Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06887/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 November 2019	**On 3 February 2020**

Before

THE HONOURABLE LORD MATTHEWS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE PERKINS

Between

C G G
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Ball, Counsel instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 we make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant's children. Breach of this order can be punished as a contempt of court. We make this order because our decision necessarily touches on their welfare and they are entitled to privacy.

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2. This is an appeal by a citizen of Jamaica against the decision of the First-tier Tribunal dismissing his appeal against the decision of the Secretary of State on 11 May 2018 refusing to revoke a deportation order made against him. It was the appellant's case that he is a refugee and that refusing to revoke the deportation order would interfere disproportionately with the private and family life of the appellant or his close relatives. It is now accepted that he is not a refugee but he maintains that deporting him would be contrary to the United Kingdom's obligations under the European Convention on Human Rights and particularly Article 8.

3. The appellant was born in 1987 and entered the United Kingdom as a visitor in December 2000. He remained in the United Kingdom for a time without permission although clearly he cannot be blamed for that because he was an infant. In February 2009 he was given indefinite leave to remain because of the amount of time he had spent in the United Kingdom.

4. He has a criminal record but significantly on 3 November 2011 he was convicted at the Crown Court sitting at Inner London of offences of burglary and theft and sentenced to fifteen months' imprisonment. He was a looter after a well-publicised riot and it is recorded that he was sentenced on the basis that although he had the necessary intention he did not actually take anything. As a consequence of that sentence he became liable to "automatic" deportation. He was given formal notice of that to which he made a formal response and further submissions in April 2012. On 16 January 2013 a Deportation Order was signed and he appealed the decision. His appeal was dismissed and his appeal rights were exhausted on 26 March 2015. Notwithstanding this decision he remained in the United Kingdom and on 18 December 2015 he made submissions by his legal representatives raising a protection and human rights claim. Before the application was decided it was supplemented by further submissions.

5. The asylum procedures were followed and the application was refused on 11 May 2018 on protection and human rights grounds including grounds relying on Article 8 of the European Convention on Human Rights.

6. The appeal against that decision was heard in the First-tier Tribunal on 4 July 2019 and the Decision and Reasons was promulgated on 16 August 2019. The appeal was dismissed on all grounds.

7. The appellant asked for permission to appeal to the Upper Tribunal and permission was granted by a First-tier Tribunal Judge. The First-tier Tribunal's ground said "Ground 2B only is arguable. There is an arguable material error of law." Ground 2B is identified as:

> "Failing to make clear findings on the issue of whether it would be unduly harsh for the children to remain in the UK without their father, given that it was accepted that it would be unduly harsh for four of his children to relocate to Jamaica."

8. Mr Ball, for the appellant, had produced a note for the Upper Tribunal entitled "Grounds" and maintaining that he was entitled to argue both of the grounds of

appeal. He is right. Whilst the wording of paragraph 3 is unequivocal the grounds as a whole were sent out in the form appropriate for a grant of permission on *all* grounds. We doubt that it was the intention of the First-tier Tribunal to limit the grounds in the way that it might look as though it had tried to do. There was no commentary on the reasons why the ground identified as "2A" was not arguable and although it does raise a discrete point it is not so different from the ground on which permission was unarguably granted that restricting the scope of the grant would make for a needlessly tortuous hearing.

9. The respondent had served a skeleton argument signed by Mr Christopher Bates in the Specialist Appeals Team dated 1 November 2019. That did not suggest that the grant of permission was limited. Mr Jarvis did not seek to argue that the grant of permission was limited.

10. Without being disrespectful to Mr Ball's drafting we summarise the two grounds as a contention that the First-tier Tribunal, first, applied the wrong test and, second, gave inadequate reasons.

11. The only relevant ground of appeal to the First-tier Tribunal is that created by Section 84(2) of the Nationality, Immigration and Asylum Act 2002 and is that "the decision is unlawful under Section 6 of the Human Rights Act 1998."

12. The Grounds of Appeal to the Upper Tribunal, which we treated as a skeleton argument, make much of the application of paragraphs 390, 390A, 391, 391A, 396 and 397 and A398 of HC 395. This is relevant because, as is now recognised as almost trite law, a person's ability to satisfy the requirements in Immigration Rules illuminates the public interest in that person being allowed to remain but the judge was obliged by its own terms to consider Part 5A of the Nationality, Immigration and Asylum Act 2002 and, although acknowledged, this should have featured more prominently in the First-tier Tribunal's decision.

13. At paragraph 38 of the Decision and Reasons the judge said that "very compelling reasons had to be shown to displace the public interest in deportation".

