



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/07152/2018

THE IMMIGRATION ACTS

Heard at Field House  
On Tuesday 25 June 2019

Decision & Reasons Promulgated  
On Monday 8 July 2019

Before

THE HONOURABLE MRS JUSTICE THORNTON DBE  
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)  
UPPER TRIBUNAL JUDGE SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR HENREY WILKINSON

Respondent

**Representation:**

For the Appellant/Secretary of State for the Home Department: Mr N Bramble, Home  
Office Presenting Officer

For the Respondent: No appearance

DECISION AND REASONS

INTRODUCTION

Procedural background

1. This is an appeal by the Secretary of State for the Home Department. For ease of reference we refer below to the parties as they were in the First-tier Tribunal albeit that the Secretary of State for the Home Department is technically the Appellant in

this particular appeal. The Respondent appeals against a decision of First-tier Tribunal Judge M A Khan promulgated on 27 March 2019 (“the Decision”) allowing the Appellant’s appeal against the Respondent’s decision of March 2018 to deport the Appellant to Jamaica pursuant to section 32(5) UK Borders Act 2007.

2. Before us there was no appearance by the Appellant or any representative on his behalf. The notice of hearing had been sent to the Appellant’s solicitors and to the Appellant himself. We put the matter to the back of our list in case the Appellant or his representative were running late but no-one had appeared by the time we concluded the remainder of our list for the day. There was at that time no application to adjourn the hearing nor any explanation for the absence of the Appellant or his representatives. Accordingly, we considered it to be in the interests of justice to proceed in the Appellant’s absence.
3. Following the conclusion of the hearing, on 27 June 2019, the Tribunal received by post a letter from SLA Solicitors dated 20 June 2019 asking to come off the record as acting for the Appellant because he had failed to give them instructions sufficient to permit them to prepare for the hearing. That letter was not sent by facsimile or e mail to ensure it was received prior to the hearing. It is not clear to us why it took until 27 June for a letter dated 20 June to reach the Tribunal. In any event, the contents of that letter do not alter the conclusion we reached at the hearing that it was appropriate to proceed absent the Appellant or his representatives since the reason given for non-attendance by the representatives is due to the Appellant’s own inaction for which there remains no explanation.

### **The Appellant’s background**

4. The Appellant is a national of Jamaica. His date of birth is 2 April 1997. He was granted indefinite leave to remain in the UK as a child of a settled parent on 23 May 2002 when was 5 years old.
5. On 18 October 2017 he was convicted of violent disorder and sentenced to 19 months imprisonment, following which the Respondent served notice of intention to deport pursuant to Section 32(5) UK Borders Act 2007. The Appellant appealed the decision and the appeal was heard by First Tier Tribunal Judge M A Khan.

### **THE LAW**

6. As a foreign criminal who had been sentenced to a period of imprisonment of at least 12 months, the Appellant became subject to deportation pursuant to section 32(5) of the UK Borders Act 2007.
7. Under section 33(2) of the UK Borders Act, Exception 1 to the automatic deportation under section 32(5) arises where the deportation of the foreign criminal would

breach his Convention rights or the UK's obligations under the Refugee Convention. Only the first of those is potentially relevant in the Appellant's case.

8. Sections 117A to 117D of Part 5A of the Nationality, Immigration and Asylum Act 2002 apply in this case. Section 117A applies where the Tribunal is required to determine whether a decision under the Immigration Acts breaches an appellant's right to respect for private and family life under Article 8 and, in the case of a foreign criminal, requires the Tribunal to have regard to the matters in both sections 117B and 117C. In brief summary, the statutory provisions and the relevant Immigration Rules (A398-A399D) create two exceptions to deportation based on Article 8 ECHR (in relation to family life and private life respectively) and provide that, where those exceptions are not met, a foreign criminal may still succeed where there are very compelling circumstances over and above the exceptions. In that regard, the statutory provisions are not clear in relation to the application of that subsection (Section 117C (6)) to a medium offender (that is to say one sentenced to a period of twelve months to under four years); the statute refers only to those sentenced to four years or more. However, as the Court of Appeal concluded in NA (Pakistan) and another v Secretary of State for the Home Department [2016] EWCA Civ 662 ("NA (Pakistan)"), the provision applies equally to medium offenders (see [24] to [27] of the judgment).
9. The FTT and the Upper Tribunal will respect the high level of importance which the legislature attaches to the deportation of criminals (NA(Pakistan) at [22]).
10. The test in the Rules (and the corresponding test in section 117C of the Nationality, Immigration and Asylum Act 2002) is intended to "provide a structured basis for application of and compliance with Article 8, rather than to disapply it" (NA(Pakistan), at [26]).

## **THE FTT DECISION**

11. The Judge arrived at the following key conclusions in the Decision:

"40. This is not an automatic deportation case, it is a conducive to public good deportation under Section 5(3) of the Immigration Act 1971, and there is an element of discretion in such cases. The Appellant entered the UK in 2001; he was age four at the time. he has spent almost all of his life in this country. He does not possess British citizenship but in every other aspect he considers himself to be British

41. Paragraph 339A(2) states:

'2. the person is aged under 25 years, he has spent at least half his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no

ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.'

