Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12626/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 February 2020	**On 9 March 2020**

Before

UPPER TRIBUNAL JUDGE CRAIG
UPPER TRIBUNAL JUDGE SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OLUWATOBI EMMANUEL KUFORIJI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms R Bassi, Senior Home Office Presenting Officer
For the Respondent: Mr S Chigbo, Legal Representative, Moorehouse Solicitors

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference we refer to the parties as they were before the First-tier Tribunal.

2. The Respondent challenges the decision of First-tier Tribunal Judge Cassel promulgated on 14 November 2019 ("the Decision") allowing the Appellant's appeal against a decision of the Secretary of State refusing the Appellant's human rights claim in the context of a decision to deport him to Nigeria following a conviction on 21 December 2017 for possession with intent to supply two controlled Class A drugs (crack cocaine and heroin). The Appellant was sentenced to a term of eighteen months' imprisonment in January 2018. It is his first and only offence.

3. The focus of the Appellant's appeal is his private life in the UK. He does not have a partner or child here. The Judge considered the applicable law as to which there is no dispute. In particular, the Judge applied Section 117C of the Nationality, Immigration and Asylum Act 2002 ("Section 117C").

4. The Appellant comes originally from Nigeria. He entered the UK as a visitor aged only six years, accompanying his mother. He did not then have leave to remain until 7 November 2013 when he was granted discretionary leave until 6 May 2016 in line with his mother. His leave was extended until 3 December 2018, but within that period he was notified of his liability to deportation under Section 32(5) of the UK Borders Act 2007. It is therefore the case that the Appellant has been in the UK since the age of six, but for much of that time he has been here unlawfully.

5. Although the Appellant has been in the UK for some time, therefore, given the lack of lawful leave for much of that time, he could not meet all three limbs of exception 1 as set out in Section 117C (4). However, other than the criterion as to lawfulness of residence, the Judge found the other two limbs of exception 1 to be met. He carried forward that finding into his consideration of whether there were very compelling circumstances over and above the exceptions and concluded that there were. The Judge therefore concluded that the Respondent's decision was a disproportionate interference with the Appellant's private life.

6. There are three grounds raised by the Secretary of State. At the heart of those grounds is the Judge's finding that the Appellant suffers from a "very severe stutter" which the Judge found would exacerbate his difficulties on return to Nigeria. Ms Bassi very fairly accepted in the course of her submissions, that this finding lays at the heart of all three of the grounds. Ground one is said to be a failure by the Judge to resolve conflict of evidence or the giving of weight to immaterial matters. That is, as I say, the Judge's reference to the stutter. The second ground is that there is a material misdirection of law or an inadequacy of reasoning regarding the Appellant's ability to integrate in his home country, and the third ground makes the same complaint as regards the finding that there are very compelling circumstances. As we say, those turn largely on the same factual finding.

7. Permission to appeal was granted by Designed First-tier Tribunal Judge McClure. As the Judge said when granting permission:

> "Central to a consideration of this matter was whether there were very significant obstacles or very compelling circumstances. Given the current case law on such issues it is arguable that the judge has erred in his consideration of such factors".

8. The matter comes before us at this stage to determine whether there is an error of law and if so what to do about it.

DISCUSSION AND CONCLUSIONS

9. Turning then to the Judge's analysis of the relevant factors, the Judge confirms at [37] of the Decision that the Appellant cannot meet exception 1 based on his private life due to the absence of lawful leave. As the Judge there observed, during the period when the Appellant did not have leave, he was still a minor. The Judge then went on to consider the other two limbs within exception 1, that is to say whether the Appellant is socially and culturally integrated into the UK and whether there would be very significant obstacles to his integration in Nigeria.

10. Although the Respondent does not challenge the conclusion as to social and cultural integration in the UK, it is necessary to say something about that because it becomes relevant when one turns to the finding that there are very compelling circumstances. As the Judge notes, the Respondent's case was that the Appellant's commission of a serious offence undermined any social and cultural integration which he might have established to that point. However, as the Judge pointed out at [39] of the Decision, the sentencing Judge's remarks noted that the Appellant was not a drug addict, was a courier, that he pleaded guilty and had previously been a man of good character. In other words, notwithstanding the seriousness of the offence, and it is very serious concerning as it does the supply of Class A drugs, this was a one-off offence. The Appellant had no previous convictions and there has been no repeat offending.

11. There was also evidence before the Judge from the Appellant's probation officer confirming that the Appellant had been compliant on licence and had completed all offence-focused work including a course on victim empathy.

12. The Appellant has a very good education history. The Judge noted that the Appellant is a "serious student" who has had some success in his studies. He has "a solid family upbringing and has an extensive family network in the UK". He "feels ashamed of his criminal behaviour".

13. For those reasons, the Judge accepted that the Appellant was socially and culturally integrated in the UK, notwithstanding the commission of the serious offence of which he was convicted.