14. A difficulty with this direction is that "very compelling reasons" did not *have* to be shown. Paragraph 398 of HC 395 shows that the deportation of a foreign criminal is in the public interest and that interest will only be outweighed by "very compelling circumstances (not "reasons") when neither paragraph 399 (parental and partner relationships) nor paragraph 399A (lived in United Kingdom for over half his life) apply. The statutory test of "very compelling circumstances" is created by Section 117C(6) of the 2002 Act and is relevant in the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years. This appeal does not concern such a case. In **MF (Nigeria) v SSHD,** [2013] EWCA Civ 1192 "very compelling circumstances" were identified as a *characteristic* of a case that should be allowed on "private and family life" grounds but it is not strictly a test.

15. It is not necessarily a fundamental error but the First-tier Tribunal Judge has overstated the difficulties slightly by saying that very compelling reasons had to be shown.

16. He was certainly entitled to remind himself of Arden L.J.'s ruling in **IT (Jamaica) v SSHD** [2016] EWCA Civ 932 where she said at paragraph 57:

"I conclude that the commencement of Section 117A to D of the 2002 Act does not mean that a different and lower weight is to be given to the public interest in applications to revoke a deportation order following deportation and in other deportation situations."

17. However we do not agree with the judge when he said at paragraph 38:

"The starting point had to be that the assessment of what was in the public interest at the date on which the order was made could not be of any less weight when revocation was sought."

18. We certainly agree that deportation remains in the public interest. That is hardly controversial but if authority is needed Section 117C(1) of the 2002 Act says that the deportation of foreign criminals is in the public interest. We do not agree that the weight to be given to the public interest in deportation is fixed. Section 117C(2) provides that "the more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal". It must follow that the public interest in deporting the foreign criminal is not equal for all foreign criminals. The term "foreign criminal" is defined in Part 5 and includes a person who has been sent to prison for at least twelve months. There will always be a public interest in deporting such a person although such a person will not always have to be deported.

19. Paragraph 391A provides:

"In other cases, a revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order."

20. Given that very clear explanation in the policy manifested in the Rules we cannot agree that the "starting point had to be that the assessment of what is in the public interest at the date on which the order was made could not be of any less weight when revocation was sought." Regard must be given to the decision to dismiss the appeal against the decision to deport but the circumstances at the time of decision are the ones that matter. That said, we agree that the public interest in deporting the appellant in this case has not diminished with the passage of time. A person who is subject to a deportation order knows that he or she is required to leave the United Kingdom and it is hard to see how remaining in the United Kingdom in defiance of that clear instruction can in any circumstances diminish the public interest in deportation. We are satisfied that there are no such circumstances here and there is no material error in the judge's misdirection.

21. Of much greater concern is the judge's consideration of the rights of the claimant's partner (if he has one) and his children. It is quite plain from the terms of Section 117C that there are two statutory exceptions to the public interest requiring deportation.

22. Exception 1 applies where, inter alia, there are "very significant obstacles" to the appellant's integration into the country to which he would be sent. This case has not been run on that basis except in so far as it was incidental to the asylum claim that is not now pursued. Although the appellant has only childhood knowledge of Jamaica he is a citizen of Jamaica and is resourceful and it not arguable that Exception 1 applies.

23. Exception 2 has to be considered carefully. We set out below the terms of Section 117C(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."

24. It is not apparent from paragraph 38 of the Decision and Reasons, or at all, that the judge gave Exception 2 proper consideration.

25. At paragraph 51 of the Decision and Reasons the judge said:

> "Taking account of all relevant facts I do not consider that the effect of the appellant's deportation upon his fiancée and all of his children, while undoubtedly detrimental, will be unduly harsh. Certainly, no very compelling circumstances over and above the factors mentioned in Exceptions 1 and 2 have been established."

26. There was no need for very compelling circumstances over and above. This is not a case of at least four years' imprisonment. Satisfying Exception 1 or Exception 2 would be proper reasons to allow the appeal. We find that the judge did not make proper findings about the application of Exception 1 or Exception 2. Failure to make such findings concerning Exception 2 and the child CJ is, we find, a material error.

27. Although the appellant has clearly had intimate relationships with several women and has a current "partner" he does not live in a nuclear family with any of the named children. The judge did not accept that there was a "qualifying partner" because the relationship was formed when the appellant knew that he was in the United Kingdom without permission and so could not satisfy the requirements of paragraph 339(b) of HC 395. We do not agree that a "qualifying partner" for the purposes of Section 117D *cannot* be a partner who relies on a relationship established when he was in the United Kingdom unlawfully because that is not what the Act says. However we find no error in the judge's conclusion that separating the appellant from his present partner, if that is what she is, is not disproportionate or otherwise unlawful.

