IN THE UPPER TRIBUNAL

R (on the application of Bent) v Secretary of State for the Home Department IJR [2015] UKUT 00654 (IAC)

Field House
London

Wednesday, 3 August 2015

THE QUEEN (ON THE APPLICATION OF)

DAMIAN ROBERT BENT

Applicant

AND

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

UPPER TRIBUNAL JUDGE MCGEACHY

Respondent

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Mr P Haywood, Counsel, instructed by Messrs Owen Stevens Solicitors, appeared on behalf of the applicant

Miss J Anderson, Counsel, instructed by Government Legal Department, appeared on behalf of the respondent

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JUDGMENT

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JUDGE MCGEACHY: The applicant is a citizen of Jamaica, born on 15 August 1986, who applies for judicial review of decisions of the respondent made on 15 October 2014 to remove him from the United Kingdom, to refuse to revoke a deportation order and to certify that refusal under Section 96 of the Nationality, Immigration and Asylum Act 2002. The effect of that certification is that the applicant has no right of appeal against the decision.

2. The applicant arrived in Britain on 2 October 1998 and was granted indefinite leave to enter. On 21 March 2001 he was convicted of robbery and, because of his age, was subjected to an action plan imposed by the court. On 24 June 2004 he was convicted of possession of a bladed article in a public place, possession of a Class C drug and driving otherwise than in accordance with a licence. He was subjected to a community order and disqualified from driving for three months. On 24 May 2006 he was convicted of possession of a Class C drug and fined and also convicted on that day of driving otherwise than in accordance with the licence, whilst uninsured and using a vehicle with no test certificate. He was fined and banned from driving for two months.

3. The applicant has a child, DB, who was born on 20 June 2010. It appears that the applicant's relationship with her mother, Sherika Taylor, ended shortly after her birth.

4. On 11 April 2011 a no time limit endorsement was placed on his passport. Seven months later he pleaded guilty to three counts of supply of Class A drugs having sold crack cocaine to undercover detectives. On 25 November 2011 he was sentenced to three years' imprisonment on each count to be served concurrently.

5. On 14 February 2012 he was served with notice of liability to automatic deportation under the provisions of Section 32 of the UK Borders Act 2007.

6. On 29 January 2013 the Children's Champion approved a family split on deportation. A decision was made to make a deportation order, against which the applicant appealed. His appeal was dismissed in the First-tier Tribunal on 10 April 2013.

7. The applicant was granted permission to appeal to the Upper Tribunal. The Upper Tribunal considered the appeal and dismissed it in a determination promulgated on 23 September 2013. By 10 October 2013 the applicant had exhausted his appeal rights.

8. The applicant was placed on reporting conditions but absconded from the reporting centre on 8 May 2014, thereby obstructing efforts to deport him on 1 June. On 28 May he again frustrated a removal attempt and on 12 June 2014 absconded when asked to go to the interview room at the reporting centre.

9. On 14 June 2014 the police attended his address as he had been reported missing by his mother.

10. On 19 June 2014 an application to revoke the deportation order was made. The refusal and certification of that claim is the subject of these proceedings. The application referred to the OASys report which had not been before the Tribunal stating that it said that the likelihood of re-offending was low and also referred to paragraphs 390, 398 and 399A of the Rules arguing that there were exceptional

circumstances in this case and that the applicant was not a risk to the public. It was emphasised that he was close to his daughter and reference was made to a letter from Ms Taylor setting out her difficulties in taking care of DB without the assistance of the applicant. The representations asserted that deportation would cause serious harm to the applicant's daughter's emotional wellbeing.

11. Emphasis was placed on the fact that he suffered from depression and had recently been hospitalised. It was said that he had suffered from depression from a young age and that he had received counselling in 2009 and was currently taking anti-depressants and that his depression has increased as a result of the stress and anxiety of detention and deportation.

12. The letter asserted that the applicant had been free from substance abuse for the last three years and referred to case law relating to Article 8 of the ECHR.

13. On 7 August 2014 arrangements were made to detain the applicant on reporting but he absconded from the reporting centre before he could be apprehended.