14. I come on then to the matter which lies at the heart of the Respondent's grounds - the Appellant's stutter. The Judge deals with this at [42] of the Decision as follows:

> "During the proceedings it was apparent that the appellant had a very severe stutter. He was able to give evidence with clarity but the time in which he needed to do so was far greater than someone who is able to speak without a stutter. It has not been addressed in either the statement of the appellant or in representations made to the Respondent but it is clearly apparent that this creates a significant obstacle in normal day-to-day life. I bear this in mind when considering whether there would be very significant obstacles in his reintegration into Nigeria. I accept his evidence, which has been confirmed by his two witnesses, that he has no family in Nigeria and that his mother, sister and other relatives are all in the United Kingdom. He does have knowledge of the culture, is healthy and speaks English which is the common language of Nigeria."

15. The Respondent's first ground is based on the submission that it was not open to the Judge to take this factor into account at all or, if he was going to do so, he needed to put this to the Respondent because neither party had relied upon it. It is perhaps unsurprising that the Respondent would not rely on it; it would not be evident to the Respondent unless she had interviewed the appellant, and it might not have occurred to her in any event that this might have any bearing on the Appellant's ability to integrate. For similar reasons perhaps the Appellant did not think it necessary to mention this in his witness statement. It would have been evident of course to the Home Office representative at the hearing, but the Home Office representative may not have thought that he or she needed to make any submission about it.

16. This is however a matter of record about the Appellant's demeanour. The Judge is entitled to take into account factors such as this whether they are evidenced or not. It is not disputed by the Respondent that the Appellant suffers from this affliction. Whether that was relevant to any of the issues is a matter for the Judge unless it is clearly immaterial, or such reliance would be irrational. As we put to Ms Bassi, it is difficult to see what the Respondent would have said about this if it had been drawn to her attention. Ms Bassi says that it could have been pointed out that this had not been an obstacle to the Appellant's day-to-day life in the UK to the extent that the Judge has relied on this as reason to take the stutter into account, because this is an appellant who had managed to survive day-to-day life in the UK and has succeeded including in higher education. However, the Judge was entitled to take into account the fact that this was a very severe stutter which caused the Appellant some problems when giving evidence. Moreover, this Appellant has family support in the UK and therefore the fact that he may be able to cope with day-to-day life in the UK is a very different proposition from returning to a country where he has not lived for very many years without any family support.

17. For that reason, we do not consider there is any error made by the Judge in failing to draw this factor to the attention of the Respondent in the course of the hearing before placing reliance on it. We also consider that the Judge was entitled to take the stutter into account as a factor going to the Appellant's ability to integrate in Nigeria.

18. That brings us on then to the second ground which is that there has been no broad evaluation of whether the Appellant has the ability to integrate, or put another way,

whether there are very significant obstacles to the Appellant's integration in Nigeria. We note from the citation at [42] of the Decision above that the Judge accepts that the Appellant has some knowledge of the culture, is healthy and speaks English, but those are not the only factors relevant to whether a person can integrate in his home country.

19. As is made clear by the Court of Appeal in Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813 ("Kamara"), what has to be considered is whether the evidence indicates that an appellant being returned to his home country will be, as the Judge put it at [43] of the Decision, "whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life". That requires no gloss; it turns on the facts. It cannot be said that the Judge did not consider the relevant case law. Reference is made to the relevant extract from Kamara and that is properly summarised. The Judge also directed himself to the very high threshold which applies due to the need for there to be "very significant obstacles". The Respondent does not assert that the Judge has materially misdirected himself.

20. The Judge then goes on to make the following findings applying that test to the facts at [44] and [45] of the Decision:

> "44. The Respondent has suggested that he would have family support if he returns to Nigeria. That seems to be on the basis of a network of family in the United Kingdom and the support which he is presently receiving. On closer examination however that is not borne out by the facts in this case. He lives with his mother and sister, both of whom are struggling financially. They would not be in a position to support him financially if he were returned to Nigeria. His uncle, well-meaning though he is, has referred to giving the appellant £50 'as and when'. Although I heard no evidence as to his means there was nothing to suggest that he could provide anything approaching sustained financial support. I heard evidence from both the Appellant and his mother, that out of shame following his criminal conviction he had little contact with remaining members of his family. Again, there is nothing to suggest that they would be willing or able to help him financially. The Appellant and his mother have given consistent evidence that there is no contact with the Appellant's father. Indeed, there was no challenge to his mother's evidence that the very reason that she came to the United Kingdom was to escape from the domestic violence at the hands of her estranged husband.
>
> 45. The Respondent refers to him [that is to say the Appellant] having valuable transferable skills. Those skills have not been described in any way, and although there is evidence that he has worked as a volunteer and in customer services, he has presented as a relatively immature young man. There can be little sensible challenge to the effect that his severe stutter would have in his ability to establish relationships in an environment

> which is in reality almost wholly unknown to him without any family or other support. For all these reasons I do find that the obstacles to integration would be very significant."

