Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10448/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 November 2020	**On 22 December 2020**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RICHARD [K]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer
For the Respondent: Ms S Iengar, Counsel, instructed by Duncan Lewis and Co

DECISION AND REASONS

Introduction

1. For ease of reference, I shall refer to the parties as they were before the First-tier Tribunal: the Secretary of State is once more the Respondent and Mr [K] is the Appellant. This is an appeal by the Respondent, with permission, against the decision of Designated First-tier Tribunal Judge

Shaerf ("the judge"), promulgated on 31 December 2019, by which he allowed the Appellant's appeal against the Respondent's refusal of his protection and human rights claims, made in the context of deportation proceedings.

2. The Appellant is a citizen of Trinidad and Tobago, born in March 1978. He arrived in the United Kingdom in 2002. He then left voluntarily in February 2005 and returned to this country in June of that year with entry clearance as a visitor. He has been in this country unlawfully since the expiry of that very limited leave. He had had a number of children, some of whom reside in the United Kingdom.

3. On 11 April 2014, the Appellant and two co-defendants were convicted of robbery of a bookmakers (the co-defendants were convicted on two additional counts of robbery relating to other businesses). A month later they were sentenced to two and half years' imprisonment. The Appellant and his co-defendants sought permission to appeal their convictions to the Court of Appeal. This had the additional consequence of the Attorney General making a reference to the Court on the ground that the sentences were unduly lenient and should be increased. In a judgment handed down on 3 October 2014, the Court of Appeal refused the Appellant and his co-defendants leave to appeal against the conviction and increased their sentences to five years ([2014] EWCA Crim 1918).

4. Deportation action was subsequently instigated by the Respondent and the Appellant responded to this by making protection and human rights claims. In respect of the former, he asserted that his life would be in danger if deported to Trinidad and Tobago due to familial connections with drugs gangs in that country. As regards Article 8, he stated that he had private and family life in this country, with particular reference to a number of his children here and a partner, Ms Lewis.

5. These claims were refused by a decision dated 3 October 2017. In respect of the protection claim, the Respondent issued a certificate under section 72 of the Nationality, Immigration and Asylum Act 2002, as amended ("the 2002 Act"), which, if upheld on appeal, excluded the Appellant from the protection of the Refugee Convention. He was also to be excluded from Humanitarian Protection. The protection claim was then refused on its merits. Article 8 was then considered and it was concluded that he should not be granted leave to remain on the basis of any protected rights.

The decision of the First-tier Tribunal

6. The appeal came before the judge on 19 November 2019. Evidence was adduced relating to the protection and human rights claims. The judge made the following core findings:

(i) The Appellant could not satisfy Exception 1 or Exception 2 under section 117C(4) and (5) of the, as amended. Indeed, the judge found that there was no genuine and subsisting parental relationship with the relevant children in this country (paragraph 50);

(ii) That taking account of the relatively brief nature of his relationship with Ms Lewis and her children from a previous relationship, the Appellant's deportation would not have an unduly harsh impact on them (paragraph 51);

(iii) That, in the context of the private and family life considerations already referred to, there were no very compelling circumstances over and above the two exceptions, with reference to section 117C(6) of the 2002 Act (paragraph 51);

(iv) That the certificate issued under section 72 of the 2002 Act should be upheld because the Appellant had failed to rebut the two statutory presumptions contained therein. As a result, the Appellant was excluded from the protection of the Refugee Convention (paragraph 54);

(v) That the Appellant had made an application to the Criminal Cases Review Commission ("the CCRC") at some unknown date and that this was still pending (paragraph 58);

(vi) That it would be "disproportionate" to deport the Appellant "and that he should be able to remain in the United Kingdom for a reasonable period of time so that the CCRC might make a finding on his application" (paragraph 58);

(vii) That in light of the previous conclusion, the judge declined to reach any findings on the Article 3 aspect of the protection claim (paragraph 60);

(viii) Under the sub-heading of "notice of decision" that: "The appeal is allowed to the limited extent identified in paragraph 58 above."

