IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005227

First-tier Tribunal No:
PA/00268/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 14th November 2024

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

SD
(ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

REPRESENTATION

For the Appellant: Mr A Pipe, instructed by HS Lawyers Ltd
For the Respondent: Ms S Simbi, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 24 June 2024

DECISION AND REASONS

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

© CROWN COPYRIGHT 2024

INTRODUCTION

1. The appellant is a national of Ethiopia. This appeal is listed for hearing before me following the decision of Deputy Upper Tribunal Judge Monson issued on 11 April 2024 to set aside the decision of First-tier Tribunal Judge Ficklin promulgated on 18 October 2023 ("the 'error of law' decision"). The FtT judge had dismissed the appellant's appeal against the respondent's decision of 17 January 2023 to refuse the appellant's protection and human rights claims. This decision should be read alongside the 'error of law' decision. Deputy Upper Tribunal Judge Monson preserved (a) the finding on the protection claim, (b) the findings that the private and family life exceptions arising under ss117C(4) and (5) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") do not apply, and (c) the miscellaneous findings of fact at paragraphs [23] to [25] of the decision of the FtT.

2. Deputy Upper Tribunal Judge Monson directed that the appeal be relisted for a hearing before the Upper Tribunal for the decision to be remade.

THE BACKGROUND

3. The background to the appeal is summarised in paragraphs [2] to [5] of the decision of Deputy Upper Tribunal Judge Monson:

> "2. The appellant is a national of Ethiopia, whose date of birth is 13 March [2002]. The appellant went to school in Ethiopia until he was aged 15. He came to the UK on 20 July 2017 to join his mother who had applied for a family reunion visa on his behalf.
>
> 3. On 24 February 2022 the appellant was convicted at Cambridge Crown Court of taking an indecent photograph/pseudo-photograph of a child, and having a blade in a public place. He was sentenced to a term of imprisonment of 1 year and 4 months for these offences.
>
> 4. A Stage 1 notice of decision to make a deportation order was served on the appellant on 1 April 2022. On 25 April 2022 his representatives responded to this notice with reasons as to why he should not be deported. The reasons included an asylum claim. On 20 September 2022 the appellant was interviewed about his asylum claim in prison.
>
> 5. On 17 January 2023 the respondent gave her reasons for refusing the appellant's protection and human rights claims, and on the same day she made a deportation order against the appellant."

THE PRESERVED FINDINGS

4. As I have said, Deputy Upper Tribunal Judge Monson preserved the finding made by the FtT on the protection claim. To that end, FtT Judge Ficklin said:

> "27 …I acknowledge the background evidence about Ethiopia that shows that there is an internal armed conflict in several regions and that certain people may be targeted for their ethnicity even in Addis Ababa, particularly Tigrayans. I find that the Appellant would not be at

> risk in Addis Ababa, the point of return, for his ethnicity either because his mother is Eritrean or because his father is Amhara. There is no evidence that the government has a list of Eritrean people that would include the Appellant. The background evidence does not show that he would be identifiable and at risk per se because of his characteristics, and he has no political affiliation or activity that would put him at risk."

5. On behalf of the appellant, Mr Pipe accepts the appellant does not satisfy the requirements of s117C(4) of the 2002 Act. Deputy Upper Tribunal Judge Monson also preserved the findings that the private and family life exceptions arising under sections 117C(4) and (5) of the 2002 Act do not apply. The FtT judge addressed s117C(5) at paragraphs [28] to [30] of the decision. The judge accepted there is a genuine and subsisting relationship between the appellant and AC. He noted that the appellant and AC have been separated during at least one period since their relationship started. The judge found that the effect of the appellant's deportation on AC would not be unduly harsh. He also found that moving to Addis Ababa would be difficult for AC, but would not be unduly harsh.