14. Arrangements were again made to remove him on 14 August 2014 but the presence of a child alone with him prevented detention. The applicant said that the child's mother was at that time in Jamaica.

15. On 2 October 2014 arrangements were made to detain him when he reported but he reported with a child, which prevented detention. On 9 October 2014 he was detained, served with a decision to reject and certify his representations to revoke the deportation order and on 16 October 2014 removal

directions were served for 6 November 2014. His application for judicial review was lodged on 31 October.

16. The decision to refuse to revoke referred to the provisions of Section 32(5) of the Borders Act 2007 and the mandatory provision that the Secretary of State must make a deportation order in respect of a foreign national who had been convicted of an offence and who had been sentenced to a period of imprisonment of at least twelve months unless he fell within one of the exceptions set out in Section 33 of that Act.

17. The Secretary of State considered that the applicant did not fall within one of those exceptions. Having set out the applicant's immigration history and referred to the determinations in the First-tier Tribunal and in the Upper Tribunal the Secretary of State set out at some length the submissions which had been made with regard to his daughter.

18. In paragraphs 19 onwards of the letter the Secretary of State considered the application and stated that the Upper Tribunal, when considering the applicant’s deportation appeal, had properly considered all relevant factors including the claim that the applicant was at low risk of offending and stated that full and anxious consideration had been given to the best interests of the applicant's daughter and that it had been found that the removal of the applicant remained proportionate. Reference was made to the provisions of Section 55 of the Borders, Citizenship and Immigration Act 2009 and it was stated that the Home Office recognised that the interests of the applicant's daughter was a primary consideration when making the decision.

19. Thorough consideration was given to the applicant's history of depression but it was stated that it was believed that the applicant was using his medical issues to frustrate attempts to deport him.

20. When considering the rights of the applicant under Article 8 of the ECHR the letter referred to paragraphs 362 and 398 to 399D of the Rules. When considering the position of DB it was noted that the applicant had not been in a relationship with his daughter's mother for some time and that she was the primary carer for DB although it was accepted that DB had regular visits with the applicant and his extended family.

21. The letter considered at length the provisions of paragraph 399A of the Immigration Rules and the exception contained therein. It was stated that it was accepted that DB was a British citizen. It was pointed out that the applicant did not live with her and it was stated that although it was considered that it would be unduly harsh to expect DB to leave the United Kingdom as she lived here with her mother who was her primary carer and was attending school here, it was not considered to be unduly harsh for her to remain with her mother when the applicant was deported.

22. The writer of the letter went on to note that the applicant was not in a relationship with DB's mother or anyone else. In paragraph 44 of the letter it was stated that it was not accepted that the applicant had been lawfully resident in the United Kingdom for most of his life. It was pointed out that he had entered Britain on 2 October 1998 aged 12 with indefinite leave to remain and he was now 27. It was not accepted that the applicant was socially and culturally

integrated into Britain – reference was made to his various offences. Moreover, it was not considered that there would be very significant obstacles to his integration into Jamaica as he had spent the majority of his youth and formative years there. The writer of the letter quoted from the decision of the First-tier Tribunal Judge which stated that:

> "The appellant has visited Jamaica twice before and his family remains free to visit him in Jamaica whenever they desire. We do not accept that the appellant has no ties to Jamaica ... It may be that the appellant only had distant relatives but we note in that balancing exercise that he is an adult and has undertaken a number of courses whilst in custody ... We conclude that the appellant has qualifications which will better equip him to seek employment in Jamaica."

23. It was stated that on the individual circumstances relating to the applicant it was not accepted that he met the requirements of the private life exceptions to deportation.

24. The letter went on to consider "very compelling circumstances" and stated that there was nothing which had been submitted that would mean that there were very compelling circumstances that the applicant should not be deported. Weight was again placed on the applicant's sentence for the supply of drugs.

25. In paragraph 48 it was asserted that the representations offered nothing new except for the submission regarding the applicant's depression and that in any event that could have been raised at the deportation appeal. It was pointed out that anti-depressant drugs were available in Jamaica

including the drug which had been diagnosed for the applicant.

