Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: HU/08633/2017

THE IMMIGRATION ACTS

Heard At Field House
On 06.11.2018

Decision signed: 07.11.2018
Sent out: 14.11.2018

Before:

THE HONOURABLE MR JUSTICE TURNER

UPPER TRIBUNAL JUDGE FREEMAN

Between:

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAWEL MWANGI MUIRURI

(anonymity direction not made)

Respondent

Representation:

For the Appellant: Ms Fijiwalla, Senior Presenting Officer

For the Respondent: Ms Sophie Walker, Counsel

DECISION AND REASONS ON ERROR OF LAW

1. The appellant in this appeal is the Secretary of State. However, it is more convenient to refer to the parties as they were before the First Tier Tribunal. From now on, therefore, we shall refer to Mr Muiruri as "the appellant" and to the Secretary of State as "the respondent".

2. The appellant was born on 8 August 1992. He is a citizen of Kenya. He entered the UK in 2004 at the age of 11. That year, his father applied under the Family Amnesty Scheme, naming the appellant and his siblings as his dependants. On 28 August 2009, the appellant was granted indefinite leave to remain in the UK exceptionally outside the Immigration Rules at the same time as his father.

3. On 6 August 2012, the appellant was found in possession of cannabis, for which offence he was fined. Far more seriously, on 21 April 2015, he carried out a knife attack in a public park. He stabbed his victim in the face, neck, chest, back and left forearm. He pleaded guilty to the offence of wounding with intent to do grievous bodily harm, and received a sentence of six years imprisonment. In addition, he was made the subject of an extended sentence of two years; but this extension was overturned on appeal. The sentence of six years was, however, left undisturbed.

4. Notice of the decision to deport the appellant was given on 28 April 2016. The appellant launched an appeal, asserting that to deport him to Kenya would be in breach of his rights under Articles 3 and 8 of the European Convention on Human Rights.

5. The First-Tier Tribunal Judge rejected the argument ventilated in respect of Article 3, but went on to find that the decision to deport was disproportionate and in breach of Article 8.

6. It is against this decision that the respondent now appeals.

7. The relevant law is uncontroversial. The Nationality Immigration Asylum Act 2002 provides:

> “117C Article 8: additional considerations in cases involving foreign criminals.
>
> The deportation of foreign criminals is in the public interest.
>
> The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

> In the case of foreign criminal ("C") who has not been sentenced to a period of imprisonment of 4 years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies."

8. It is not disputed that Exception 2 has no application to the circumstances of the present appeal.

9. Section 117C goes on to provide:

> "(4) Exception 1 applies where:
>
> C has been lawfully resident in the United Kingdom for most of C's life,
>
> C is socially and culturally integrated in the United Kingdom, and
>
> There will be very significant obstacles to C's integration to the country to which C is proposed to be deported."

10. In this case, however, the appellant faced the more stringent test imposed by section 117C (6) of the 2002 Act:

> "In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least 4 years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in the Exceptions 1 and 2."

11. The Judge correctly observed that, although under section 117C (6) very compelling circumstances were required over and above those described in Exception 1, it remained a relevant exercise for her to consider, as a starting point, whether the exception would, in fact, have applied. With reference to *MA (Pakistan) & others* [2016] EWCA Civ 705 (and see also *MM (Uganda) & another* [2016] EWCA Civ 617), the Judge rightly observed, that, having considered the exception, it would then be necessary to see whether any of the facts falling within those exceptions had such force, whether by themselves or taken in conjunction with any relevant factors not covered by the circumstances set out in the exception, as to satisfy the test in section 117C (6).

12. In her consideration of Exception 1, the Judge concluded, uncontroversially, that the appellant could not meet the requirement of having been lawfully resident in the UK for most of his life. He had only lived in the UK for eight and a half years, which fell short of this requirement.

13. The Judge went on to consider whether or not the appellant was socially and culturally integrated in the UK, in accordance with

the second limb of the first Exception. She found that he had satisfied this criterion.

14. Her decision in this regard is challenged by the respondent, who emphasises the following features of the case:

    (i) 4(1) The appellant moved out of the family home at the age of 16 and has not lived with his family since;

    (ii) 4(2) No member of his family attended to give evidence in support of his appeal; and

    (iii) 4(3) No member of his family provided a witness statement or letter of support for use on his appeal.

15. The Judge correctly pointed out that the appellant had been educated in the UK from the age of 11, although his attendance record would appear to be patchy. He had not received full time education in Kenya. On the other hand, the fact that he has spent 3 years of his life in prison until his release earlier this year must be regarded as a seriously negative factor.

16. We take the view that the factors militating against a finding that the appellant was socially and culturally integrated into the UK were so compelling that it was simply not open to the Judge to find that this criterion had been satisfied. The determination on this issue, therefore, amounted to an error of law on rationality grounds.

17. The Judge went on to find that there were significant obstacles to the integration of the appellant in Kenya in the event of his being deported. With reference to the case of Kamara [2016] EWCA Civ 813, the Judge held that, when considering whether or not a person will be able to integrate, the question must be addressed as to whether they would be enough of an insider in terms of understanding how life is carried on in that society with a capacity to participate in it so as 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 relationships to give substance to private and family life.

18. In this regard, the Judge observed that the appellant had not been back to Kenya since he left as a child. He had no family there and nowhere to go. He would not have linguistic barriers to employment, but would be challenged by a lack of particular skills or qualifications. He had also suffered from periods of mental illness which would further threaten his integration into Kenyan society.

19. The respondent challenges the Judge's decision on this criterion, asserting that she had not adequately considered whether support would be available through NGOs or other establishments in Kenya and that the Judge had failed to conduct a broad evaluative judgment on this issue. It is contended that, with the requisite degree of support, the appellant may well have been able to shelter himself, obtain food and meet people to go on to develop meaningful relationships.

20. Although the circumstances of this case fall close to the line, we are not satisfied that the Judge fell into error when addressing this criterion.

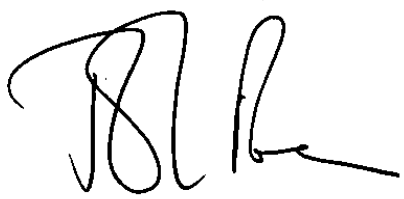
21. However, the position is that, as we have found, the appellant was able to satisfy only one of the three criteria under Exception 1. He would have therefore struggled to challenge his deportation even in the event that he were to have been sentenced to a period of imprisonment of under 4 years. Bearing in mind the requirement of "very compelling circumstances, over and above the expectations" provided under Section 117C(6) of the 2002 Act, we are entirely sure that the circumstances of this case fell so significantly short of meeting this threshold requirement that the Judge's decision that it was satisfied cannot be sustained. No reasonable analysis of the circumstances of the appeal could justify this decision which is, thus, in error of law.

22. Counsel on behalf of the appellant was unable to provide us with any information to indicate that the appellant's position had improved since the matter was heard before the First-Tier Tribunal Judge. No purpose would, therefore, be served by ordering that the appeal be heard afresh in the First-tier Tribunal.

NOTICE OF THE DECISION

The making of the decision of the First-Tier Tribunal involved the making of an error on a point of law. The decision is set aside. We re-make the decision by allowing the appeal and thus upholding the decision to deport the appellant.

(written by Turner J, and signed on his behalf)



(a judge of the Upper Tribunal)

Dated 07 November 2018