6. The miscellaneous preserved findings at paragraphs [23] to [25] of the decision of the FtT referred to by Deputy Upper Tribunal Judge Monson are:

   a. The appellant claims he was raped in 2019 whilst he was living in a hostel. It is not reasonably likely to have happened. *(paragraphs [23] and [24])*

   b. The appellant claims to have a chronic heart condition and awaits surgery. The appellant's GP notes do not support his claims to have heart problems or to be awaiting surgery. *(paragraph [25])*

7. At the hearing before me, both Mr Pipe and Ms Simbi agree that the finding by the FtT at paragraph [26] of the decision should also have been preserved:

> "I accept that the Appellant has serious mental health problems and is prescribed medication that he is not currently taking. He has self-harmed in the past. There is no evidence that his mental health impacts on his protection or human rights claim."

THE LEGAL FRAMEWORK

8. Section 32 of the UK Borders Act 2007 defines a foreign criminal, as a person not a British citizen who is convicted in the UK of an offence and, inter alia, sentenced to a period of imprisonment of at least 12 months. Section 32(4) of the 2007 Act sets outs out the clear proposition that deportation of a foreign criminal is conducive to the public good. That is a statement of public policy enacted by the legislature, which the courts and tribunals are obliged to respect. Section 32(5) of the 2007 Act requires the Secretary of State to make a deportation order in respect of every foreign criminal, subject to the exceptions set out in section 33. Insofar as is relevant that is:

> "(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach–
>
> (a) a person's Convention rights, or
>
> (b) the United Kingdom's obligations under the Refugee Convention
>
> …
>
> (7) The application of an exception—
>
> (a) does not prevent the making of a deportation order;
>
> (b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good;
>
> but section 32(4) applies despite the application of Exception 1 or 4.".

9. Part 5A of the Nationality, Immigration and Asylum Act 2002 NIAA 2002 informs the decision making in relation to the application of the section 33 exceptions. Section 117A in Part 5A provides that, when a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article 8, and, as a result, would be unlawful under section 6 of the HRA 1998, the court, in considering the public interest question, must (in particular) have regard to the considerations listed in section 117B and, additionally, in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C. Section 117C specifically deals with the weight to be attached to the public interest in deporting foreign criminals and provides a structure for conducting the necessary balancing exercise, dependent in part, on the length of sentence imposed.

10. The first question which arises is whether the appellant is a foreign criminal, as defined in s117D(2) of the 2002 Act. The appellant is not a British citizen, and he has been convicted of an offence and sentenced to a period of imprisonment of at least 12 months. The appellant is a 'foreign criminal' as defined in s117D. Applying s117C(3) of the 2002 Act, the public interest requires the appellant's deportation unless Exceptions 1 or 2 set out in s.117C(4) and (5) apply. Mr Pipe accepts that Exception 1 does not apply and on the preserved findings, Exception 2 does not apply.

THE ISSUE

11. It is common ground between the parties that the live issue in the appeal is whether there are very compelling circumstances over and above those described in Exceptions 1 and 2 of s117C of the 2002 Act so at to outweigh the public interest such that the deportation of the appellant is disproportionate.

12. In *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22, Lord Hamblen referred to the 'very compelling circumstances' test. He cited the judgement of Sales LJ in *Rhuppiah v Secretary of State for the Home Department* [2016] 1 W.L.R 4203, at [50], that the 'very compelling circumstances' test "provides a safety valve, with an appropriately high threshold of application, for those exceptional cases involving foreign

criminals in which the private and family life considerations are so strong that it would be disproportionate and in violation of article 8 to remove them".

