Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00115/2018

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 18 July 2019	**On 6 August 2019**

Before

UPPER TRIBUNAL JUDGE GRUBB
DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

B S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Hodgetts, instructed by South West Law
For the Respondent: Ms S Rushforth, Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) we make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to contempt of court proceedings.

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Introduction

2. The appellant is a citizen of Sierra Leone who was born on 1 November 1994.

3. The appellant entered the United Kingdom on 3 February 2010 when aged 15. He entered with his father and sister in order to join his mother in the UK who had come to the UK in 2002. She was granted refugee status in 2006. It would appear that, on the basis of family reunion, the appellant was also granted refugee status. He, and his family, were granted indefinite leave to remain on 11 July 2011.

4. Between 2013 and 2017, the appellant was convicted of a number of offences. In 2013, he was convicted of possession of an offensive weapon, namely a baseball bat; in 2014 he was convicted of theft and in 2016 he was convicted of battery. In relation to these offences, he was sentenced, inter alia, to an absolute discharge and a community order which was subsequently varied to one day's detention in a youth detention centre.

5. On 1 December 2017, he was convicted at the Bristol Crown Court of wounding contrary to s.20 of the Offences against the Person Act 1861. He was sentenced to a term of imprisonment of nineteen months. In addition, he was convicted of the offence of theft and sentenced to a consecutive term of imprisonment of one month. The total period of his imprisonment was, therefore, twenty months.

6. On 21 December 2017, a decision to make a deportation order was made based upon the appellant's conviction on 1 December 2017. A deportation order was made on 22 December 2017.

7. Submissions were made on the appellant's behalf on 26 January 2018 and 9 February 2018.

8. On 13 March 2018, the respondent issued a notice of intention to revoke the appellant's refugee status.

9. On 31 May 2018, a decision was taken to revoke the appellant's refugee status. Further, on 3 July 2018, the Secretary of State refused the appellant's international protection and human rights claims.

The Appeal

10. The appellant appealed to the First-tier Tribunal against the decisions to revoke his refugee status and to refuse his human rights claims, in particular under Art 8 of the ECHR.

11. The appeal was heard by Judge Trevaskis on 13 March 2019. In a determination sent on 22 March 2019, the judge dismissed the appellant's appeal.

12. The appellant was granted permission to appeal by the First-tier Tribunal (DJ Macdonald) on 24 April 2019.

13. On 14 May 2019, the Secretary of State filed a rule 24 response seeking to uphold Judge Trevaskis' decision.

The Judge's Decision

14. As we have indicated, Judge Trevaskis dismissed the appellant's appeal against the decision to revoke his refugee status. That decision was not challenged in the grounds of appeal and was not challenged before us by Mr Hodgetts, who represented the appellant, and we need say no more about it.

15. In relation to Art 8 of the ECHR, the judge dealt with the appeal both under the Immigration Rules (paras 399(a) and 399A) and outside the Rules.

16. The judge made the following findings. First, as regards the appellant's relationship with his claimed partner, the judge accepted that this was a genuine and subsisting relationship. He accepted the evidence of the appellant's partner that if he were deported she would accompany him to Sierra Leone. The appellant's partner is an EU citizen who has a permanent right of residence in the UK and the judge treated her as "settled" in the UK. However, applying the terms of para 399(b), the judge found that it would not be unduly harsh for his partner to accompany him to Sierra Leone and it would not be unduly harsh for her to remain in the UK without the appellant if he were deported. We interpose that those findings are, in effect, that Exception 2 in s.117C(5) of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002") was not satisfied.

17. Secondly, applying para 399A, the judge found: first, that the appellant had not spent most of his life lawfully resident in the UK; second, that he was not socially and culturally integrated in the UK; and third, that they were not very significant obstacles to his integration in Sierra Leone. We interpose that this finding is, in effect, that the appellant did not meet the requirements of Exception 1 in s.117C(4) of the NIA Act 2002.

18. Finally, the judge concluded, outside the Rules, that the public interest represented by the "very serious offence" of which the appellant had been convicted outweighed his private and family life in the UK such that his deportation was not disproportionate.

The Issues

19. Both in his written grounds and oral submissions, Mr Hodgetts identified eight grounds. We have renumbered his grounds to reflect the typographical mistake of "Ground 3" being duplicated.

20. Grounds 1, 2 and 3 relate to the judge's assessment of the public interest and the severity of the appellant's offending:

(i) The judge failed to take into account the sentencing remarks of the Crown Court judge, in particular the mitigating circumstances surrounding the offence, which were properly the "starting point" following Masih (deportation – public interest – basic principles) Pakistan [2012] UKUT 0046 (IAC).

(ii) In taking into account the appellant's offending history prior to the index offence, the judge failed to take into account the sentences imposed which included an absolute discharge and a community order varied to one day detention at a youth detention centre. Further, in relation to the index offence he failed to take into account that the starting point for the sentence was three years' imprisonment but the appellant was, in fact, sentenced to nineteen months' imprisonment.