26. With regard to the certification under Section 96 of the 2002 Act the writer of the letter referred to the judgment in J v SSHD [2009] EWHC 705 (Admin) and the four stage process therein. It was pointed out that the applicant had had another right of appeal which he had exercised, that the matters raised could have been raised at that appeal and that moreover there was no satisfactory reason for the matter not having been raised at appeal. The Secretary of State had, in any event, used her discretion when deciding that certification was appropriate.

27. The Judicial review proceedings were served on 31 October 2014. On 4 November 2014 Upper Tribunal Judge Warr refused the application for a stay. In refusing the application for a stay Judge Warr wrote:-

> "Attention is drawn to the respondent's assertion that the applicant had not been lawfully resident in the United Kingdom for most of his life. This is criticised as being flawed and surprising. However, the Rules refer to lawful residence and the applicant was sentenced to a three year term of imprisonment for supply of drugs in 2011 and he absconded from the reporting centre on two occasions in 2014. Further, given these matters it is difficult to construct a case that the applicant is socially and culturally integrated."

28. The application for a stay was renewed orally before Upper Tribunal Judge Gleeson. She granted a stay on the basis that the balance of convenience was not in favour of removal of the applicant while judicial review proceedings were proceeding.

29. The judicial review proceedings were then considered, on the papers, by Upper Tribunal Judge Rintoul who granted permission in the following terms:

> "It is arguable that for the reasons set out in the grounds, matters which the applicant sought to raise could not have been raised under the older formulation of the Immigration Rules which were superseded on 28 July 2014; it may also be arguable that the entry into force of Section 117C of the Nationality, Immigration and Asylum Act 2002 permits additional issues to be raised that could not previously have been raised."

30. The application referred to the determination of the Tribunal and the fact that it had been conceded in the First-tier that the applicant could not bring himself within the exceptions in paragraphs 399 and 399A. However, it was argued that paragraphs 399 and 399A were potentially applicable. Reference was made to the representations made by the applicant's solicitors on 19 June 2014 and it was pointed out that those had been made before Section 117 of the Immigration Act 2014 and the new formulation of Immigration Rules 399 and 399A had taken effect and that these had changed the criteria from those that applied when the deportation appeal had been considered. The application referred to the supporting letter from the applicant's ex-partner and her assertion that arrangements had been made between them which benefited them both as parents in that DB would stay with Miss Taylor during the week and with the applicant over the weekend. Miss Taylor emphasised that she did not want her child to grow up without a father and she did not want her to be labelled as another fatherless child.

31. The grounds referred to the provisions of paragraph 390 emphasising that a relevant issue was the grounds on which the order had been made. The exemptions set out in paragraph 399 and 399A had changed: the Rule now referred to issues as to whether or not it would be unduly harsh for the child to remain in the UK without the person who was to be deported and it was emphasised that the requirement that there needed to be no other family member who was able to care for the child had been dropped from the Rule.

32. With regard to the provisions of paragraph 399A emphasis was placed on the fact that the rules had changed and now applied a different test, that of whether or not a person had been lawfully resident in Britain for most of his life. It was argued that that was applicable in the applicant's case and this contrasted with the previous requirement of twenty years' residence which had been dropped. Moreover, referring to the provisions of Section 117C of the 2014 Act, reference was made to Exception 1 which would apply where the claimant had been lawfully resident for most of his life, was socially and culturally integrated into Britain and there were significant obstacles to his integration into the country to which it was proposed he should be deported.

33. It was submitted that the decision maker had erred in the assessment of whether or not the applicant's relationship with his daughter meant that he was within the terms of the exemption now set out in paragraph 399 and had further erred in concluding that the applicant had not spent more than half his life lawfully in the United Kingdom. It was also stated that the decision maker had erred in assessing the rights of the applicant under Article 8 of the ECHR.