7. In its entirety, paragraph 58 reads as follows:

> "Given the length of time the Appellant has been in the United Kingdom, albeit unlawfully, the long history between himself and Ms Lewis, and the basis on which the Appellant has applied to the CCRC, I find it would be disproportionate at this stage to deport the Appellant and that he should be permitted to remain in the United Kingdom for a reasonable period of time so that the CCRC the might make a finding on his application. I was informed that an application has been made but not when it had been made. According to the CCRC the the average time taken to deal with applications in 2017 was about 70 weeks.""

8. Paragraph 59 goes on to state:

> "I have come to this conclusion after taking into account the public interest in the deportation of foreign criminals and the gravity, including the violent elements, of the offence for which the Appellant has been convicted as well as the length of his sentence. If the conviction were to be set aside, the Appellant's claim for leave to remain in the United Kingdom would be put on an entirely different footing. I note the lack of evidence of any offending or violent behaviour in the period since his release on 11 November 2016 and conclude that permitting the Appellant to remain for a further short period of time would not be disproportionate to any of the legitimate public objectives identified in Article 8(2) of the European Convention or Part VA of the 2002 Act: see *MS (Ivory Coast) v SSHD* [2007] EWCA Civ 133."

The grounds of appeal and grant of permission

9. The Respondent's grounds essentially make three points: first, that the judge should not have accepted that the Appellant had in fact made an application to the CCRC; second, that the judge had "no jurisdiction" to allow the appeal to a limited extent, as he had purported to do; third, that his conclusion that the appeal should be allowed on the basis set out was perverse.

10. Permission to appeal was granted by Designated First-tier Tribunal Judge Macdonald on 21 January 2020.

11. In advance of the hearing, Ms Iengar served a rule 24 response.

The hearing

12. At the outset of the hearing, I informed the parties that I was aware of guidance issued by the CCRC to applicants and legal representatives. In respect of the former, I referred to a document entitled "Questions and Answers", consisting of 10 pages. In respect of the latter, reference was made to a document entitled "Criminal Cases Review Commission Guidance for Legal Representatives.

13. At the hearing before me Ms Cunha relied on the first point raised in the grounds of appeal, submitting that it was "bewildering" of the judge to have accepted the Appellant's evidence on the CCRC application at face value. She accepted that the assertion in the grounds that the judge had "no jurisdiction" to have allowed the appeal as he did was misconceived. He had purportedly allowed it on Article 8 grounds and it was the rationality of this, rather than any jurisdictional issue, which was put forward as the main thrust of the Respondent's challenge.

14. In respect of the perversity challenge, Ms Cunha emphasised the very high threshold under section 117C(6) of the 2002 Act. She made reference to the importance of the public interest and the increased sentence imposed by the Court of Appeal. In short, she submitted that the conclusions set

out in paragraph 58 did not constitute a rational basis for the judge's ultimate decision to allow the appeal.

15. Ms Iengar submitted that the judge had been entitled to have accepted the Appellant's evidence on the making of the CCRC application. On the rationality issue, the judge had directed himself properly in law and had taken all relevant matters into account. What he said at paragraphs 58 and 59 should be looked at in the round and that reliance on the CCRC application was "one factor of many". She emphasised the elevated threshold applicable to rationality challenges.

Decision on error of law

16. I conclude that the judge was entitled to have found as a fact that the Appellant had made an application to the CCRC. Whilst it clearly would have been better for corroborating evidence to have been provided (I am somewhat puzzled as to why this was not the case), there was nothing erroneous in law in the judge accepting the Appellant's evidence at face value. This finding is to be seen in the context of paragraph 43, in which the judge notes that there had been no material challenge to the Appellant's credibility during the hearing, and also paragraph 25 where it is recorded that the Presenting Officer appeared to rely on the existence of the CCRC application as a reason for undermining the Appellant's asserted remorse for his offending (the point being that the application implied a profession of innocence).

17. Having said that, I conclude that the judge reached a conclusion on proportionality to which he was not rationally entitled, having regard to the relevant legal framework and the reasoning provided in paragraphs 58 and 59 of his decision. In saying this, I take full account of the elevated threshold applicable to rationality challenges and, with respect, the experience of the judge concerned.

