Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10151/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Heard on 20 March 2019	**On 15 April 2019**
Prepared on 3 April 2019	

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR ANTHONY GRANT
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Aslam, Counsel
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Jamaica born on 2 September 1970. He appealed against a decision of the Respondent dated 21 April 2017 to make a deportation order against him and a decision dated 30 August 2017 to refuse a human rights claim and maintain the decision to deport. His appeal was allowed at first instance by Judge of the First-tier Tribunal Atreya and the Respondent appeals with leave against her decision. For

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the reasons which I set out in more detail below, I have set that determination of the First-tier Tribunal aside and I have proceeded to remake the decision in this determination. Although the matter came before me initially as an appeal by the Respondent as I have redetermined the appeal I will continue to refer to the parties as they were known at first instance.

2. The Appellant entered the United Kingdom on 10 September 2000 as a visitor and was then granted leave to remain as a student until 31 January 2002. He had no further leave thereafter (save as referred to below) although he applied unsuccessfully for leave as a spouse in 2008. The Appellant had a number of criminal convictions dating back to 2002 including a conviction for drug dealing for which he was sentenced to 42 months by Snaresbrook Crown Court (having been found guilty after a not guilty plea) on 15 April 2002. He was notified of his liability for deportation in 2009 and a decision to deport him was made on 2 February 2011. The Appellant successfully appealed against the 2011 deportation decision and was granted 3 years discretionary leave following this appeal.

3. However, the Appellant's offending did not stop after succeeding in his first deportation appeal. He received a conditional discharge for possessing cannabis in 2013 and a fine in March 2015 for an offence of attempting to pervert the course of justice and possession of cannabis and a further fine in May 2015 for another offence of possession of cannabis. The Appellant accepted that he was addicted to cannabis. On 21 April 2017 the Respondent made a second deportation order against the Appellant and subsequently refused the Appellant's human rights claim based on his private and family life. The Appellant's appeal against the Respondent's decisions has given rise to these proceedings.

The Appellant's Case

4. The Appellant contested the second deportation on Article 8 grounds. He has three adult children and five children under the age of 18. He was found by the Judge at first instance to be actively involved and present in the lives of all his children although he did not live with any of them. He had separated from his wife Juliet who suffered from depression. His youngest child T was born after the 2nd Home Office decision to deport the Appellant. At the time of his first deportation appeal in 2011 Judge Monro in allowing the appeal stated that the Appellant had made a fresh start in life and made a positive contribution to the lives of his children and other people.

5. In the second appeal the Appellant told Judge Atreya that he had been working since he came out of prison and financially supporting his wife and children producing bank statements on his mobile phone as confirmation. He accompanied his wife to hospital appointments which concerned the children and he was the first point of contact at the secondary school. The Appellant's present partner [ML] stated that while she did not live with the Appellant he was at her house every day. The Appellant supported her 14-year-old son which she had had by another

relationship. The Judge also heard evidence from friends of the Appellant and his daughter [SB] who had made a statement for the appeal dated 9 June 2018 in which she described the Appellant as “the rock of my stability”.

The Decision at First Instance

6. Judge Atreya found the Appellant to be a truthful witness who had a genuine and subsisting relationship with his three adult children and five under 18’s. He was in a committed and serious relationship with [ML]. There was a significant public interest in the Appellant’s deportation, but the Judge found the Appellant had addressed his drug addiction and had not been to prison since the previous deportation appeal. At [73] of the determination the Judge found on the balance of probabilities that it would be unduly harsh for the under 18 children to remain in the United Kingdom without the Appellant. He was in a position to give continued love and support and guidance which could not be given meaningfully on a reduced basis for example by Skype. Visits were unlikely to happen because of the cost.

7. At [74] the Judge stated that the Appellant fell within the exception to Paragraph 399(a) because he had been involved with his children all their lives and continued to play a significant role in their everyday lives. Even if he did not come within the exception, there were very compelling circumstances which outweighed the public interest in deportation. These were that the Appellant was a constant and involved parent and addressing his cannabis addiction and contributing to society through work. The children were vulnerable because of their age and depended on the Appellant emotionally and financially and risked losing a parent permanently.

The Onward Appeal

8. The Respondent appealed against this decision arguing that the Judge had failed to correctly apply the test of unduly harshness as identified in **MM Uganda [2016] EWCA Civ 450**. The Judge failed to give the requisite weight to the strong public interest, as identified by Parliament, in the Appellant’s deportation given the serious nature of the offence involving drugs and the Appellant’s continual offending. The Judge failed to give clear reasons what the unduly harsh consequences of separation would be if the Appellant was deported and the partner and children remained in the United Kingdom. In order to satisfy the rigorous test of undue harshness it was necessary to identify factors that went beyond being a supportive parent providing moral and emotional support or normal father-child interactions. There was no finding that the Appellant partner [I assume this reference also includes the Appellant’s ex-wife] would be unable to support the children or provide for them. The Judge had failed to give clear reasons how the public interest in deportation was outweighed by the Appellant’s family life relied upon.

9. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Lambert on 12 December 2018. In granting

permission to appeal she referred to the relatively brief content of [73] of the determination (see paragraph 6 above) which had displayed an arguable lack of adequate reasoning consistent with case law. There was no Rule 24 response from the Appellant to the grant of permission.

The Error of Law Stage

10. In consequence of the grant of permission to appeal the matter came before me to determine in the first place whether there was a material error of law in the determination such that it fell to be set aside. If there was not, then the decision of the First-tier Tribunal would stand. If there was then I would give directions for the rehearing of the appeal.

11. For the Respondent the Presenting Officer argued that there was a material error of law in the determination and she relied on the grounds provided. The Appellant had to show that there was something beyond the ordinary in the connection between him and his family, but he could not do this. He did not live with his family he only picked the children up from school. The Respondent relied on the Supreme Court decision of **KO [2018] UKSC 53** which confirmed that undue harshness implied an element of comparison. The facts of **KO** involved British citizen children. The Appellant had spent more time in the United Kingdom without leave then with it as the Judge acknowledged at [50] when she referred to the Appellant having four years lawful leave out of a total time spent in the United Kingdom of ten years.

12. The Judge had not properly considered that whilst the Appellant had contact with his children he had nevertheless committed offences. [73] of the determination did not properly address the issue of undue harshness. The Appellant was not the primary carer and so it was difficult to see what was out of the ordinary in the current arrangements which the Appellant had. Even if the Appellant did see the children every day their mother was the primary carer. There had not been a full consideration of all the facts.

13. In reply counsel indicated he would focus on the grounds as drafted. **KO** had not been promulgated when the hearing in the First-tier took place (20 September 2018). The main criticism of the determination made by the Respondent was that the Judge had not identified circumstances which made the effect on the family to be unduly harsh. However, the determination was comprehensive. The Judge had dealt in some detail with why it was unduly harsh for the family to be separated from the Appellant. She had identified factors which took this case out of the ordinary. She had accepted the Appellant was a family man and committed to all eight of his children even though he did not live with any of them.

14. Her summary at [59] of the evidence of Michael Griffiths was particularly relevant. He was a friend of the Appellant’s and a youth support worker with 30 years’ experience in his field. His evidence, which the Judge accepted, was that the Appellant was actively involved in his children’s lives and had a meaningful and positive presence in their lives. I queried with counsel by way of clarification what guidance the Appellant would be

giving to young people in the light of his 2015 offending. Counsel responded that the Appellant accepted he was addicted to cannabis. It was recorded at [70] that the Appellant was addressing his drug addiction by attending a course which he was close to finishing. The starting point of the Article 8 analysis was the acceptance by the Respondent, noted by the Judge at [69] that Judge Monro had accepted the strength of the Appellant's relationship with his children in the first deportation appeal in 2011.

15. One had to look at all of the Judge's findings together. There was evidence of financial support being paid to the Appellant's wife at the date of the hearing even though he was unable to live with her. The Appellant had been a significant carer for the children since their births. As he was an involved parent it would be unduly harsh for him to be deported. The Respondent's grounds were no more than a disagreement with the determination.

16. At the conclusion of submissions, I gave short oral reasons why I found there to be a material error of law in the determination such that it fell to be set aside. I indicated that I would give full reasons in writing in my determination which I now do.

17. The deportation of the Appellant is conducive to the public good and in the public interest because he has been convicted of an offence and sentenced to a period of imprisonment of less than 4 years but at least 12 months, that is to say the conviction in 2002 for possession and supply of a controlled drug for which he received a prison sentence of 42 months. One of my concerns about the determination in this case is the Judge's statement at [70] that while there have been criminal offences since 2002 there have been no custodial sentences since then and no criminal offending since 2015. It is not at all clear to me that the Judge has looked at this matter cumulatively in that the Appellant had a lengthy prison sentence followed by further offending, Rather the impression is gained that the Judge has in some way started the clock again concentrating on the fact that the 2013 and 2015 convictions (which included a conviction for attempting to pervert the course of justice) resulted in non-custodial sentences. That approach would be wrong in law since the effect of the Appellant's offending is a cumulative one. For an example of this, see the Court of Appeal decision in **Harverye [2018] EWCA Civ 2848** where the Respondent was successful in a second deportation appeal, the Appellant having won his first appeal, because there had been a change of circumstances. The facts behind the convictions were still relevant once the Article 3 risk to the Appellant had passed.