28. The appellant does have children. RG was born on 28 October 2008 and so is now 11 years old. JG was born on 4 January 2010 and so is now 10 years old. CG was born

on 11 June 2010 and so is now 9½ years old. Sadly that child's mother has died, on 21 December 2016. We find this a significant change of circumstances since the earlier appeal was dismissed and we consider it in more detail below. KG was born on 9 November 2011 and so is now 8 years old. The appellant also has a further child whose date of birth is not given in the social worker's report but is described as being a few weeks old.

29. The First-tier Tribunal Judge should have decided if the appellant had a "subsisting parental relationship" with any of the children and if they were in fact qualifying children. As far as we can see he did not. We are concerned most about CG and it is accepted in the refusal letter that she is a British citizen. It follows that she is a qualifying child *if* the parental relationship is established.

30. All the named children appear to have lived in the United Kingdom for at least seven years. It may well be that each of the other children are qualifying children too but we have not found it necessary to make specific findings on this point.

31. There is a social worker's report is prepared by an appropriately qualified independent social worker, Mr Gary Crisp (MSc BA (Hons), NBASW). It is in some ways a disappointing document. He has seen the children. It is clearly his opinion that it is in their best interests that their father remains in the United Kingdom. The children all spend a great deal of time together, with the appellant, typically at weekends and sometime during school holidays, and the appellant's present partner is at least content with that arrangement.

32. It is not helpful when the report refers to the effects of removal as "unduly harsh". This phrase coincides with a statutory test. We do not know if the social worker understood that or whether he was coincidentally using words that chime with the statute. It would have been much more helpful if, instead of using a phrase that is a term of art, he had predicted the consequences of removal so that the Tribunal could then decide if they were unduly harsh.

33. All of the children report being upset if they are not in frequent contact with their father but we are particularly concerned about the child CG whose mother has died. The appellant said of her that CG's mother died "about three years ago and that since her mother's death the child had been 'bad, she is not focused in school and she needs a lot of attention and comfort from me. She sometimes says that she misses her Mummy and I have to be there to comfort her or take her to school.'" The child CG said that she would be "sad" if she would not be able to see her father for a long time.

34. We had been particularly impressed with the letter from CG's grandmother. It is at page 109 in the bundle. It is in manuscript and although clear and sober in its tone it is not professionally drawn and in some senses is all the better for that. This is a grandmother telling us about her grandchild whose mother is dead. She described the child as "very close" to the appellant and that the appellant "play (sic) a good role in her life by helping me". She said how the child spent every other weekend

with the appellant. Sometimes the appellant took her to her mother's grave. She said that the child "love her dad very much it would break her little heart if she is separated from her dad as her mother is not around any more."

35. There is a letter from CG's school dated 12 February 2019 [page 131]. The school is a state junior school in Surrey. It says the child was admitted to the school in 2017 and that the appellant "is known to the school. He has come to collect his child on several occasions during the past two years." The letter is signed by the head teacher. This evidence is valuable because it confirms the claim that the appellant is involved in the life of the child.

36. There is also a letter from the Head of School of the "Pegasus Academy Trust" dated 1 March 2017 identifying the appellant as the "main carer" of CG and saying that CG is more settled since [the Appellant] has been more involved in her up-bringing, bringing her to and from school etc."

37. We have considered the reasons for dismissing the appeal. The judge, rightly, reminded himself that the test asks if separation is "unduly harsh" which phrase assumes that the consequences can be expected to be harsh. In the case of all the children except CG we find the judge's approach to be sound.

38. However there are two passages in the appellant's statement that impress. He refers to having an agreement with the child's grandmother that he sees the appellant every other weekend and collects her from school. He said how he had taken the child to visit her mother's grave and that he wanted her to remember her mother and he told her stories about her mother and described her as a "kind and a loving person." The appellant then said: "my daughter is a strong girl however; she always breaks down in tears when she sees me and as she fears that she will also lose me. I try to explain to her that she will never lose me and I will always be part of her life."

39. Mr Jarvis indicated that he saw no reason to challenge the appellant's evidence on this point or the evidence of the grandmother or the social worker.

40. We consider again the First-tier Tribunal Judge's decision and reasons. He reminded himself correctly of the need for there to be undue harshness before much weight could be given to the breakup of a family life and reminded himself, correctly, to the well-known maxim in **<u>A D Lee</u> [2011] EWCA Civ 348** that splitting up families "is what deportation does".

