IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02364/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 November 2015	**On 20 November 2015**

Before

UPPER TRIBUNAL JUDGE WARR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GREGORY DWAYNE WHILBY
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Kandola, Home Office Presenting Officer
For the Respondent: Mr F Khan of Counsel instructed by Edward Marshall Solicitors

DECISION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the original appellant, a citizen of Jamaica, born on 4 September 1978, as the appellant herein.

2. The appellant arrived in this country as a visitor in 2002, he applied without success to settle as a dependent relative of his mother in that year.

3. The appellant made various applications for leave to remain as a spouse. He was granted three years' discretionary leave outside the Immigration Rules following an application made in 2007 and in 2011 he was granted further discretionary leave until 12 December 2014.

4. The appellant was convicted of possession with intent to supply cannabis on 23 May 2013 at Harrow Crown Court and was sentenced to 51 weeks' imprisonment. A decision was made to deport him on 14 November 2013.

5. The appellant's appeal came before First-tier Judge O'Garro on 30 September 2014. The judge heard oral evidence from the appellant and his partner, Mrs Sokoni. She is British. The couple have a child born on 2 November 2011 who is autistic. The appellant has two elder children by a former partner who is also British.

6. The judge found that paragraph 398(c) of the Immigration Rules applied in the circumstances of this case, the appellant's sentence being under twelve months.

7. Having set out paragraph 399 and 399A the judge noted that it was accepted that the appellant had a genuine and subsisting parental relationship with his three minor children who were all under the age of 18 years and who were in the UK and who were British.

8. The judge considered whether it would be unduly harsh for the appellant's children to move with the appellant to Jamaica if he were deported or whether it would be unduly harsh for them to remain in the United Kingdom when he was deported. She referred to the Secretary of State's guidance on the meaning of "unduly harsh" which stated that when considering the public interest statements words must be given their ordinary meanings and that the Oxford English Dictionary defined "unduly" as "excessively" and "harsh" as "severe, cruel".

9. The judge accepted that the impact of deportation on the children would be harsh and also reminded herself of the need to take into account the best interests of the children.

10. In relation to the older children, the judge noted that there was no evidence that they were not healthy children and that their best interests would be in some measure impaired by loss of the company of their father and although this was a consideration of the first importance it was not the only consideration. The judge made reference to **Lee v Secretary of State [2011] EWCA Civ 348** which she said made it plain that separation may be the consequence of serious criminal conduct such as that engaged in by the appellant. I note that at paragraph 27 of **Lee v Secretary of State** Sedley LJ stated as follows:

> "The tragic consequence is that this family, short-lived as it has been, will be broken up for ever because of the appellant's bad behaviour. That is what deportation does. Sometimes the balance between its justification and its consequences falls the other way, but whether it does so is a question for

an Immigration Judge. Unless he has made a mistake of law in reaching his conclusion – and we readily accept that this may include an error of approach – his decision is final. In our judgment the Immigration Judge in the present case reached a permissible conclusion by means of a properly structured appraisal of the evidence, informed by a correct understanding of the legal importance of a child's best interests. It follows that this appeal has to be dismissed".

11. In respect of the elder children, the judge found that they would be able to visit the appellant in Jamaica and in the meantime communicate with him by telephone or on the internet so that all contact would not be lost. In the circumstances it would not be unduly harsh for them to remain in the United Kingdom if the appellant were to be deported.

12. The judge then turned her attention to the youngest child (M.) and concluded her determination as follows:

"58. I find the case of M., the appellant's youngest child who will be three in a few weeks time and with whom the appellant lives, requires different considerations. M. has been diagnosed as suffering from autism spectrum disorder. According to the medical evidence before me this is a condition with no cure and can only be managed by behaviour support. The information I have read said that children and young people affected by this disorder are also affected by other mental health conditions such as attention deficit hyperactive disorder (ADHD) anxiety or depression.

59. In M.'s case, I note the report from Brent Child Development Service dated 20 January 2014 said that M. has significant difficulties with communication and interaction and that his communication had in fact worsened. It said that his receptive skill was well below average, that he is not responding to toilet training and he does not indicate when his nappies are wet and dry. The report concluded that M. will benefit from ongoing speech and language Therapy input.