18. The Immigration Rules contain (for the purposes of this case) an exception to the deportation of persons in the Appellant's position. That is if they can show that they have a genuine and subsisting parental relationship with a child under the age of 18 years who is a British citizen and it would be unduly harsh for that child to remain in the United Kingdom without the Appellant. There is no dispute in this case that the Appellant has a genuine and subsisting parental relationship with his children, the error of law issue

turns on whether the Judge properly considered undue harshness in the light of the Appellant's offending history.

19. The Respondent in his grounds of onward appeal relies on the Court of Appeal decision **MM [2016] EWCA Civ 617** from which the Supreme Court respectfully differed in **KO**. The Judge cited **MM** at [66] noting that the expression "unduly harsh" in both the 2002 Act and the Immigration Rules required regard to be had to all the circumstances including the criminal's immigration and criminal history. The only real consideration substantively of that case occurs at [70] which I find is inadequate for the reasons I have given. Whilst the Supreme Court in **KO** emphasised that the effect on a child of separation from a parent was not to be weighed in the balance against the parent's offending, I find there is very little recognition in the determination of Judge Atreya of the seriousness of the Appellant's offending. In particular the consideration that having won his first deportation appeal the Appellant continued to offend thereafter. He clearly was not rehabilitated despite serving half of his 42-month prison sentence. It is not apparent from the determination that the Judge has paid due attention to the public interest in the deportation of criminals who have a significant history of offending as this Appellant has, notwithstanding the Judge's comment at [68]. For those reasons I find there is a material error of law in the determination and I set it aside.

20. After I announced my decision I indicated that this was not a case where there appeared to be a need for further evidence although as the Appellant was present that option was available if he so chose. The Judge had engaged in a fact-finding exercise on the family circumstances of the Appellant. The issue turned on whether the consequences of deportation as found by the Judge were indeed unduly harsh. I therefore proposed that I would proceed with the appeal rehearing against the backdrop of the Judge's factual findings. Neither party objected to this course of action after I had outlined it.

The Re-hearing

21. For the Respondent it was argued that undue harshness was a high threshold for the Appellant to cross and nothing had been put forward to demonstrate undue harshness on the children. The Appellant's actions in picking the children up from school was an everyday activity. This was the 2nd deportation appeal and the Appellant had shown himself to be someone willing to continue to commit crimes. He had accepted he was addicted to cannabis and at the First-tier hearing had said he had last taken it one month before. His habit had resulted in crime.

22. For the Appellant it was argued that given that the evidence at the First-tier hearing had largely not been challenged by the Respondent, many of the witnesses were not cross-examined, attention was drawn to the First-tier Tribunal's summary of their evidence. There were very compelling circumstances in this case and the Appellant was addressing his cannabis addiction. There had been no offending since 2015. That was four years ago, a significant period of time. The evidence of Mr Griffiths was

particularly relevant. (see above at paragraph 14). The Judge had stated at [72] that his daughters had been given emotional guidance and moral support in their journey from childhood to adulthood by the Appellant. Taking all factors together that met the test of undue harshness and the appeal should be allowed.

Findings

23. Much of this case has turned on the definition of "unduly harsh". The Supreme Court in the case of **KO** approved the definition that it was more than "severe" or "bleak", there must be something inordinately so about it. That must mean more than merely unreasonable, since otherwise that would duplicate section 117B(6) of the 2002 Act. At paragraph 23 the Supreme Court said: "… the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies 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."

24. It is difficult on the facts as found by the Judge to see that element of undue harshness required by section 117C of the 2002 Act. That section contains a general statement that the more serious the offence committed by a foreign criminal the greater is the public interest in deportation of the criminal. In this case not only has the Appellant been sentenced to 42 months and succeeded on a deportation order but far from rehabilitating himself after that prison sentence was served he continued to offend.

25. In allowing his appeal against the first deportation order Judge Munro, quoted by Judge Atreya at [24], found that the Appellant had made a fresh start in life and had made a positive contribution to the lives of all his children and other people. His daughter Shasheika had a very close relationship with the Appellant and if the Appellant were deported his children would be deprived of any meaningful relationship with him. The problem in this case is that effectively the Appellant ran the same argument with the same facts before Judge Atreya as he had run before Judge Munro.

