Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00358/2018

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 14 December 2018	**On 23 January 2019**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DEAN [M]

Respondent

Representation:
For the Appellant: Ms H Aboni, Senior Home Office Presenting Officer
For the Respondent: Professor W Rees instructed by Chris & Co Solicitors

DETERMINATION AND REASONS

Introduction

1. This is an appeal by the Secretary of State, brought with the permission of the First-tier Tribunal (Judge N J Bennett) against a decision of the First-tier Tribunal (Judge Loughridge) which allowed the appeal of the respondent (hereafter "the claimant") against a decision taken on 20 December 2017 to refuse his human rights claim under Art 8 of the ECHR following a decision refusing to revoke the deportation order made against the claimant.

2. The claimant's history can be briefly stated as follows. He is a citizen of Jamaica who was born on 16 August 1976. He first came to the United Kingdom in 2001 as a visitor. His leave for six months expired and he overstayed.

3. On 14 November 2013, the claimant was convicted at the Bristol Crown Court of conspiracy to supply a Class A controlled drug and on 19 November 2003 was sentenced to a term of imprisonment of five years and six months and recommended for deportation.

4. A decision was taken to deport the claimant and a deportation order made on 22 February 2005. The claimant appealed but, on 12 October 2005, the Asylum and Immigration Tribunal confirmed that the claimant had withdrawn his appeal.

5. On 22 December 2005, the claimant was deported to Jamaica.

6. In October 2006, the claimant married Ms P, a British citizen. The marriage took place in Jamaica where she visited the claimant together with their son ("JQ") who was born on 15 October 2003.

7. Sometime in 2007, the claimant entered the United Kingdom in breach of the deportation order.

8. On 17 October 2008, the claimant and Ms P had a second son ("JV").

9. On 31 March 2015, the claimant's representatives made submissions to the Secretary of State under Art 8 and sought the revocation of the deportation order made against him.

10. Those submissions were rejected on 20 December 2017 and it was that decision that the claimant appealed to the First-tier Tribunal.

The Judge's Decision

11. Judge Loughridge allowed the claimant's appeal under Art 8. He accepted that the claimant had a genuine and subsisting relationship with Ms P and also had a genuine and subsisting parental relationship with his two children, JQ and JV.

12. In approaching Art 8, and in particular the issue of proportionality, the judge applied the regime set out in Part 5A of the Nationality, Immigration and Asylum Act 2002 ("the NIA Act 2002"). The judge recognised that, as a result of the claimant having been convicted of an offence and sentenced to five years and six months' imprisonment, he was a foreign national offender and that the claimant could only succeed if he established the requirements set out in s.117C(6) of the NIA Act 2002. The judge accepted that the claimant could not succeed simply by establishing Exception 1 in s.117C(4) or Exception 2 in s.117C(5). He recognised that the claimant could only succeed if he met the requirements in s.117C(6) which provides that:

> "In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation

unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2."

13. The judge approached the claimant's case first, on the basis of whether he fell within Exception 1 or Exception 2, in particular the latter. Thereafter, having concluded that the claimant could establish Exception 2, the judge went on to consider whether there were "very compelling circumstances, over and above" that Exception.

14. Exception 2 focuses upon the impact of deportation upon a "qualifying child". It was accepted both JQ and JV were that as they were both under the age of 18 and are British citizens (see s.117D(1)). Exception 2 is in the following terms:

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

15. At [17]–[19] the judge concluded that it would be "unduly harsh" to expect the children to remain in the UK without the claimant. The judge said this:

> "17. The issue for me to determine is whether there are very compelling circumstances against the Appellant's removal from the UK. The first factor for me to consider is the children, specifically whether it would be unduly harsh for them to live in Jamaica, and whether it would be unduly harsh for them to remain in the UK without the Appellant. These are the two 'limbs' of paragraph 399(a), and a similar issue arises under section 117C(5).
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> 18. [JQ] is now 14 years old and has lived his whole life in the UK. He is a British citizen. He attends secondary school and will be starting his GCSEs in September 2018. He is unlikely to have any significant knowledge or experience of the culture in Jamaica and moving to that country would be enormously disruptive for him. It is not in my view remotely realistic, or fair, to expect him to go to live in Jamaica, and I find that doing so would indeed be unduly harsh, and very much against his best interests. Much the same can be said for [JV] albeit as a nine-year-old the disruption would be at a slightly lower level.
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> 19. As for the children remaining in the UK without the Appellant, other than when [JQ] was a very young child the Appellant has always been in their lives and he has been an active father. [Ms P] says, and I accept, that the children need a positive male role model and that there would be a negative impact on them if the Appellant has to go back to Jamaica. This is particularly the case for [JQ] who she describes as being a typical teenager, thinking that he knows it all, and needing his father in his life to keep him on the straight and narrow at a time when there is a lot of peer pressure. I recognise that [Ms P] herself is a committed parent and appears to be a very stable and hard-working influence, and that if the Appellant returned to Jamaica she would do the best she can as a single parent, and is likely to have some support from her mother. However, it is widely acknowledged that it is far better for children to have both parents involved in their lives and this argument is particularly strong in the case of a male teenager and his father. This obviously depends on the father being a positive influence

which is not inevitable but is, in my view, very much the position in this case. Taking all of this into account I find that expecting the children to remain in the UK without the Appellant would be unduly harsh, and very much against their best interests."

16. Recognising that that was not sufficient for the claimant to succeed because of s.117C(6) (see [20]), the judge went on to consider whether there were "very compelling circumstances" at [21] – [28] and reached a finding in the claimant's favour:

> "21. Clearly under the Rules themselves the relationship with [Ms P] attracts little weight because it was formed at a time when the Appellant's immigration status was unlawful/precarious (see paragraph 399(b)(i)). Similarly, the Rules themselves make no provision for any weight to be given to the Appellant's broader private life, such as the help he provides to his mother-in-law and her elderly uncle.
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> 22. I recognise that in a case of deportation of a foreign criminal the Article 8 balancing exercise is different compared with a case of effective immigration control. However, the difference, essentially, is that the weight of the factors against removal needs to be greater in a deportation case because the need to be able to deport foreign criminals is greater than the need for effective immigration control. Accordingly, under Article 8 itself factors such as [Ms P] and the Appellant's broader private life should not be *completely* disregarded, and to do so would be to ignore the 'holistic'/rounded approach required under Article 8. In particular, it seems to me that the relationship with [Ms P] is properly regarded as an additional factor because I have not yet specifically taken it into account elsewhere. It is a relationship with potentially forms an alternative basis to meeting the requirements of paragraph 399 (or section 117C(5)) but given that those provisions have already been satisfied by the relationship with the children, the relationship with [Ms P] needs to be 'added' to the assessment. The important thing is that there is no double counting and approaching the assessment in this way does not in my view cause this. As for the help provided to the Appellant's mother-in-law and her uncle, there is no specific scope for this to be taken into account under either paragraph 399 or section 117C(5), but it is legitimate to include it as an additional factor/circumstance as part of the assessment of whether, overall there are very compelling circumstances.
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> 23. I note with particular interest the comment by [Ms P's mother] that "my son-in-law is a very devoted father to his children, and a loving husband to my daughter. He is a valid and extremely important member to my family unit, which is a small family that only consists of myself, my daughter, my uncle [and] my two grandsons".
>
> 24. Giving due weight to the relationship with [Ms P] and the Appellant's broader private life, the case is very near the 'tipping point' and is finely balanced.
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> 25. However, the key deciding this Article 8 appeal is in my view to look carefully at the factors in favour of removal. The starting point in a deportation case is that there are fundamentally two reasons for removal:

firstly, as a deterrent to others and a positive expression of society's condemnation of serious criminal activity; and secondly, in order to prevent re-offending and thereby protect society from further harm from the individual in question.

26. It is highly significant that since re-entering the UK the Appellant has not been in any trouble of any kind with the police. I do not regard this as a positive factor in his favour but it strongly suggests that in this particular case preventing re-offending is not a weighty factor. In other words, the Respondent's case must logically rest solely on the factor of deterrence of others and condemnation of serious criminal activity. The consequence of this is that somewhat less weight is required on the other side of the balance, in the Appellant's favour, than would otherwise be the case.