42. The test of ties with the country of origin was set in the case of Kaur, R (on the application of) Secretary of State for the Home Department [2018] EWCA Civ 1423 (21 June 2018). The word 'no ties' was considered by Blake J and UT Judge O'Connor in the Upper Tribunal's decision in Ogundimu v SSHD [2013] UKUT. The Upper Tribunal held that the phrase imports a continued connection to the life of a country of origin. The test under the Rules is an exacting one. Consideration of whether a person has no ties to a country must involve a rounded assessment of all the relevant circumstances, and it is not limited to cultural and family circumstances.

...

44. The Appellant in this case has lived almost all of his life in the UK. I accept the Appellant's, his mother and sister's evidence that there is no family remaining in Jamaica. As the Appellant has spent his life in the UK, he would not have any ties, cultural or social with anyone in Jamaica. I find that the Appellant would not be considered as an "insider" and would not have a "reasonable opportunity" to be accepted in Jamaica."

## DISCUSSION AND CONCLUSIONS

12. We are satisfied that there are errors of law in the Decision and that it must be set aside.
13. The Judge applied a previous version of the Immigration Rules and an outdated test of 'no ties' with Jamaica to the Appellant's private life rather than considering whether there are very significant obstacles to integration in his home country (paragraph 399A). On behalf of the Respondent, Mr Bramble referred us to the Court of Appeal's decision in AS v SSHD [2017] EWCA Civ 1284 where the Court considered the legal deficiencies in applying the earlier version of the rules in relation to integration into a home country:

"54. The First Tier Tribunal did not refer to sections 117A-D and cited the previous version of the Immigration Rules. The Judge spent some time in his judgment specifically considering the issue of 'ties' including by quoting from Ogundimu, expressly because it had considered the meaning of "the term 'ties' in paragraph 399". It is right that the Judge referred, briefly, at the end of his decision to the three factors set out in the new paragraph 399A. But as the Upper Tribunal Judge noted, it is plain that the FtT Judge was "concerned with the issue of whether the Appellant had ties to Iran... being the former manifestation" of the Immigration Rules. It is also plain, as again noted by the Upper Tribunal Judge, that this brief

reference “does not follow from any reasoned assessment” of the issue of very significant obstacles. Absent any such assessment, it was almost inevitable that the Upper Tribunal would decide that there had been a material error of law.

55. In my view, it also cannot be successfully argued that, to quote from AJ(Angola), paragraph 49, “on the materials before the tribunal any rational tribunal must have come to the same conclusion”. I do not accept Mr Buley’s submission that the differences between the rules were of no significance. It is right to say that, when considering the former version, the Court applied a “rounded assessment of all the relevant circumstances” (YM(Uganda) paragraph 51, approving Ogundimu) and that the latter version required “a broad evaluative judgment” (Kamara paragraph 14). However, the assessment and the evaluation are undertaken in the context of the different formulations which provide the relevant framework. The Upper Tribunal was justified in deciding that the First Tier Tribunal had adopted too narrow an approach and did not take potentially relevant factors into account. To repeat what Sales LJ said in Kamara, paragraph 14, “It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal to direct itself in the terms that Parliament has chosen to use”. In this case, the First Tier Tribunal had not directed itself in the correct terms.”

14. Secondly; the Judge mistakenly considered the case was not an automatic deportation case. For a reason which is not apparent to us, he seems to have thought that it was a “conducive to public good deportation” ([40]). Not only is that wrong in fact but the Judge also appears to have thought that he had some discretion as a result although he does not say what is the source of that discretion nor how that comes into play in a case where the only issue is whether the decision to deport breaches the Appellant’s Article 8 rights. His reference in this context to ‘an element of discretion in such cases’ at paragraph [40] of his decision leads us to the conclusion that the Judge failed to give proper weight to the public interest in the deportation of foreign criminals.
15. We note that the Judge did cite from the case of Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813 (“Kamara”) at [43] of the Decision. We considered whether it might be said that the very obvious errors to which we have alluded are not material since the case of Kamara does refer to the correct test whether there are “very significant obstacles to integration” in an appellant’s home country. However, having set out [14] from the Court of Appeal’s judgment, the Judge went on to reach the findings at [44] of the Decision which we set out above. As Mr Bramble submitted, and we accept, notwithstanding the citation from relevant case law as to the current test, the Judge continues to look at the

Appellant's ability to return to Jamaica only in terms of the ties he has there. In other words, he there continued to apply the wrong, outdated test.

16. As a consequence of the foregoing, very obvious errors the Judge failed lawfully to explain why the Appellant should succeed. We therefore set aside the Decision. Given the extent and very clear nature of the errors, in particularly the misdirections in law, we venture to suggest that the Decision ought probably to have been set aside on review at an earlier stage and remitted to another Judge for re-hearing. As it is, since the re-hearing of the appeal will require a second Judge to start from scratch, the extent of fact finding required on re-hearing is such that we consider it appropriate, having regard to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal and to the overriding objective, to remit this appeal to the First-tier Tribunal for re-hearing..

### **NOTICE OF DECISION**

**We are satisfied that the Decision contains material errors of law. We set aside the decision of First-tier Tribunal Judge M A Khan promulgated on 27 March 2019. We remit the appeal for re-hearing before a Judge other than Judge M A Khan.**



Signed

The Hon. Mrs Justice Thornton DBE

Dated: 4 July 2019