13. In *Yalcin v Secretary of State for the Home Department* [2024] 1 WLR 1626, Lord Justice Underhill explained:

> "53. The starting-point is to identify the basic structure of the law in this area. At para. 47 of his judgment in *HA (Iraq)* Lord Hamblen approved the summary which I gave at para. 29 of my judgment in this Court:
>
> > "(A) In the cases covered by the two Exceptions in subsections (4)-(5), which apply only to medium offenders, the public interest question is answered in favour of the foreign criminal, without the need for a full proportionality assessment. Parliament has pre-determined that in the circumstances there specified the public interest in the deportation of medium offenders does *not* outweigh the article 8 interests of the foreign criminal or his family: they are, given, so to speak, a short cut. The consideration of whether those Exceptions apply is a self-contained exercise governed by their particular terms.
> >
> > (B) In cases where the two Exceptions do not apply – that is, in the case of a serious offender or in the case of a medium offender who cannot satisfy their requirements – a full proportionality assessment is required, weighing the interference with the article 8 rights of the potential deportee and his family against the public interest in his deportation. In conducting that assessment the decision-maker is required by section 117C(6) (and paragraph 398 of the Rules) to proceed on the basis that 'the public interest requires deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2'."
> >
> > …
> >
> > 57. *NA (Pakistan)* thus establishes that the effect of the over-and-above requirement is that, in a case where the "very compelling circumstances" on which a claimant relies under section 117C(6) include an Exception-specified circumstance ("an Exception-overlap case")[9] it is necessary that there be something substantially more than the minimum that would be necessary to qualify for the relevant Exception under subsection (4) or (5): as Jackson LJ puts it at para. 29, the article 8 case must be "especially strong". That higher threshold may be reached either because the circumstance in question is present to a degree which is "well beyond" what would be sufficient to establish a "bare case", or – as shown by the phrases which I have italicised in paras. 29 and 30 – because it is complemented by other relevant circumstances, or because of a combination of both. I will refer to those considerations, of whichever kind, as "something more". To take a concrete example, if the Exception-related circumstance is the impact of the claimant's deportation on a child (Exception 2) the something more will have to be either that the undue harshness would be of an elevated degree ("unduly unduly harsh"?) or that it was complemented by another factor or factors – perhaps very long residence in this country (even if Exception 1 is not satisfied) – to a sufficient extent to meet the higher threshold; or, as I have said, a combination of the two.

> …
>
> 62. … I agree that it would in principle conduce to transparent decision-making if the tribunal identified with precision in every case what the something more consisted of; but that will not always be straightforward. The proportionality assessment is generally multi-factorial and requires a holistic approach. A tribunal must of course in its reasons identify the factors to which it has given significant weight in reaching its overall conclusion. It is no doubt also desirable that it should indicate the relative importance of those factors, but there are limits to the extent to which that is practically possible: the factors in play are of their nature incommensurable, and calibrating their relative weights will often be an artificial exercise. It would in my view place an unrealistic burden on tribunals for them to have to decide, and specify, in every case whether the something more consists of the Exception-specific circumstance being present to an elevated degree, or of some other circumstance or circumstances, or a combination of the two. There may be cases where for some reason peculiar to the case this degree of specificity is necessary; but I do not believe that there is any universal rule. We should not make decision-making in this area more complicated than it regrettably already is."

14. The cumulative factors relied upon by the appellant that form part of the multi factorial proportionality assessment are identified in paragraph [17] of the appellant's skeleton arguments dated 3 May 2024 that has been settled by Mr Pipe.

THE SENTENCING REMARKS

15. Before I turn to the evidence before me, it is helpful for me to set out the sentencing remarks made by His Honour Judge Lowe to put in context the appellant's convictions and the sentence imposed. His Honour Judge Lowe said:

> "…It is right to say that certainly from the point where he served his defence case statement at the end of last year he was accepting that he had created these moving images of him having penetrative sexual activity with 15 year old [Person A] and in essence in that defence case statement, because he also accepted he knew that she was under 18, he admitted that offence. So notwithstanding the late plea of guilty, I am prepared to give him 25 per cent credit for it.
>
> This is not a straightforward sentencing exercise… The defendant has pleaded guilty on a written basis of plea. The Crown do not challenge that basis and one can understand why. They have not charged this defendant with either consensual or non-consensual sexual activity with a … 15 year old girl, arising from the images that are seen in those five clips. Two things must flow from that it seems to me; firstly, that the activity depicted was consensual and I understand that that much is clear from the images themselves and secondly, that I should sentence the defendant on what he says was his understanding of her age.
>
> … This was a 19 year old young man filming consensual sexual activity with a 15 year old girl, when he believed her to be 17. It was a single incident of sexual activity, albeit that the recordings are spread over five separate clips. The total duration is said to be somewhere between 20 to 30 minutes.