34. The grounds went on to argue that the decision to certify was wrong because the basis of the claim relied on matters which, by definition, could not have been previously raised. The new provisions regulating deportation had a different effect from those which had been in force at the time of the hearing of the applicant's appeal. In particular, there were the issues of whether or not there would be undue harshness in the separation of the applicant from his daughter and whether or not the applicant was socially and culturally integrated into Britain and it was argued that therefore it was wrong to certify these new issues which had not been subject to a previous determination. It was stated that the decision maker had not properly considered the question of whether or not there would be undue harshness in separating the applicant from his daughter and that the issue of whether DB lived with her mother who was her primary carer was not the determinative issue in that assessment.

35. It was further argued that the questions set out in paragraph 399 or in Section 117C on the issue of undue harshness on both the applicant and on his daughter for him to be deported and separated from his daughter required a high level of justification if it was expected that she should go with him. It was stated that the decision that it was not unduly harsh for the applicant to be separated from his daughter was contrary to the evidence.

36. The grounds further went on to state that the applicant had lived in Britain for more than half his life and therefore it was wrong for the decision maker to state that he had not been lawfully present for most of his life. It was also argued that the issue of whether the applicant was socially and culturally integrated should be separated from

the fact that he had committed crimes here. Emphasis was placed on the fact that he had arrived in Britain as a child, spoke English and that his immediate family were all settled here. It was also argued that there would be difficulties in the applicant reintegrating into Jamaica. It was therefore argued that the claim should not have been certified both because reliance was placed on matters which could not have been previously raised because of the changes in the law but also because the terms of the new provisions could be met.

37. Before the hearing before me Mr Haywood lodged a skeleton argument which to a large extent repeated what was in the initial grounds of application but also argued that the criteria set out by Stadlen J in J v SSHD [2009] EWHC 705 (Admin) had not been met, particularly with regard to the second and fourth criteria - the Secretary of State had not properly used the discretion open to her when the decision had been certified.

38. In his submissions to me Mr Haywood emphasised the discretionary element in certification under Section 96 and referred to the public law principles of fairness, he referred to the guidance in the judgment of the Court of Appeal in Khan [2014] EWCA Civ 88. He accepted the importance of preventing repeat claims and the need to stop argument about matters which should have been raised before, but he said that there was a distinction in a case like this where there had been a change in the law which was a fundamental change rather than one at the margins.

39. He accepted that the Rules relating to deportation were intended to be a complete code but said there were clear exceptions and the fact that the applicant might or might

not be successful in coming within those exceptions was not the relevant matter when certification was considered. This was not a case where an attempt had to be made to stop the mischief of repeated applications. He stated that he was not trying to argue in these proceedings matters which might be put forward on appeal but only to show that there was a prima facie case for finding that there should have been an in-country right of appeal. He accepted that it could not be argued that the applicant was in a relationship with his former partner but the relevant issue related to his relationship with his daughter. Again he stated that the Rules had changed significantly when they now referred to the issue of whether or not it was unduly harsh for the child to remain in Britain without the person who was to be deported. There had been a fundamental shift in the way in which exceptions to deportation had been set out and this was not something that could have been dealt with or indeed foreseen at a time when the applicant's appeal had been heard in the Upper Tribunal.

40. Moreover, paragraph 390 refers to the requirement to consider representations made and indeed all relevant factors.

41. He emphasised that paragraph 392 referred to all relevant factors which should be considered. It was his assertion that the letter of refusal did not properly consider all issues and that therefore the exercise of discretion had not been completed.

42. With regard to the merits of the claim, he referred to the letter from Miss Taylor and the important role which the applicant played in his daughter's life. He also argued that the normal meaning of words to be used and where the

Rule referred to “most of his life” that clearly meant more than half and that was the case of the applicant who had spent fifteen years in Britain and only twelve in Jamaica.

43. In reply Miss Anderson relied on a detailed skeleton argument in which she argued that what was important was to consider whether or not the outcome would be the same as it had been in the past. While the statutory prohibition under Section 84 1-3 of the Criminal Justice and Courts Act 2015 on granting relief where it would not change the outcome for an applicant does not apply to cases where applications for judicial review were lodged before 13 April 2015, relief was still discretionary and should not be granted where the outcome was very likely to be the same. She stated that that was the position both procedurally and substantively.