27. I acknowledge that the Appellant returned to the UK in 2007 in breach of the deportation order. However, it was precisely *because* of his commitment to his family that he took that decision, even though he knew it was wrong. I do not condone his actions but it is important to recognise that what he did was for the 'right' reasons, in terms of seeking to be reunited with his wife and young son. It was not a case of returning to the UK to continue a life of crime. I am sure it was not a decision he took lightly, and that he did so out of considerable emotional desperation.

28. Taking all these factors into account and giving appropriate weight to each I conclude that there are indeed very compelling circumstances against removal. It is an exceptional case and one in which, looking beneath the 'veneer' of a deported criminal who returned to the UK in blatant contravention of a deportation order and then lived here clandestinely for many years, there is a more complex story and an individual who is part of a small and closely-bonded family in which he plays an important significant role."

17. At [29]–[35], the judge went on to consider submissions that were made on the claimant's behalf concerning the weight to be given to mitigation put forward by the claimant which, in effect, would have required the judge to look behind the sentencing judge's comments. Correctly, the judge declined to do so and did not take such matters into account.

The Submissions

18. On behalf of the Secretary of State, Ms Aboni submitted that the judge had been wrong in law to find that the claimant met the very high threshold of "very compelling circumstances" over and above Exception 2. In fact, Ms Aboni submitted, the judge had been wrong in law to even find that the impact upon the claimant's children of his deportation was "unduly harsh". She accepted that the children (together with Ms P) could not be expected to relocate to Jamaica but, she submitted, the impact upon them of remaining in the UK with their mother (but without the claimant) was not such as to be "unduly harsh". They could, she submitted, continue their life in the UK with their mother and could maintain contact with their father including visiting him in Jamaica.

19. On behalf of the claimant, Professor Rees submitted that the judge had carefully and properly considered the high threshold of "very compelling circumstances". He submitted that, having accepted that there was a genuine and subsisting parental relationship with his children, the judge had properly identified the factors, especially at [22], [23] and [28] that demonstrated that the circumstances went beyond the "unduly harsh" which the judge had found in the claimant's favour at [19]. Professor Rees submitted that the children were 15 and 10 years old respectively and there was the risk of them falling into bad company if they had no father. Professor Rees also referred to the fact that the claimant's conviction was in 2005. Professor Rees submitted that the judge had correctly directed himself in accordance with s.117C(6) and had reached a reasonable and rational finding that its terms were met.

Discussion

20. There was no real issue between the parties as to the application of Part 5A of the NIA Act 2002 to the claimant. As is well recognised, Part 5A sets out a number of considerations generally irrelevant (s.117B) and those additionally relevant to deportation cases (s.117C) and which a Court or Tribunal "must (in particular) have regard" to in determining whether any interference with an individual's private and family life is justified under Art 8.2 (see s.117A).

21. It is equally uncontentious that the "considerations" are relevant not only when an individual is subject to deportation but also when they seek to revoke an existing deportation order.

22. Of particular reference is s.117C which provides as follows:

> "**117C Article 8: additional considerations in cases involving foreign criminals**
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> (1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ("C") 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.
>
> (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.

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

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

23. As will be clear from s.117C(6), where an individual is subject to deportation and has been convicted of an offence for which they have been sentenced to a period of imprisonment of "at least four years", the public interest requires their deportation unless there are "very compelling circumstances" which are "over and above" those described in Exceptions 1 and 2.

24. For the purposes of this appeal, the central issue concerned Exception 2 where the person subject to deportation has a "genuine and subsisting parental relationship" with a "qualifying child, as JQ and JV are, and whether the effect of deportation on the child would be "unduly harsh". Of course, simply to establish that the individual's deportation would be "unduly harsh" on the qualifying child is not sufficient because of the terms of s.117C(6).