18. This was a case in which the Appellant could only succeed if he could show that there were very compelling circumstances, with reference to section 117C(6) of the 2002 Act and having regard to the considerations under the other sub-sections and those contained in section 117B. The judge had already concluded that the Appellant could not show undue harshness or very compelling circumstances in respect of his claimed family life in the United Kingdom.

19. On any sensible reading it is clear that the primary basis upon which the judge concluded that it was disproportionate (and by this he must have meant disproportionate in the context of having to show very compelling circumstances) was the fact that the Appellant had an outstanding application with the CCRC. I say that partly because this application and the (highly speculative) possible outcome of the application is referred to at numerous other parts of the decision; but also because what

immediately follows from his stated conclusion that it would be disproportionate to deport the Appellant is the observation that, "he [the Appellant] should be permitted to remain in the United Kingdom for a reasonable period of time] *so that* the CCRC might make a finding on his application " (italics added).

20. Before examining that conclusion more closely, I consider the other factors included referred to in paragraph 58. The first of these is the length of time the Appellant has been in the United Kingdom. That period was fairly significant, although the judge acknowledged the unlawfulness of almost all of that residence. If he had had section 117B(4) of the 2002 Act in mind as a mandatory consideration (as he was bound to), this had the effect of limiting the weight to be attached to the private life established during the period of residence (subject to any compelling features of the case, none of which are identified in terms by the judge). This factor, even on the judge's application, could only ever have been of limited value.

21. The second stated factor is what is described as the "long history between [the Appellant] and Ms Lewis". However, when one looks back at paragraph 51, the judge there referred to the "brief time she [Ms Lewis] and the Appellant have been together …". There is at the very least a tension here, if not an outright contradiction. In any event, the judge had also concluded that there was no undue harshness in the couple being separated (indeed there was no finding that Ms Lewis could not go with the Appellant to Trinidad and Tobago).

22. Thus, the additional factors which Ms Iengar has emphasised were, on any rational view, of a very limited nature indeed.

23. Turning then to the CCRC application and the judge's significant reliance on it for his conclusion that deportation would be disproportionate. I have already mentioned the absence of any corroborative evidence relating to the application. There was clearly also an absence of any relevant materials relating to such applications to the CCRC in general. This may well have been because the matter was only raised by the Appellant in evidence at the hearing. In any event, the judge has given no consideration as to whether the Appellant could pursue his application from outside of the United Kingdom, whether legally represented (as he then was, and continues to be) or acting alone. The guidance document referred to in paragraph 12, above, states at page 9, under the heading "if the CCRC reviews my case, will that stop my deportation?", the following:

> "There is no automatic right for you to have deportation proceedings suspended because you have applied to the CCRC. If we refer your case for an appeal, then your deportation may be stopped until the appeal is finished. If you are deported after you have applied to the CCRC, we can review your case even if you are in another country as long as you provide us with a contact address or email address."

24. There was, as I understand it, no evidence before the judge to indicate that the Appellant would not, for whatever reason, be unable to

communicate with either legal representatives in this country or indeed the CCRC if he were deported to Trinidad and Tobago.

25. This lack of consideration of what was clearly a relevant issue given the centrality of the CCRC application to the judge's decision had to be coupled with the entirely speculative view that the application might result in a positive outcome for the Appellant (namely a referral to the Court of Appeal). Further, the judge has not identified any additional specific reasons as to why the application could not have been pursued post-deportation. If he had thought that the Appellant would be left without an adequate remedy following outcome in the Court of Appeal, this would have been misconceived. The Appellant could of course apply for a revocation of the deportation order from abroad and would, in that hypothetical scenario, no doubt have strong grounds for doing so.