41. We agree with the judge to a large extent that the consequences of the appellant's removal on the children will be of the kind that can be expected. Parliament has said that such disruption is only significant if it amounts to undue harshness. We see no basis for criticising the judge's findings insofar as they relate to the children other than CG.

42. However CG's position is different. Although there are many examples of children being brought up successfully by only one parent it is, we find, still the received view that being brought up by both parents is, usually, inherently desirable. Sometimes

for a variety of reasons that is not possible and the consequences of the criminal behaviour of a parent are often good reasons for a parent's involvement in the life of child to be minimised even if greater involvement is desirable for the sake of the child. However this child has already lost her mother.

43. We do not wish to suggest that the grandmother is anything other than a competent, caring and effective substitute parent but with the best will in the world she is not the child's mother. The child has frequent contact with her father and that will stop if her father is deported. We do not know what the effect of that would be. No one does. But all our experience entitles us to conclude that it would be another nasty jolt to an already hurt little girl. We would expect it to unsettle her as she comes to terms with her mother's death and leave her bewildered and insecure.

44. We find that those consequences would be unduly harsh. We find the judge was wrong to conclude otherwise. He did not explain his decision and we reach a different decision on the facts.

45. This is not important for the purposes of Exception 2 unless the appellant and CG enjoy a "parental relationship". It is clear from the respondent's decision that the Secretary of State did not accept this. There the relationship is described as a "private fostering arrangement" where the child's grandmother was the primary carer (see paragraph 92). This conclusion was reached after accepting evidence that the appellant's role in CG's life increased considerably to her benefit in the aftermath of her mother's death but diminished later as the grandmother took day to day control.

46. We are unaware of any complete definition of the phrase "subsisting parental relationship" for the purposes of section 117C(5). We doubt that it can ever be established simply by proving a biological link. If it could then the words "subsisting" and "relationship" would be otiose but other than that it is a matter of fact and degree.

47. Here the child does not live with the appellant but contact is frequent and enriching. When the child's mother died the appellant promptly took responsibility and provided a home. He was later instrumental in organising the transfer of day to day care to a grandmother. It seems that he has helped organise appropriate care without the need for involvement by stage agencies. That is to his credit. He is plainly known to the school. We do not see how the relationship can be described meaningfully as other than "parental" and "subsisting".

48. We do not accept all of the criticisms made of the judge.

49. We do not accept there has been any diminution in the public interest in his deportation. The only thing that has changed save for the death of the mother of CG is that the appellant has extended his stay in the United Kingdom when he knew he ought to have left and has had no more sense of responsibility than to allow another close relationship to develop and to father another child. We accept that the passage of time can diminish the need but this is not a case where the need is diminished in that way.

50. Clearly the appellant is able to work in the United Kingdom if given an opportunity. He is articulate and not without wit. He knows life in the United Kingdom. Although he has been in trouble for matters other than the offence leading to his deportation most of the offending was some time ago and nothing was comparably serious. The most recent offence was dealt with by way of a caution and although wholly discreditable it should not be given more weight than it deserves. It is an episode of bad behaviour which was dealt without prosecution. These matters are slightly against the appellant in the balancing exercise but carry very little weight.

51. Removing him will impact adversely on the lives of his children including the fourth child as she grows up from being a tiny baby. This is against their best interests, which are for the appellant to remain in the United Kingdom where his children can see him, but the law does require the best interests of the children to be satisfied when the public interest requires deportation. Parliament has decided that the public interest requires the deportation of foreign nationals who commit criminal offences in the United Kingdom below a modest level of severity and the disruption to the family lives of those who cared about the offender is the price that has to be paid.

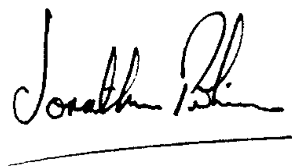
52. We find the First-tier Tribunal erred in law. The judge misdirected himself about the appropriate test and made no reasoned findings on the application of "Exception 2".

53. We are satisfied that the appellant and CG enjoy a parental relationship and the consequences of deportation on CG would be unduly harsh. We therefore allow the appeal.

54. It is important that the appellant understand that we allowed the appeal for the sake of his daughter whose mother has died and for no other reason. If, and when, he ceases to be in a parental relationship nothing in this decision helps him and he must not assume that, as CG grows up, the effects of his removal will continue to be unduly harsh. Presently they are and we allow the appeal.

Decision and Reasons

55. The First-tier Tribunal erred in law. We set aside it aside and we substitute a decision allowing the appeal.



Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 30 January 2020