25. As the Court of Appeal made plain in NA (Pakistan) v SSHD [2016] EWCA Civ 662 at [37], in the case of a person to which s.117C(6) applies because he has been sentenced to "at least four years' imprisonment":

> "It will often be sensible first to see whether his case involves circumstances of a kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect of private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are 'very compelling circumstances, over and above those described in Exceptions 1 and 2' as is required under Section 117C(6). It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6)."

26. Exception 2 – and the requirement that the effect on the qualifying child be "unduly harsh" – was considered by the Supreme Court in KO (Nigeria) and Others v SSHD [2018] UKSC 53. There, the Supreme Court adopted the "authoritative guidance" given by the Upper Tribunal in MK (Sierra Leone) v SSHD [2015] UKUT 223 (IAC) and applied in MAB (USA) v SSHD [2015] UKUT 435 (IAC). In MK, the Tribunal said that:

> "By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it possesses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

27. Both the Upper Tribunal in MK and in MAB noted that the effect on a "qualifying child" must be "excessive, inordinate or severe" in order for the effect to be "unduly harsh" (see e.g. [80] of MAB).

28. These passages were approved by the Supreme Court at [27]–[29] in which the Supreme Court also resolved, authoritatively, that the issue of whether the effect on a "qualifying child" is "unduly harsh" looks only to the position of the child and there is "no balancing exercise" taking into account the public interest.

29. At [23], Lord Carnwath (with whom Lords Kerr, Wilson, Reed and Briggs agreed) distinguished between the test of whether it was "reasonable" to expect a child to leave the UK (as in s.117C(6)) and the requirement that the effect of deportation be "unduly harsh" (as in s.117C(5)). The latter imposed a more onerous test. Lord Carnwath said this:

> "Further the word 'unduly' comprise an element of comparison. It assumes that there is a 'due' level of 'harshness', that is a level which may be acceptable or justifiable in the relevant context. 'Unduly' implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent."

30. It is of course self-evident that in order to establish that there are "very compelling circumstances, over and above" Exception 2, the impact must be more than "unduly harsh" and therefore the test sets a hurdle of required impact going even beyond Exception 2, albeit that hurdle may have regard to other factors not directly relevant under Exception 2.

31. In my judgment, Judge Loughridge fell into error in concluding that the impact upon JQ and JV would be "unduly harsh", let alone that there were "very compelling circumstances" (even having regard to other factors) *over and above* Exception 2.

32. Leaving aside [18] which is concerned with whether it would be "unduly harsh" to expect JQ and JV to relocate to Jamaica (which the Secretary of State now accepts cannot be expected), [19] sets out the factors which led the judge to conclude that the impact of the claimant's deportation would be "unduly harsh" upon them. I have set the passage out in full above. In my judgment, the factors set out in [19] could not rationally be described as creating an "unduly harsh" impact upon JQ and JV. The judge, of course, recognises that to separate a caring father from his two sons aged 15 and 10 would not be in their best interests. It would be difficult to contemplate any different conclusion unless there was something about the relationship that called

into question their continued contact with their father. None is, of course, suggested here. But, in effect, the judge's reasoning in para [19] recognises no more than the inevitable effect upon JQ and JV of the claimant's deportation. It is the kind of separation and impact which unavoidably follows from deportation. That cannot, in my judgment, be rationally brought within the high threshold accepted in KO (Nigeria) where the enquiry is to search for "a degree of harshness going beyond what would necessarily be involved for any child faced with a deportation of a parent" (*per* Lord Carnwath at [23] in KO(Nigeria)) and which can reasonably and rationally be described as an "excessive, inordinate or severe" impact. Nothing in para [19] of the judge's determination comes even close, in my judgment, to establishing that high threshold.

33. Further, the judge's reasons in [21]–[28], cannot sustain his finding that there were "very compelling circumstances" over and above those in Exception 2. The judge recognised at [22] that the claimant's deportation would have an effect on Ms P and to some extent upon the family of the claimant's spouse. At [23], the judge went on to recognise the importance of the family's unit but this adds little to the conclusion in relation to Exception 2. Then, at para [28] the judge appears to give his reasons for concluding that the requirement in s.117C(6) was met. I have already set out his reasons above but I repeat them here for convenience:

> "It is an exceptional case and one in which, looking beneath the 'veneer' of a deported criminal who returned to the UK in blatant contravention of a deportation order and then lived here clandestinely for many years, there is a more complex story and an individual who is part of a small and close-bonded family in which he plays an important and significant role."