> It seems to me given those set of facts that this is one of those exceptional cases where I should depart from the guidelines, and I am going to do so significantly and that departure from the guidelines is driven by the production in this case being so very different to the production in the vast majority of such cases.
>
> I am going to approach this case as though it were a possession within the meaning of the guidelines, but it is aggravated by her actual age. It is aggravated because this offence was committed whilst this defendant was subject to both a suspended sentence order and a community order and even allowing for the discount for guilty plea that I have indicated, that involves moving up within the relevant guidelines from the starting point.
>
> I bear in mind the absence of similar offending. I bear in mind the defendant's personal circumstances and what appears to be the difficult early life that he had experienced. In my judgment the custody threshold is met and giving him the 25 per cent discount for his guilty plea, the shortest sentence I can impose is one of 14 months' imprisonment.…"

THE EVIDENCE

16. I have been provided with a Composite bundle comprising of 305 pages. I have also been provided, separately, with a letter from Dr F Iklaki of the Ridgacre Medical centres dated 8 May 2024, and information regarding a referral made in respect of the appellant's partner AC to the breast clinic.

17. The appellant attended the hearing and gave evidence. He adopted his witness statement dated 3 July 2023. He confirmed that he is currently prescribed 'Propranolol 10mg tablets to be taken 3 times/day' and 'Amitriptyline 10mg tablets to be taken once/day'. He confirmed that he is also prescribed and takes 'Mirtazapine 15mg tablets once/day'. He confirmed that he has been referred to 'Forward Thinking Birmingham' for therapy. He had an initial discussion on or about 22 April 2024 and is currently awaiting a further appointment. The appellant also confirmed that he underwent an MRI scan about 6 weeks ago and is waiting to hear from his GP about the results of that scan.

18. In cross-examination, the appellant said that he began to suffer with his mental health after he was sexually assaulted. He was referred to, and attended a mental health clinic, Cameo, but was discharged after about nine months because he felt better with the support of his partner. He said that he continued to experience flashbacks when he was in prison and following his release on 9 March 2023, the only support he has received is that from his parents and partner. A referral has been made by his GP to 'Forward Thinking Birmingham'. He said that he is unable to work or study. He confirmed that his mother travelled to Ethiopia about 3 years ago, but claimed that he did not know why she had travelled there, how long she was there, or where or who she stayed with. He maintained that it would not be safe for him or AC, who is not an Ethiopian national, and would likely be targeted by kidnappers to live in Ethiopia. In re-examination the appellant claimed the family do not have any property in Ethiopia and that since his release from prison, he has been provided with packs with tasks at three monthly intervals to keep him busy.

19. The appellant's partner AC also gave evidence. She adopted her witness statement dated 3 July 2023 and confirmed that she has lived in the United Kingdom since the age of two. The majority of her family including parents, brother, aunts, uncles and cousins live in the United Kingdom. Her paternal grandparents are retired and have returned to Portugal. She confirmed that she is currently under investigation regarding a number of lumps that have been found on her breast and that she has been diagnosed with severe polycystic ovaries, and may need surgery in the future regarding her testosterone levels. She has completed a degree in Travel and Business Management, and currently works as a supervisor at Greggs. She expects to be promoted shortly to Store Manager.

20. In cross examination she said that if the appellant is deported, she is likely to be in danger in Ethiopia as someone who is likely to be perceived as having money. She has seen social media reports of people being robbed but has not spoken to anyone who lives in Ethiopia. She claimed that none of the appellants family has travelled to Ethiopia and she was not aware that his mother had travelled there. She confirmed that since the appellant's release from prison, he has been provided with some support to keep him occupied and that a referral has been made to Forward Thinking Birmingham.