(iii) The judge was wrong to equate the index offence of wounding, even using a knife, with the seriousness of a class A drugs offence in stating that it was a "very serious offence" which attracts the revulsion of society.

21. Ground 4 (renumbered) relates to the judge's conclusion under para 399(b) (or s.117C(5)) that the effect of the appellant's deportation would not be unduly harsh on the appellant's partner.

(iv) The judge failed to take into account that the appellant's partner had an EU right to remain in the UK.

22. Ground 5 (renumbered) concerns the judge's assessment of the appellant's relationship with his mother in the UK.

(v) The judge failed to take into account medical evidence concerning the health of the appellant's mother and to make a clear finding as to whether or not "family life" existed between the appellant and his mother.

23. Ground 6 (renumbered) relates to the judge's finding in respect of para 339A (or s.117C(4)).

(vi) The judge failed to take into account all the evidence concerning the appellant in concluding that he was not socially and culturally integrated in the UK.

24. Ground 7 (renumbered) relates to the judge's assessment of the risk that the appellant would reoffend.

(vii) The judge failed to take into account, in assessing the appellant's risk of reoffending, a report from a forensic psychologist which concluded that the appellant's risk of reoffending was "low".

25. Ground 8 (renumbered) relates to the judge's decision outside the Rules.

    (viii) In applying s.117C(6) of the NIA Act 2002, the judge failed to enquire, even if Exceptions 1 and 2 were not met, whether there were "very compelling circumstances" over and above those Exceptions sufficient to outweigh the public interest.

26. Ms Rushforth, who represented the Secretary of State, made the following submissions which we set out in summary.

27. First, it was clear from para 75 of his determination that the judge had, in fact, had regard to the Crown Court judge's sentencing remarks as he specifically referred to the judge having found, within the relevant sentencing guidelines, that the appellant's offending amounted to "greater harm". Further, the case of Masih only required that the sentencing remarks be the "starting point". The judge plainly had regard to the seriousness of the appellant's offending by reference to the length of sentence and the OASys Report.

28. Second, the judge referred to the appellant's earlier offending history at para 88 but did not take those offences into account (including the largely non-custodial sentences) in assessing the public interest.

29. Third, Ms Rushforth submitted that the judge was entitled to take into account that the s.20 offence of wounding using a knife was a "very serious offence" which did attract the "revulsion of society".

30. Fourth, in assessing whether it would be unduly harsh for the appellant's partner to travel to Sierra Leone, Ms Rushforth submitted that the judge was entitled to take into account her evidence that she was willing to do so. Further, at para 93 the judge had also been entitled to find, that if she chose not to accompany the appellant, there was no evidence to demonstrate that it would be "unduly harsh" for her to remain in the UK without him, having regard to the "very short duration" of their relationship.

31. Fifth, Ms Rushforth accepted that the judge had not referred to the supporting medical evidence concerning the appellant's mother. She submitted that, perhaps, his reference at para 103 to their being "[n]o medical evidence" referred to the evidence at the hearing. She accepted there was medical evidence at page 81 of the appellant's bundle but that it made no reference to the care provided by the appellant to his mother.

32. Sixth, Ms Rushforth accepted that the judge had not been correct to find, on the basis of all the evidence, that the appellant was not socially and culturally integrated in the UK having lived here since 2010 when he was 15 years old. However, the judge had found that the appellant did not meet the other two requirements of para 399A or Exception 1 and so his error was not material.

33. Seventh, Ms Rushforth accepted that the judge had not made reference to the expert psychologist's report assessing the appellant's risk of reoffending as "low". However, she submitted that this was not an EEA case and so propensity was less significant. The seriousness of the offence itself justified the deportation.

34. Eighth, Ms Rushforth submitted that the judge had carried out a proper assessment outside the Rules having regard to paras 76-89 of his determination where he had set out the relevant factors in carrying out the balancing exercise.

Discussion

35. The judge's determination is detailed. He considered the appellant's case under the relevant Rules dealing with deportation at para 90 (para 339(a)), paras 91-93 (para 399(b)) and paras 94-98 (para 339A). In addition, albeit disconnected from one another, the judge dealt with the appellant's Art 8 claim outside the Rules at paras 76-89 and at paras 99-104.

36. Although we do not accept Mr Hodgetts' submissions in respect of all his grounds, we are satisfied that a number of them (Grounds 5-8) are well made and lead us to conclude that the judge's decision to dismiss the appellant's appeal under Art 8 is legally flawed and cannot stand.