34. That again, with respect to the judge, is to state the normal and ordinary situation when, in the context of a family where there are genuine relationships not only between spouses and with their children but also with other family members, there is an inevitable impact upon those relationships by as a result of an individual's deportation.

35. At para [34] the judge again returned to the issue under s.117C(6) and stated that:

> "34. Deporting the Appellant would utterly tear apart the family and would have a hugely detrimental effect on [JQ] and [JV], such that I would have serious concerns about the paths their lives might take in the next few years. The circumstances of this case can be regarded as very compelling circumstances but additionally/alternatively they are circumstances in which deportation would be disproportionate in the context of Article 8 itself, particularly bearing in mind the absence of any risk of the Appellant re-offending. I acknowledge that the fact that he returned to the UK in breach of the deportation order is a serious matter but, taking into account the desperate circumstances in which he found himself, and his motives, it is not something which tips the balance against him."

36. As Ms Aboni submitted, the judge's statement that the impact upon the claimant's deportation would have a "hugely detrimental effect" on JQ and JV was not particularised by the judge. It is wholly unclear to me what evidence, set out in his

determination, could have justified such a characterisation of the impact upon them. The judge's words can reflect no more than that which he had previously concluded in [19] and which went no further than recognising the inevitable impact of the claimant's deportation on his children.

37. In my judgment, the circumstances of the claimant's children taken together with such impact as the judge recognises on the claimant's spouse and her family could not rationally amount to "very compelling circumstances" over and above those in Exception 2.

38. I do not accept Professor Rees' submission that the age of the appellant's offending (he was convicted in 2005) affects whether there were "very compelling circumstances". Of course, if the Secretary of State inordinately delayed in seeking to deport an individual, that might be relevant in assessing the public interest and, at least for these purposes I am prepared to assume, would be relevant in applying the "very compelling circumstances" test in s.117C(6). Here, however, there was no such delay. The claimant was convicted in November 2003 and sentenced to five years and six months' imprisonment. The deportation order was made in February 2005 and he was deported in December 2005. He then returned in breach of that deportation order in 2007. His further representations were not made until March 2015. It was only at that point that he sought to have the deportation order revoked. The judge explored with the claimant why he had delayed and set out his response at para [4] of his determination. The claimant confirmed that he was "keeping his head down" because he was worried that he might be deported again. That behaviour by the claimant simply cannot assist him in establishing "very compelling circumstances" or in any way dilute the public interest recognised by the very serious criminal offence and sentence he received.

39. For these reasons, therefore, the judge erred in law in allowing the claimant's appeal by concluding that the public interest did not require his deportation because he fell within s.117C(6).

40. In response to a question from me, Professor Rees acknowledged that if the Secretary of State's grounds were made out, not only had the judge materially erred in law but the decision would necessarily have to be remade dismissing the appeal. That, in my judgment, is entirely correct. As I have already indicated, the claimant's circumstances could not rationally fall within Exception 2 in s.117C(5) and, even having regard to other factors, his circumstances were not rationally capable of amounting to "very compelling circumstances, over and above those described in Exceptions 1 and 2" as set out in s.117C(6).

41. In my judgment, therefore, the judge's decision must be both set aside and remade dismissing the appellant's appeal. The only proper factual finding on the evidence before the judge (and which I make) is that there were not "very compelling circumstances, over and above those described in Exceptions 1 and 2". It follows, in my judgment, that the public interest engaged by the claimant's very serious

criminality is not outweighed and so his deportation is a proportionate interference with his private and family life in the UK. No breach of Art 8 has been established.

Decision

42. The decision of the First-tier Tribunal to allow the claimant's appeal under Art 8 involved the making of an error of law. It cannot stand and is set aside.

43. I remake the decision dismissing the claimant's appeal under Art 8 of the ECHR.

Signed

A Grubb
Judge of the Upper Tribunal

10, January 2019