DECISION

21. The appellant has appealed the respondent's decision to refuse his human rights claim under s.82 of the Nationality, Immigration and Asylum Act 2002 on the ground that the decision is unlawful under s.6 of the Human Rights Act 1998. The appellant must satisfy me on the balance of probabilities that Article 8 ECHR is engaged. If it is, the burden shifts to the respondent to establish that the decision is proportionate.

22. I accept the appellant has established a family and private life in the UK given his length of residence and the support that he receives from his parents and partner. I accept that any interference with the appellant's Article 8 rights would be prescribed by law and in pursuit of a legitimate aim for the purposes of Article 8(2) ECHR. The issue for the Tribunal therefore is whether the deportation would be proportionate in all the circumstances.

23. The appellant fails to meet the statutory exceptions to deportation in every respect and he must show, if he is to avoid deportation on Article 8 ECHR grounds, that there are very compelling circumstances over and above those in the exceptions to deportation, which suffice to outweigh the public interest in deportation: s117C(6) of the 2002 Act.

24. The test in s117C(6) is a proportionality test, balancing the rights of the appellant against the public interest in his deportation. The scales are nevertheless weighted heavily in favour of deportation. Although the appellant has not been sentenced to a period of imprisonment of four years or more, he does not fall beneath the statutory threshold for automatic deportation as a foreign criminal, and I consider that there is a cogent and strong public interest in his deportation.

25. Against the cogent public interest in deportation, the importance of which is underlined in primary legislation, I have had regard to the factors identified in paragraph 17 of the appellant's skeleton argument, which, Mr Pipe submits, taken cumulatively, outweigh the public interest.

26. In reaching my decision I have had regard to the witness statement of the appellant's father and the evidence he sets out of the difficulties faced by the family previously and during the early years of the appellant's life prior to his arrival in the UK. He refers to the lack of any on-going ties to Ethiopia, and the risk that the appellant would be exposed to because of his ethnicity and background. I have also had regard to the letters relied upon in support of the appellant from 'Phoenix Futures' and 'People Plus', and from Michael Jones, the Printshop Instructor regarding the support that the appellant sought to address the issues he has faced, and the steps taken by him to turn his life around through education and learning. There is evidence before me, albeit somewhat dated from Cameo Early Intervention Services, regarding the appellant's mental health and well-being and the support provided to him.

27. I accept that in sentencing the appellant His Honour Judge Lowe recognised that the task of sentencing the appellant was not an easy one because in the end, there was a single incident during which the appellant had filmed consensual sexual activity with a 15 year old girl, when he believed her to be 17. That is reflected in the judge's departure from the general sentencing guidelines and the sentence imposed.

28. I accept the appellant joined his mother in the UK when he was 15 years old. He completed the latter part of his education in the UK and he will undoubtedly have formed relationships with friends and relatives. The evidence before me from the appellant's partner and his father attests to that. Despite his conviction, I accept the appellant has demonstrated that having regard to his upbringing, education, employment history, history of criminal offending and imprisonment, the appellant is socially and culturally integrated in the UK.

29. There is a preserved finding that the appellant would not be at risk upon return to Addis Ababa. Although I accept the appellant does not have any immediate familial connections to Ethiopia, the evidence of the appellant, which I accept, is that his mother travelled to Ethiopia about three years ago. Having given that evidence, I find that the appellant was being deliberately vague in his evidence that he did not know why she had travelled to Ethiopia, for how long, where, and with whom his mother had stayed. I find that the appellant's family do have some on-going connections to Ethiopia and that the appellant's mother's visit was without incident.

30. There is a preserved finding that the appellant has serious mental health problems and is prescribed medication. The letter dated 8 May 2024 from Ridgacre Medical Centres lacks detail but confirms the appellant contacted his GP in March 2024 regarding depression. In April he was started on antidepressants and he has been referred to Forward Thinking Birmingham for psychological support. I find that the appellant's mental health is

managed by the medication that he is prescribed. The respondent notes in the decision dated 17 January 2023, and I accept that the MedCOI database for Ethiopia states that psychiatrists are available to treat people with mental illnesses, such as depression and PTSD. Mirtazapine, an anti-depressive that is currently prescribed to the appellant is not available, however other anti-depressive drugs such as Sertraline, Fluoxetine and Mitriptyline are available. The appellant is awaiting therapy but the evidence regarding any other treatment required by the appellant to treat his mental health is sparse. I find the treatment required by the appellant will be available to the appellant in Ethiopia.