21. Taking that reasoning as a whole, it is evident that the severe stutter is not the only or indeed a central factor relied upon in the findings. Further, it cannot be said that the Judge has done other than make a very broad, evaluative assessment of all the relevant factors. This is an appellant who came to the UK as a child. He was not, on the face of it, educated in Nigeria, he certainly has never worked in that country, he has no ties to that country.

22. We were told by Mr Chigbo who represents the Appellant today that the only time that the Appellant has returned to Nigeria is for a period of three days. This is a man who would be returning to a country he does not know as a young adult with no knowledge of how to gain employment in Nigeria, without financial support, and with no family members in that country.

23. It might be said that the Judge's finding that the Appellant has knowledge of the culture, is healthy and speaks English indicates that the Appellant could find work in Nigeria, but the Judge deals with that suggestion at [45] of the Decision. The Appellant has not worked in the UK other than as a volunteer and in customer services. The Judge also there takes into account the Appellant's demeanour – both his stutter and lack of maturity. There would, in the Judge's view, be obstacles to the Appellant finding work in Nigeria without the financial support and family ties which, on the Judge's finding, he would not have in Nigeria.

24. For those reasons, the Judge concluded that there would be very significant obstacles to integration. That is a finding which was open to the Judge for the reasons given. Those reasons are adequate and there is no error of law in that regard.

25. That brings us finally to the question of very compelling circumstances. Ms Bassi appeared to accept that if the Secretary of State failed on grounds one and two as we have found is the case, she probably could not succeed on ground three either because that assessment brings into play the findings made earlier in the Decision, but for the sake of completeness we deal with that ground also.

26. It cannot be said that the Judge has misdirected himself as to the law which applies. The Judge was very clearly aware that the very compelling circumstances threshold is a high one (see [48] of the Decision in particular). There is in any event no challenge to the Judge's self-direction as to the law.

27. The Judge sets out what he considers to be the very compelling circumstances at [49] to [52] of the Decision as follows:

> "49. Those factors which weigh in favour of immigration control are the serious nature of the offence itself. The sentencing judge made it clear that acting as a courier of drugs is a very serious matter and requires a sentence of imprisonment. There is no evidence that the Appellant has a partner or

> dependent children and he had been in the United Kingdom without leave for a significant period of time, albeit cannot be held responsible for that, but nonetheless had been without lawful leave."

We pause to observe that this passage encapsulates the public interest which applies in this case, both as to the criminal offending and the Appellant's presence without leave.

> "50. Those factors that weigh in favour of family and private life are that he is under the age of 25, he is 23. He has lived in the United Kingdom for the vast majority of his life. He committed a single offence albeit with two types of class A drugs for which he is remorseful. His probation officer has made positive comments about his period on licence. He and his mother have given credible evidence which is consistent and supported by his uncle, that he fully intends to return to his studies and all the evidence points to him being likely to succeed and obtain his degree. He lives at home with his mother, who undoubtedly has a very strong and positive influence on his behaviour. While he was employed he gave financial support to her. She gave convincing evidence that the Appellant was fully aware of the enormous impact on her that his criminal behaviour had and although there were no further reports from the probation service it appears that he is at low risk of reoffending. I have already commented on the severe stutter he has and the impact that undoubtedly has on his ability to communicate."

That passage sets out the factors weighing in favour of the Appellant: in other words, it deals with the strength of his private life in the UK and the interference which deportation will have. We take Ms Bassi's point that such things as rehabilitation, expression of remorse, etc. are only neutral factors; a person is expected to abide by the law. However, the level of risk is something which the Judge was entitled to take into account when looking at the overall balance, particularly in light of his earlier comments regarding the one-off nature of the offence. None of the case law suggests that the level of risk is not relevant.

28. The Judge repeats the reference to the pressing public interest at [51]. He there takes into account his earlier finding that there are very significant obstacles to integration in Nigeria. He concludes at [52] of the Decision that there would be disproportionate interference when a balance is struck between the competing interests.

29. The paragraphs which we have just set out are a paradigm example of the sort of balancing exercise which is advocated by the Supreme Court in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60. We can see no reason to interfere with the findings which were open to the Judge on the evidence for the reasons he gave. Those reasons were adequate in the circumstances.

30. We conclude by saying that this is not a decision which we would necessarily have made ourselves. It is perhaps generous to the Appellant but that is not the test for us. The test for us is whether there is an error of law in the First-tier Tribunal Judge's

Decision. For the reasons we have given, there is not. For those reasons we uphold the First-tier Tribunal's Decision.

Notice of Decision

We are satisfied that the decision of First-tier Tribunal Judge Cassel promulgated on 14 November 2019 does not contain an error of law. For those reasons we uphold the First-tier Tribunal Judge's decision.

Signed  Dated: 26 February 2020

Upper Tribunal Judge L Smith