court of Appeal was considering the materiality of identified errors in circumstances where it had concluded that the Upper Tribunal’s assessment of the private life exception was wrong: [115-120]. This paragraph of the judgment is a factual assessment of the circumstances arising in CI’s appeal. It does not aid the appellant in this matter. At [71] of his decision the Judge clearly noted the appellant’s ‘troubled and unstable background’ as part of the balancing exercise, but reasonably concluded that this ‘only seeks’ to provide an explanation for his offending, and that he had opportunities to ‘mend his ways and take a different course’. Noting the public interest in the appellant’s deportation, the Judge considered relevant factors and adopted the balance sheet approach. Whilst another judge may reasonably have reached a different conclusion favourable, it is not the appellant’s case that the Judge’s conclusion was irrational. I return to the observation above that the appellant was not able to advance a positive case as to what factors were given insufficient weight. Rather, the appellant sought to re-argue that either individually, or in

combination, they met the high bar. As detailed above, the appellant's challenge is, at its highest, a disagreement with cogent and lawful judicial findings: *MA (Somalia) v. Secretary of State for the Home Department* [2010] UKSC 49, [2011] 2 All E.R. 65, at [45].

33. In the circumstances, the appeal is properly to be dismissed.

34. I take this opportunity to observe that is clear from the decision that the Judge did not find deciding this appeal an easy matter. He accepted, as do I, that the appellant is taking positive steps to move away from criminality. However, these were infant steps in July 2023 undertaken when the appellant had only been released into the community a few months previously. The appellant's rehabilitation continues, on its face, to garner speed at the time of this decision, with the support of Ms King. It may well be that the appellant will enjoy increasing maturity consequent to the birth of his child. No doubt a desire not to replicate the failings of his children, with his attendant understanding of the personal damage that may ensue, and the wish to enjoy a family life with his partner and child may further cement the positive steps he is undertaking. Mr Clarke properly acknowledged that the birth of a British citizen child may lead to an application to revoke the deportation order on human rights grounds. However, these are future possibilities. The role of the Upper Tribunal in this matter is to consider whether the First-tier Tribunal has materially erred on a point of law. The only proper conclusion available to this Tribunal is that the First-tier Tribunal did not.

Notice of Decision

35. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law. The decision of the First-tier Tribunal is upheld.

36. The appeal is dismissed.

D O'Callaghan
Judge of the Upper Tribunal
Immigration and Asylum Chamber
15 January 2024