26. Once again, he sought to avoid the consequences of his criminal offending by relying on his relationship with his children. I do not detect in the decision of the First-tier Tribunal in either determination, that of Judge Munro or Judge Atreya, any recognition that the Appellant's claimed ability to be a positive influence in his children's lives is affected by his offending. Judge Atreya noted the evidence given by Mr Griffiths that the Appellant was actively involved in his children's lives and had a meaningful and positive presence in their lives. It was a material error of law for the Judge

(in addition to the ones I state above) not to adequately demonstrate how she arrived at that conclusion when weighed against the Appellant's offending between 2002 and 2015.

27. The issue of the Appellant's involvement with the children goes towards the question of undue harshness. It is not in my view a mere disagreement by the Respondent with the result, for the Respondent to say that there would not be undue harshness on the Appellant's children if the Appellant were deported and the children were to remain here. The Judge found that the Appellant was not living with any of the children but had daily contact with them. It is difficult to see how that is out of the ordinary in such a way that it crosses the threshold of undue harshness. To deprive a child of contact with their father may be harsh but that is not the test. The test is whether the harshness is unduly so. The comparison which this definition implies is that separating a child from his or her parent may be harsh, but it has to be more than that, it has to be severe or bleak. It is difficult to see on the facts of this case how that test is met.

28. The Appellant's offending was very serious because not only did he receive a prison sentence of 42 months, but he continued to offend after succeeding in a deportation appeal by arguing his connections with his children. His interactions with his children are not such that there would be undue harshness if he were removed because they do not live with him and because the beneficial guidance which it is claimed the Appellant gives has in my view been overstated. How for example was the Appellant able to be a role model for his children during the 21 months he was in prison. How can he demonstrate guidance to his children when he has a serious drug addiction which leads him into criminality as the Respondent correctly submitted to me?

29. It is difficult to see how on the facts as found by the Judge it can properly be argued that the Appellant is no longer at risk of committing further offences because he is addressing his cannabis addiction. The evidence received by the Judge was that the Appellant had not smoked cannabis for a month prior to the hearing, see [39]. It is hard to see how continued use of cannabis knowing that he the Appellant had a deportation appeal coming up very shortly can be said to be evidence of the Appellant addressing his drug addiction. Although the Appellant succeeded in his first deportation appeal on the basis of his connections with his children, there is a very strong public interest in his deportation given his continued offending after succeeding in that appeal. The public interest in the Appellant's deportation is not in my view outweighed by the effect on his children if he the Appellant were to be deported. They would continue to be cared for by their mother.

30. Whilst communication between the United Kingdom and Jamaica might at times be difficult, it is hard to see how that constitutes undue harshness. The Appellant states he has worked in the United Kingdom, the Judge does not deal to any great extent whether the Appellant could work in Jamaica, a country he lived in for the first 30 years of his life. However the Judge's conclusion at [73] that visits would be unlikely to happen because of the

cost is speculative. The Appellant could if he chose facilitate family visits to Jamaica using resources obtained from lawful work in that country.

31. The effect of the Appellant's offending and deportation is that a family is split up as the Court of Appeal noted in **AD Lee v Secretary of State for the Home Department [2011] EWCA Civ 248**: "The tragic consequence is that this family, short-lived as it has been, would be broken up for ever, because of the Appellant's bad behaviour. That is what deportation does." As Judge Southern went on to observe, having cited this passage in **KO** when it was in the Upper Tribunal, the family relationship in **KO** was not short lived "but the point is the same". That was not disputed in the Supreme Court judgment.

32. It is difficult to see what very compelling circumstances there are in this case (outside the Immigration Rules) which would outweigh the very considerable public interest in the Appellant's deportation particularly as I find that the Appellant cannot demonstrate undue harshness. I bear in mind the direction in **Secretary of State for the Home Department v Millar [2018] EWCA Civ 28,** that it is helpful if the Upper Tribunal set out matters in a balance sheet form. On the Appellant's side of the balance sheet is the Judge's reference to the Appellant contributing to society through work and parenting his children. On the Respondent's side this overlooks the very negative contribution the Appellant has made to society by continuing to offend even after succeeding in a deportation appeal. On the Appellant's side, the Appellant has contact with his children, but this is not a family in which the Appellant is living in the same household as the British citizen children. Arrangements for their care would continue even if the Appellant was no longer in the United Kingdom.

33. Overall the matters weighing in the Respondent's side of the scales exceed by a considerable margin those factors relied upon by the Appellant. I find that the Appellant is not able to demonstrate that the exception of undue harshness in Paragraph 399 applies in this case. The Judge did not allow the appeal in respect of the Appellant's private life and that issue has not been appealed and is not therefore before me. I dismiss the Appellant's appeal against the Respondent's decision.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside.

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 8 April 2019

……………………………………………….
Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed this 8 April 2019

……………………………………………….
Judge Woodcraft
Deputy Upper Tribunal Judge