44. She referred to the judgment in MF (Nigeria) [2013] EWCA Civ 1192 which made it clear that the issue of proportionality under Article 8 of the ECHR should reach the same answer whether or not the issue was considered discretely or under the Rules since the Rules did not change the basic Article 8 assessment. She stated that the Upper Tribunal and the First-tier Tribunal had considered all the facts relevant to the proportionality assessment in relation to the applicant's child and private life and the pressing public interest in deportation when finding that deportation was not disproportionate pursuant to Article 8 of the ECHR.

45. In any event she argued that deportation remained lawful and therefore mandatory under the automatic deportation regime. There was nothing that had been omitted either in

the determinations of the Upper Tribunal or indeed in the letter of refusal.

46. She concluded that the codification of Article 8 of the ECHR within the Immigration Rules had not been intended to make it possible for a foreign criminal to obtain a finding that removal was disproportionate where that was not achieved under a "free form" Article 8 assessment or indeed under the earlier version of the Rules. The Court of Appeal in repeated judgments, including that in SS (Nigeria) [2013] EWCA Civ 550, had made it clear that Parliament had emphasised the importance to be accorded to the deportation of foreign criminals. She referred to the finding of the Upper Tribunal which was:-

> "... that on the basis of the seriousness of the offence alone, the panel was entitled to come to the conclusion that it did on proportionality of the decision to deport the appellant."

47. She stated that decision had been reached after a proper consideration of all relevant matters and that the only matter which had not been considered by the Upper Tribunal was that relating to the applicant's mental health, but she pointed out that clearly that could not meet the high test set out in N v UK 2008 ECHR 26565/05 or Bensaid 2001 ECHR 44599/98 as applied by the Court of Appeal in GS (India) [2015] EWCA Civ 40 – the medical exception could really only apply to deathbed cases.

48. Having set out the factual background she stated that the driver in deportation was the public interest as set out in Section 32 of the 2007 Act.

49. She argued that the application of the exceptions in Section 33 did not prevent the making of a deportation order.

50. She referred to Section 117C of the 2002 Act which emphasised that deportation of foreign criminals is in the public interest. Subsection 5 set out exception 2 which applied where a claimant had a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of his deportation on the partner or child would be unduly harsh.

51. She asserted that it was relevant to note that even if the certification under Section 96 was quashed, the applicant's claim could be certified under Section 94(B) and therefore he would not have an in-country right of appeal.

52. She argued that the fact that the statutory framework had changed was not a matter within the contemplation of the guidelines set out in J – what was relevant was the substance of the claim.

53. She stated that the applicant had not attempted to argue that there would be any material change in the factual position regarding his daughter and that really the only new material related to his mental health. The Secretary of State had gone into all relevant factors.

54. She referred to the various judgments of the Court of Appeal including that in LC (China) [2014] EWCA Civ 1310 regarding the issue of what would make deportation “unduly harsh”.

55. With regard to the issue of whether or not the applicant has spent most of his life here, she stated that had Parliament wished the Rule to relate to more than half of the applicant's life that it what would have been put into the statute. A period must exclude a time in prison rather than an arithmetical approach.

56. She argued furthermore that the applicant was not integrated into Britain and there was no reason why he could not return to Jamaica and make a life for himself there. No positive obstacles to his return had been put forward.

57. She went on, in her oral submissions, to emphasise that changes in law could not prevent certification in a repeat appeal. She relied on the judgment of Lord Neuberger in ZA (Nigeria) v SSHD [2010] EWCA Civ 926 where he had stated that:

> "Immigration and asylum have been the subject of a large and increasing, almost bewildering, volume of legislation (both statutory and regulatory) and of litigation (both in tribunals and courts) over the past 40 years. One of the problems that has had to be addressed is that of renewed claims, that is claims for asylum, leave to remain and the like, made by people who have already had their claims rejected. On the one hand it is only fair that the opportunity to make such a renewed claim should be available to those who have good reason for making them – normally because of a significant unforeseen change in circumstances since a previous claim was made and rejected. On the other hand it must be right to shut out renewed reported factual claims which either raise no new grounds or are hopeless."