60. In a more recent report dated 21 July 2014, prepared by Ealing hospital Community Child Health, it would seem that not much has changed with M.'s condition. M. is observed as being overative and has not responded well to toilet training nor does he indicate when his nappies are wet or soiled. His nursery staff thinks that they cannot meet his need adequately and reported to the parents that he has no sense of danger that leaves him with his high level of motor activity to climb and jump without thinking of the consequences.

61. In light of M.'s medical condition I find that he will need all the help he can get to live as normal a life as possible and having both parents around to give him that extra help will assist in the treatment of his autism spectrum disorder.

62. Presently M. receives support from the Community Child Health and Development Service, which support he is entitled to receive as a British child. M.'s mother said that she will not move to Jamaica with the appellant because she wants her child to continue to receive the health care and support he is receiving in the United Kingdom and he is unlikely to receive the same sort of medical care and support in Jamaica.

63. I do believe a child who has been diagnosed with the autism spectrum disorder should have the benefit of both parents in order to maximise the support he needs. I have not overlook the fact that both the appellant and Ms Sokoni has family members around, such as their parents and siblings who may also be able to offer support but I also appreciate that any support family members can offer to a child like M. will be limited due to their own personal commitments and the bulk of the responsibility to keep up with a child who requires a great deal of one to one attention will be left to Ms Sokoni if the appellant is deported.

64. For this reason I find that it would be in M.'s best interest for the appellant to remain in the United Kingdom to assist in his care and support Ms Sokoni, who is at the moment heavily pregnant and will need continuous on hand support when she has another child to care for, along with M., who is a child with special needs. I find, looking overall at what is in M.'s best interest, it would be unduly harsh to deport the appellant, leaving M. without the additional care support he clearly needs to manage his condition.

65. In relation to Paragraph 399(b), the appellant had been granted Indefinite Leave to Remain since 2011 and there is no dispute that he is in a subsisting relationship with his present partner, Ms Sokoni who is a British citizen.

66. Ms Sokoni said that she will not go with the appellant to Jamaica because M. will need to remain in the United Kingdom to access the medical care he needs to manage his autism spectrum condition. I find Ms Sokoni's position to be quite reasonable. I find that it would be unduly harsh to expect her to move to Jamaica with the appellant in light of M.'s condition and his care needs.

67. Further as I have already stated Ms Sokoni needs the appellant's support in caring for M. and I find that this family's circumstances are compelling and exceptional and it would be unduly harsh to deport him leaving both M. and his mother without the support they clearly need.

68. As I have already stated above, in light of the seriousness of the appellant's offence, I have given due weight to the respondent's decision to deport the appellant and accept that the decision made to deport the appellant is in accordance with the law.

69. The appellant committed a very serious crime. Dealing in the sale of drugs is very serious as it has an impact on the health of the community. There is no doubt about that but in the balance is the length of time the appellant had been in the United Kingdom, the strength of his ties here in the United Kingdom, the fact that he has not re-offended and there is no evidence that he is a persistent offender thus being a risk to the community. I have borne all this in mind in the balancing exercise I am required to undertake.

70. In addition I have paid regard to the public interest considerations which I am now required to consider by virtue of Section 19 of the Immigration Act 2014 which inserts Part 5A into the Nationality, Immigration and Asylum Act 2002.

71. I have noted that Section 117C of the Nationality, Immigration and Asylum Act 2002 (as amended) states that deportation of foreign

criminals is in the public interest, that the more serious the offence the greater is the public interest in deportation of a criminal. The section also states that in the case of a foreign criminal who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies. Here are the Exceptions:-

(4) Exception 1 applies where –

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

72. This appellant has not lived in the United Kingdom for most of his life. He came to the United Kingdom AA [sic] an adult at the age of 22, which means that he should still be familiar with the culture and mores of Jamaica if he is deported there. However even though I find that Exception 1 do not apply to this appellant, I have no hesitation in finding that Exception 2 does assist him, as he has not been sentenced to a period of imprisonment of four years and based on my findings that the appellant has a genuine and subsisting relationship with his partner Ms Sokoni and his children and that the effect of his deportation will be unduly harsh on both his partner and his child M..