26. What is said in paragraph 59 does not go to bolster the conclusion set out in the preceding paragraph. The judge does make reference to the public interest as well as the violent elements of the offence. On the facts of this case and with reference to section 117C(1) and (2) of the 2002 Act, the offending was very serious indeed, as described by the Court of Appeal in its judgment:

> "57. It seems to us that the evidence on account 1 demonstrated a high degree of involvement by the three defendants…. they were intimately concerned with the offence that was being perpetrated… their individual roles were substantial rather than peripheral.
>
> 58. … There was a significant degree of planning… the incidents must have been terrifying given the violence that was threatened and used…[An employee of the bookmakers] suffered significantly as a result of her ordeal.
>
> …
>
> 60. This was sophisticated offending, it was cleverly planned and it was executed with a real degree of ruthlessness."

27. That very strong public interest simply could not have been sufficiently diminished or outweighed by the reasons provided by the judge in paragraph 58 such that the Appellant was rationally entitled to succeed.

28. In light of the foregoing, the basis for the judge's conclusion that deportation would be disproportionate was, on the reasoning provided and with respect, incapable of rationally supporting the outcome.

29. Finally, I note the concluding observation in paragraph 59 that: "permitting the Appellant to remain for a further short period of time would not be disproportionate to any of the legitimate public objectives identified in Article 8(2) of the European Convention or Part VA of the 2002 Act". That appears to me to be reversing the equation.

30. For the reasons set out above, this is an example of a relatively rare case in which a perversity challenge has been made out.

31. The judge's error of law is clearly material, and his decision must be set aside.

32. Before turning to the issue of disposal I note a somewhat puzzling aspect of the judge's decision. Following his conclusion on proportionality he states in paragraph 60 that it was not "appropriate or practicable" to deal with the Appellant's protection claim insofar as it relied on Article 3. For my part, I am not entirely clear why the judge did not address this claim in detail and make relevant findings of fact. The section 72 certificate had no bearing on this and the exercise could have been undertaken notwithstanding the existence of the CCRC application.

Disposal

33. I was initially inclined to the view that this appeal should be retained in the Upper Tribunal for a resumed hearing at which the Article 8 issue could be addressed. However, not only does this matter have to be looked at again, but there is the absence of any findings and conclusions on the Article 3 protection claim. In my view it would not be right for the Appellant to be denied the opportunity to have this dealt with at first instance. It is therefore appropriate to remit this case to the First-tier Tribunal.

34. There are clearly a number of conclusions adverse to the Appellant which have not been the subject of challenge by way of a cross-appeal or indeed the rule 24 response. I am conscious of the potential difficulties that can be caused in the First-tier Tribunal when an appeal is remitted with preserved findings.

35. However, and having considered what is said in the recent decision of the Upper Tribunal in AB (preserved FtT findings; *Wisniewski* principles) Iraq [2020] UKUT 268 (IAC), it is appropriate to preserve the judge's findings on the following matters:

(i) the upholding of the section 72 certificate;

(ii) the exclusion from Humanitarian Protection;

(iii) the inability of the Appellant to meet either of the two Exceptions under section 117C of the 2002 Act;

(iv) the Appellant has a pending application with the CCRC.

36. These findings will form the starting point for the First-tier Tribunal's consideration of the Appellant's appeal on remittal. The Appellant is not precluded from adducing new evidence on these matters.

37. The First-tier Tribunal will in any event address Article 8 in the context of section 117C(6) of the 2002 Act, together with the Article 3 protection claim. The preserved findings will not in my view create a judicial straightjacket in respect of that exercise.

38. On a purely practical note, it would seem to me to be sensible if a case management hearing were held once it has gone back to the First-tier Tribunal.

Notice of Decision

39. The decision of the First-tier Tribunal contains an error of law and is set aside.

40. This appeal is remitted to the First-tier Tribunal.

41. No anonymity direction is made.

Directions to the First-tier Tribunal

1) This appeal is remitted to the First-tier Tribunal (Taylor House hearing centre);

2) The remitted hearing shall not be conducted by Designated First-tier Tribunal Judge Shaerf;

3) The remitted hearing shall be conducted in light of what is said in this error of law decision.

Signed H Norton-Taylor Date: 8 December 2020

Upper Tribunal Judge Norton-Taylor