58. She referred to the importance of legal certainty and the importance that legal proceedings should not lead to multiple claims on the same facts. Certification was a support mechanism to stop that happening.

59. She emphasised that the Upper Tribunal had in their determination considered all relevant factors and that the primary issue when considering undue harshness was the taking away of a child from the primary carer. Such was clearly not the case here.

60. In reply Mr Haywood emphasised that the certification power should not be exercised routinely because it was one of a range of powers which should be considered and where discretion should be applied.

Discussion

61. I consider that it is of use to set out the legal framework in this appeal. Section 96 of the Nationality, Immigration and Asylum Act 2002 states:

> **"96 Earlier right of appeal**
> (1) A person may not bring an appeal under section 82 against a decision ("the new decision")
> if the Secretary of State or an immigration officer certifies–
> (a) that the person was notified of a right of appeal under that section against another decision ("the old decision") (whether or not an appeal was brought and whether or not any appeal brought has been determined),
> (b) that the claim or application to which the new decision relates relies on a ground that could have been raised in an appeal against the old decision, and

(c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that ground not having been raised in an appeal against the old decision.

(2) A person may not bring an appeal under section 82 if the Secretary of State or an immigration officer certifies—

(a) that the person has received a notice under section 120(2),

(b) that the appeal relies on a ground that should have been, but has not been, raised in a statement made under section 120(2) or (5), and

(c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that ground not having been raised in a statement under section 120(2) or (5).

(4) In subsection (1) “notified” means notified in accordance with regulations under section 105.

(5) Subsections (1) and (2) apply to prevent a person's right of appeal whether or not he has been outside the United Kingdom since an earlier right of appeal arose or since a requirement under section 120 was imposed.

(6) In this section a reference to an appeal under section 82(1) includes a reference to an appeal under section 2 of the Special Immigration Appeals Commission Act 1997 (c. 68) which is or could be brought by reference to an appeal under section 82(1).

(7) A certificate under subsection (1) or (2) shall have no effect in relation to an appeal instituted before the certificate is issued. **Notes**

62. It is accepted that the appropriate legal framework is that set out in the judgement of Stadlen J in J v SSHD [2009] EWHC 704 (Admin) as follows:

"Under Section 96 (1) and (2) before the Secretary of State can lawfully decide to certify, she has to go though a four stage process. First she must be satisfied that the person was notified of a right of appeal under Section 82 against another immigration decision (Section 96(1)) or that the person received a notice under Section 120 by virtue of an application other than that to which the new decision relates or by virtue of a decision other than the new decision (Section 96(2)). Second she must conclude that the claim or application to which the new decision relates relies on a matter that could have been raised in an appeal against the old decision (Section 96(1)(b)) or that the new decision relates to an application or claim which relies on a matter that should have been but has not been raised in a statement made in response to that notice (Section 96(2)(b)). Third she must form the opinion that there is no satisfactory reason for that matter not having been raised in an appeal against the old decision (Section 96 (1) (c)) or that there is no satisfactory reason for that matter not having been raised in a statement made in response to that notice (Section 96 (2)(c)). Fourth she must address her mind to whether, having regard to all relevant factors, she should exercise her discretion to certify and conclude that it is appropriate to exercise the discretion in favour of certification.

63. It is also useful to set out the changes in the rules and to the Nationality, Immigration and Asylum Act 2002. Section 117(C) of that act states:

117C Article 8: additional considerations in cases involving foreign criminals

(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.

64. Finally I set out the changes to the rules - I have used the tracked changes as they assist in showing what the changes actually were. The relevant rules are paragraphs 390, 398 and 399A. They state:

"**Revocation of deportation order**

390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:

the grounds on which the order was made;

any representations made in support of revocation;

the interests of the community, including the maintenance of an effective immigration control;

the interests of the applicant, including any compassionate circumstances.

390A. Where paragraph 398 applies the Secretary of State ~~or Entry Clearance Officer assessing the application~~ **DELETED** (HC 760 13.12.2012) will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.