31. The appellant has qualifications that can be used to help him gain employment and help with his reintegration upon return to Ethiopia. The appellant spent a significant part of the formative years of his life in Ethiopia, and I find that he will be enough of an insider in terms of how life in Ethiopia is carried on, and that he has a capacity to participate in it, and be able to operate on a day-to-day basis in society and build a variety of human relationships, as he has done in the short time he has been in the UK, so as to give substance to his private and family life.

32. In the short term, I am left in no doubt that the appellant would receive emotional and financial support from his parents and partner in the same way that they have supported him in the UK. In Ethiopia there are avenues for the appellant to explore with regards to attaining employment and financial support so that he will not be destitute. Looking at all the evidence before me holistically, there will inevitably be a period of adjustment, but in my judgement the appellant will be able to re-adjust to life in Ethiopia within a reasonable timescale. I find that some emotional and financial support will continue to be provided to the appellant by his partner and family in the short-term. The appellant's parents are clearly very fond of him, and I find, would provide emotional support to the appellant. Life in Ethiopia will not be easy initially, but I do not accept the appellant could not cope notwithstanding the appellant's ethnicity and background.

33. In reaching my decision I have also had regard to the fact that the appellant expresses remorse and that there is no evidence before me of any further offending. As the Supreme Court highlighted in *HA*, the time that has elapsed since the index offence was committed and the appellant's conduct during that period is a relevant consideration. The appellant took advantage of the rehabilitation opportunities that have been made available to him and I accept that very much to the appellant's credit, there is no evidence before me that the appellant has engaged in criminal activity and he has not been convicted of any further offending since his release. The appellant has demonstrated that he is able to abstain from offending and I attach due weight to that in my proportionality assessment.

34. I have also had regard to the evidence before me concerning the assaults upon the appellant by stabbing and the head injury suffered by the appellant whilst he was detained at HMP Peterborough in or about May

2023 when the appellant was assaulted in prison. I accept that the period when the appellant was serving a sentence of imprisonment will have been difficult for him and an unpleasant experience.

35. I have considered appellant's relationship with AC. There is a preserved finding that there is a genuine and subsisting relationship between the appellant and AC. AC refers to the dangers that both she and the appellant fear they will be exposed to in continuing their relationship in Ethiopia. Their subjective fears are based upon speculation and I find, are not objectively well founded. In a preserved finding the FtT Judge noted the appellant and AC have been separated during at least one period since their relationship started. The judge found that the effect of the appellant's deportation on AC would not be unduly harsh. He also found that moving to Addis Ababa would be difficult for AC, but would not be unduly harsh.

36. In reaching my decision I have had regard to all of the factors that are relied upon by Mr Pipe to support his submission that the appeal should be allowed because there are very compelling circumstances over and above those described in Exceptions 1 and 2. I have carefully considered the written submissions set out in the appellant's skeleton argument even though I have not considered it necessary to deal with each matter in turn or to address each specific piece of evidence that is referred to.

37. Even giving credit to the appellant for his conduct since his release, and the factors that weigh in his favour, I am not satisfied that the public interest is weakened to the point where it is capable of being outweighed by the appellant's Article 8 claim. In my final analysis, I find the appellant's protected rights, whether considered collectively with rights of others that he has formed associations with, or individually, are not in my judgement such as to outweigh the public interest in the appellant's removal having regard to the policy of the respondent as expressed in the immigration rules and the 2002 Act. I am satisfied that on the facts here, the decision to refuse the appellant's human rights claim is not disproportionate to the legitimate aim and I dismiss his appeal on Article 8 grounds.

NOTICE OF DECISION

38. The appeal is dismissed.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 October 2024