Grounds 5-8

37. First, in assessing the appellant's case outside the Rule as required by s.117C(6) (see NA (Pakistan) v SSHD [2016] EWCA Civ 662), the judge was required to consider whether there were circumstances "over and above" those described in Exceptions 1 and 2 that amounted to "very compelling circumstances". In order to make a finding in that regard, the judge had properly to consider whether Exceptions 1 or 2 were met. Although we accept Ms Rushforth's submission that the judge's error in assessing whether the appellant met the requirement in Exception 1 (at s.117C(4)(b)) that he be socially and culturally integrated in the UK could not be material to his finding that Exception 1 was not met, that factual error necessarily was carried over to his consideration outside the Rules. It was, at least, a relevant factor in assessing whether there were "very compelling circumstances". Although this matter was not raised before us at the hearing, in assessing the appellant's private life claim outside the Rule, this error may be reflected in what the judge states in para 99 of his determination that the "appellant's presence has been lawful but precarious until July 2018". That may well reflect the judge's earlier finding that the appellant was not socially and culturally integrated despite having lived in the UK since the age of 15 and undertaken his education in the UK including in university. The judge's latter comment is, also, inconsistent with the fact that the appellant was granted indefinite leave to remain in July 2011.

38. Secondly, in assessing the appellant's claim outside the Rules, we accept Mr Hodgetts' submission that the judge, in assessing the public interest, took into account that, according to the OASys Report the appellant was a "medium risk of serious harm to members of the public" (see para 49). However, the judge made no reference to the expert psychologist's report at paras 12.3 and 12.4 (at page 91 of the bundle) that indicated that the appellant's further risk of violent offending was "low". The judge was required to consider this evidence and grapple with it in assessing what, if any, risk the appellant posed of reoffending. While the risk of reoffending may be less significant in a non-EEA case, we do not accept Ms Rushforth's submission that it is, in effect, immaterial because of the seriousness of the appellant's offending. We accept that the judge was entitled, contrary to Mr Hodgetts' submissions, to characterise the appellant's offending as "very serious" and that offences of wounding involving knives attracted the "revulsion of society". However, it is also clear to us that in assessing the public interest the judge had regard to the appellant's risk of reoffending and in that respect he failed properly to grapple with the psychologist's report.

39. Thirdly, in assessing the appellant's claim outside the Rules the judge considered the appellant's relationship with his mother. It is not clear to us whether in para 103 the judge found that there was "family life" between the appellant and his mother. The judge was, in any event, wrong to say that there was "[n]o medical evidence" concerning her. There was medical evidence at page 81 of the appellant's bundle from her GP. That highlighted a number of significant medical issues which she faced. In addition, there was evidence from a support worker (at page 80 of the appellant's bundle) relevant to his mother's mental health and physical problems connecting them to her experience in Sierra Leone prior to her coming to the UK and being recognised as a refugee. There was also a supporting letter from the appellant's mother (at pages 78-79 of the appellant's bundle) speaking to the support that the appellant provided his mother. As we have said, it is unclear whether the judge made a finding that "family life" existed between the appellant and his mother. Paragraph 103 of his determination is in the following terms;

> "103. I have considered whether the appellant and his mother have a relationship of mutual dependency which amounts to a relationship which is capable of engaging article 8 ECHR, despite the fact that the appellant is no longer a child. It is unfortunate that his mother was unable to attend this hearing. I have however considered the content of her letter of support. No medical evidence has been provided in respect of her, and the appellant has given very little detail of the care that he provides to his mother. She also has a daughter, apparently now living in Birmingham, and there has been no evidence to show why she would be unable to provide care for her mother in the absence of the appellant."

40. The absence of a clear finding is, in itself, an error of law and, in any event, the judge failed to have regard to the relevant evidence we have

set out which would be material to determining whether "family life" existed between the appellant (as an adult child) and his mother (see Butt v SSHD [2017] EWCA Civ 184 and the case law set out at [17] – [18]).

41. It follows, in our judgment that we are persuaded on the basis of Grounds 5-8 (renumbered) that the judge materially erred in law in dismissing the appellant's appeal under Art 8.

Grounds 1-4

42. It is unnecessary for us to express any view on Grounds 1-4 as we are satisfied on the basis of Grounds 5-8 (renumbered) that the judge materially erred in law in dismissing the Art 8 claim and his decision cannot stand. As the re-making will require the judge to make findings of fact based upon the up-to-date position of the appellant and his family and whether at the date of hearing his deportation will breach Art 8, the hearing should be *de novo* and none of the judge's findings are preserved.

Decision

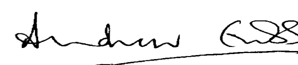
43. For the above reasons, the judge materially erred in law in dismissing the appellant's appeal under Art 8 of the ECHR. That decision is, accordingly, set aside.

44. Having regard to the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal in order to remake the decision in respect of Art 8 of the ECHR. None of the findings in respect of Art 8 are preserved.

45. On remittal, the First-tier Tribunal's decision to dismiss the appellant's appeal against the revocation of his asylum status shall stand.

46. The appeal is remitted to the First-tier Tribunal to be heard by a judge (other than Judge Trevaskis) to remake the decision in respect of Art 8.

Signed



A Grubb
Judge of the Upper Tribunal

30 July 2019