Deportation and Article 8 (HC 760 13.12.2012)

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a)the deportation of the person from the UK is conducive to the public good and in the public interest(28.07.2014 HC 532) because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b)the deportation of the person from the UK is conducive to the public good and in the public interest(28.07.2014 HC 532) because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good and in the public interest(28.07.2014 HC 532) because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, ~~it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.~~ **DELETED** (28.07.2014 HC 532) the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A. (28.07.2014 HC 532)

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

the child is a British Citizen; or

the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a)~~it would not be reasonable to expect the child to leave the UK; and~~ **DELETED** (28.07.2014 HC 532) it would be unduly harsh for the child to live in the country to which the person is to be deported (28.07.2014 HC 532)

~~there is no other family member who is able to care for the child in the UK~~ **DELETED** (28.07.2014 HC 532) it would be unduly harsh for the child to remain in the UK without the person who is to be deported (28.07.2014 HC 532)

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

~~the person has lived continuously in the UK for at least 20 years 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; or~~

~~the person is aged under 25 years, he has spent at least half of 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.~~ **DELETED** (28.07.2014 HC 532)

(a)

the person has been lawfully resident in the UK for most of his life; and

(b)

he is socially and culturally integrated in the UK; and

(c)

there would be very significant obstacles to his integration into the country to which it is proposed he is deported. (28.07.2014 HC 532)

~~399B. Where paragraph 399 or 399A applies limited leave may be granted for a period DELETED (HC 760 13.12.2012) for periods (HC 760 13.12.2012) not exceeding 30 months. Such leave shall be given subject to such conditions as the Secretary of State deems appropriate. (09.07.2012 HC 194)Where a person who has previously been granted a period of leave under paragraph 399B would not fall for refusal under paragraph 322(1C), indefinite leave to remain may be granted. (HC 760 13.12.2012)~~ **DELETED** (28.07.2014 HC 532)

65. I have considered this application in the light of the structured approach set out in J. Clearly the first condition is met in that the applicant was given, and exercised a right of appeal. I note that the determination of the appeal dealt with the likelihood of re-offending. This second issue - whether or not the new decision relates to a matter which could have been raised in the appeal and the third question - whether or not there is any

satisfactory reason for the matter not being raised are, I consider, the focus of this application.

66. These issues relate to the increasing involvement of the applicant with his daughter and the change in the rules which have brought in the issue of whether or not the deportation of the applicant would lead to unduly harsh consequences for his daughter, and also to the change in section 117C relating to the applicant's own circumstances in that he has now lived in Britain for more than half of his life as well as the fact that he suffers from depression. However, the issue before me is whether or not there is any substance in these changes which would mean that it was inappropriate to certify this application.

67. Whilst it was the case put forward by Mr Haywood that the writer of the letter of refusal had not properly engaged with the submissions made, I consider that that argument is clearly flawed. The letter setting out the reasons for refusing the application for revocation of the deportation order and further giving reasons for the certification of the claim under Section 96 was clear and thorough. It simply cannot be said that it did not deal with all relevant factors including the applicant's criminality, the determination in the First-tier and that in the Upper Tribunal and the relationship of the applicant and his daughter. The letter also dealt with the one new matter which arose which related to the applicant's hospitalisation after a bout of depression but the decision of the respondent thereon was clear and logical. A proper enquiry had been made as to what drugs were available in Jamaica and furthermore the reality is that the applicant's claim that his mental health was such as to amount to a

claim under the ECHR was simply unarguable, particularly given the high threshold in such cases.

68. While it was argued that the changes in the Rules and statue were such that there had been a change of circumstances which would mean that the claim should not have been certified I accept Miss Anderson's argument that it is clear that the overriding intention of Parliament in enacting Sections 32 and 33 of the 2007 Act and in setting out relevant factors to be considered in Article 8 claims of deportees in the Rules and finally in statute are, in effect, all of a piece – the codification of the weight to be placed on the public interest in the deportation of criminals and furthermore how the approach to an Article 8 claim made by a foreign criminal to avoid deportation should be considered.