73. I believe, having considered all the evidence which has been carefully weighed into the scales, that I have struck a fair balance and in all the circumstances of this case, I do not find that it would be proportionate for the appellant to be deported".

13. The judge allowed the appeal. The respondent applied for permission to appeal. Permission was refused by the First-tier Tribunal but permission was granted by the Upper Tribunal on 18 February 2015. Upper Tribunal Judge Eshun found it was arguable that the findings were inadequately reasoned.

14. Mr Kandola relied on the original grounds and submitted that the judge should have considered the public interest in the appellant's removal. He accepted that the Rules indicated a sliding scale of criminality. He referred to **MAB (USA) [2015] UKUT 00435 (IAC)** and **KMO (Nigeria) [2015] UKUT 00543 (IAC)**. He accepted that the judge had directed herself at paragraph 49 about the meaning of the words "unduly harsh". Unduly harsh should not be equated with reasonableness. The children were not a trump card.

15. Mr Khan submitted that the grounds amounted to a reasons challenge. The judge had correctly directed herself about the legal position. The

Rules did indicate a sliding scale as Mr Kandola had submitted. The appellant's sentence of imprisonment had been 51 weeks. The judge had referred to reports about the youngest child in paragraphs 59 and 60 of the determination. The child was a British citizen, the judge was entitled to find the circumstances were compelling and exceptional and accordingly unduly harsh. It had been open to conclude as she had done in paragraph 67. She had clearly had regard to Section 117C of the 2002 Act. There was no error of law and the decision should stand.

16. At the conclusion of the submissions, I reserved my decision. I can of course only interfere with the judge's decision if it was materially flawed in law.

17. One of the points taken is that the judge did not give proper emphasis to the appellant's criminality. The judge referred in paragraph 41 to the respondent's criminality guidance about the meaning of the words "serious harm". She states she had full regard to the Secretary of State's policy. She refers in paragraph 42 to the respondent's legal responsibility to prevent crime and disorder and that the deportation order should have come as no surprise to the appellant. She correctly addressed herself to the meaning of the words "unduly harsh". The grounds refer to the English Oxford Dictionary definition of unduly harsh as did the judge.

18. I do not find that the reference to reasonableness in paragraph 55 of the determination indicates an error of approach by the judge in this case. The paragraph has to be read in context. It is quite clear that she found in respect of the older children that it would not be unduly harsh for them to remain in the United Kingdom if the appellant were deported. She refers as I have said to the decision in **Lee v Secretary of State**.

19. She explains fully why she drew a distinction between the younger child and had full regard to the medical material before her. There is no arguable inadequacy of reasons in her decision.

20. The judge has set out the Rules correctly as well as the statute. She refers in paragraph 69 to the fact that the appellant committed a very serious crime and states that she had borne all this in mind in the balancing exercise she was required to undertake. It appears quite clear that whether one adopts the approach in **KMO (Nigeria)** or **MAB (USA)**, the judge did not materially misdirect herself in concluding as she did.

21. It is clear that the young child has special difficulties reflected in paragraph 60 of the determination and elsewhere. In addition the judge noted that the appellant's partner was expecting another child and indeed since the decision their child has been born.

22. The respondent argued in the original grounds that the judge had erred in concluding that British nationality alone satisfied the requirements of the Rules but I see no evidence that the judge so erred. The judge had all relevant considerations in mind.

23. It is true that the judge did not make a comparative analysis of the availability of treatment in Jamaica but I am not satisfied in the particular circumstances of this case that the judge erred in finding that removal to Jamaica would be unduly harsh or in appearing to accept what the appellant's partner said as recorded in paragraph 62.

24. I am not satisfied that either set of grounds raises any material flaw in the judge's decision. What was said by Sedley LJ in **Lee v Secretary of State** at paragraph 27 which I have reproduced above is apposite in the circumstances of this case. In that case the appellant's appeal was dismissed and of course in this case the appeal was allowed. The question in every case is a question for the First-tier Judge. The judge in this case reached a permissible conclusion and directed herself by reference to the correct statutory framework.

25. For the reasons I have given the appeal of the Secretary of State is dismissed and the decision of the First-tier Judge stands.

26. The judge made no anonymity direction and I make none. No fee award was paid or payable.

Signed Date 16 November 2015

Upper Tribunal Judge Warr