69. I cannot see that these change in the rules and in statute could, of themselves, lead to a situation where the discretionary powers under Section 96 of the 2002 Act could not be exercised by the respondent in deciding to certify a claim when the purpose of the changes is so evident.

70. I am fortified in that conclusion when I consider the changes there have been to the Rules and the issue of whether or not the Rules and the coming into force of Section 117 have led to such a change that new issues have arisen which require further litigation. I place weight on the decision of Lord Neuberger in ZN where he emphasised the necessity of reaching finality in immigration appeals.

71. It would, of course, be a nonsense if by changing the Rules and bringing the provisions of Section 117C on to the

statue book it could be argued that the Secretary of State was attempting to assist a foreign criminal to remain.

72. When I consider the changes in the Rules I note the changes on which Mr Haywood relied. Firstly, he referred to the position of the applicant's daughter. His argument was two fold. Firstly, there was a change of circumstances regarding the applicant's relationship with his daughter in that he is now much more involved with his daughter. I do not consider that that is a matter which could lead to the decision of the Upper Tribunal being unseated. The reality is that the Upper Tribunal did properly consider the applicant's relationship with his daughter and no change of substance has taken place. It is still the case that the applicant's daughter is aged 4 and for much of her life the applicant was in prison. He does not live with her and does not have a relationship with her mother who is her primary carer. Secondly, Mr Haywood relied on the change in the rules and the issue of whether or not it would be unduly harsh for her should the applicant be removed – the change being where a British child could not be reasonably expected to leave Britain and there was no other family member who was able to care for the child (as in the original Rules) and the position under the Rules which came into force in 2014 which referred to the test of unduly harshness for the child to live in the country to which the person is to be deported and where it would be unduly harsh for the child to remain in the UK without the person who is to be deported.

73. While I accept the requirement for there to be no other carer in the United Kingdom has gone, the reality is that the test of whether or not it would be unduly harsh for the child to remain without the person who is to be deported is

a very high test, and the fact that the child in this case lives with her mother and has never lived with her father, albeit she now spends weekends with him, could not possibly reach a threshold of being unduly harsh. Importing into that threshold there must be a proportionality exercise which takes into account the father's conduct.

74. Mr Haywood also referred to Exception 2 set out in Section 117C regarding relevant private life factors which should be taken into account. The Rule does now refer to an applicant living in Britain for most of his life. I agree however, with Miss Anderson that that must be a qualitative decision rather than a mathematical one and that the fact that the applicant has spent time in prison should be discounted. Even, however, if I am wrong in that regard, the reality is that the applicant cannot meet the other requirements of that exception.

75. It is simply unarguable to state that a man who has produced no evidence of working here, has no extant relationship here other than the fact that he has a daughter in Britain and other relatives, can be said to have integrated into British society when one takes into account the series of crimes which he has committed – crimes which clearly militate against his integration into this society and place him outside society here. Moreover, the reality is that there has been nothing put forward to indicate that he would not be able to integrate into Jamaica where he speaks the language and where he has some skills which he can use, where he has visited in the past and indeed where his former partner was visiting when attempts were made to detain him. He does have a father there, although he states that his father is an alcoholic, but there is nothing to indicate that he has no other

relatives in Jamaica. It simply cannot be said that he meets the requirements to qualify under that exception.

76. There is therefore nothing of substance which would mean that any appeal now would succeed and I conclude that there is nothing of substance which indicates that the second and third requirements of the judgment in J are not met.

77. I also consider that, taking into account, the applicant's behaviour when released from prison and his repeated attempts to abscond or to defeat being removed mitigates any argument that the respondent should have used her discretionary powers to grant the applicant a further right of appeal. The reason that he was not deported after his appeal was unsuccessful in the Upper Tribunal was because he evaded detention. There is nothing to show that the respondent should have used her discretion differently. The fourth condition in J is therefore met.

78. Taking all these factors into account I conclude that the conclusion of the Secretary of State to refuse the application and further to certify the claim under Section 96 was one which was unarguably open to her - there is nothing which would mean that certification was not appropriate.

79. I therefore dismiss this application for judicial review.

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