



IAC-FH-NL-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: DA/00490/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 7 November 2014**

**Determination Promulgated  
On 20 November 2014**

**Before**

**UPPER TRIBUNAL JUDGE ESHUN**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR BENJAMIN KWASI WILSON**

Respondent

**Representation:**

For the Appellant: Mr C Avery, Home Office Presenting Officer

For the Respondent: Mr R Reynolds, of Counsel instructed by Wilson Solicitors LLP

**DECISION AND REASONS**

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Nicholls allowing the appeal of the respondent against the decision made on 7 March 2014 to issue a deportation order against him. The respondent will from now on be referred to as the claimant.
2. The claimant is a citizen of Ghana born on 10 September 1972. He entered the UK on 9 January 2005 with entry clearance to join his spouse, Nicolet Lewis whom he had married in Ghana on 11 September 2004. He and his wife have three children, Maya

Suzanne Wilson born 25 August 2007, Maliyah Rosemary Wilson born 10 November 2008 and Mikaela Mariah Wilson born on 8 November 2010. All the children were born in the UK and are British citizens. The claimant was granted indefinite leave to remain in the UK on 22 December 2006.

3. On 28 January 2013 the claimant was convicted at the Crown Court at Wood Green of conspiracy to supply class B controlled drugs and on 23 April 2013 he was sentenced to two years' imprisonment. He completed his sentence and was released on 7 April 2014. At the date of the hearing of his appeal he was on licence.
4. It was as a result of the claimant's conviction that the appellant decided to make a deportation order against the claimant under Section 32 of the UK Borders Act 2007. The claimant appealed on the basis that his deportation would interfere with his human rights under Article 8 of the ECHR.
5. Following consideration of all the evidence before him, the judge allowed the claimant's appeal on human rights grounds. The two concluding paragraphs are as follows:

“30. Taking into consideration all the factors I have mentioned above, including those about the behaviour and health problems of the children, the carious care arrangements for the children, the best interests of the children and adding in the health of the Appellant's wife, who would be the primary carer for the children if the Appellant is deported, and balancing those factors with the weighty public interest in the deportation of foreign criminals, I find that it has been demonstrated to the required standard of probability that the deportation of the Appellant would have unduly harsh effects on both his wife and, particularly, on his three children. I find, therefore, that Exception 2 in section 117C(5) applies and that in this case, in accordance with section 117C(3), the public interest does not require the deportation of the Appellant. I find that the provisions of paragraph 399 apply to this Appellant and that his deportation is not required in the public interest, in accordance with paragraph 398(c).

31. I find, therefore, that Exception 1 in section 33(2) UK Borders Act 2007 applies to this Appellant and that his deportation would breach the article 8 rights of the Appellant, his wife and their three children. Accordingly, the deportation order made under section 32(5) should not have been made and the decision to do so was not in accordance with law.”

6. The appellant appealed arguing firstly that the judge materially misdirected himself in law in finding that the claimant meets the exceptions set out in paragraph 117C of the Nationality, Immigration and Asylum Act 2002. The appellant submitted that it is not unduly harsh for the claimant's partner and children to have to remain in the United Kingdom without him or travel with him to continue their lives in Ghana.

The family have a choice as to how to continue their lives together. Their circumstances do not outweigh the public interest in deporting the claimant.

7. Secondly, the appellant argued that the public interest has not been properly balanced by the judge against the claimant's circumstances. This ground relied on the Court of Appeal's judgment in **SS (Nigeria) [2013] EWCA Civ 550** where the Court of Appeal held that the public interest in deporting foreign criminals is "pressing" and that the interest would be injured where a foreign criminal is not deported for a serious offence. It was submitted in the grounds that the claimant has committed a highly serious offence which has far reaching consequences and the judge has failed to properly balance the considerations in paragraph 117 of the 2002 Act against other public interest considerations. The judge's assessment of the public interest was fundamentally flawed and therefore the decision to allow the appeal was not in accordance with the law.
8. First-tier Tribunal Judge McClure granted permission as follows:
  - "3. This appeal in part deals with section 117C of the 2002 Act as amended and exception 2 as set out in subsection 5. The appellant has a partner and three children. The judge has dealt with the deterioration in the behaviour of the children whilst the appellant was in custody and the medical conditions suffered by the partner and children and the partner's mother. However it is arguable in concluding that it would be unduly harsh the judge has not identified any factors which would render the deportation unduly harsh on the partner and children. Inevitably deportation may affect the children's behaviour but it is arguable that the judge has failed to give valid or adequate reasons why such would be unduly harsh in the circumstances."
9. Mr Avery relied on the grounds submitted on behalf of the Secretary of State. He argued that the judge did not properly engage with the public interest consideration and the nature of the offence committed by the claimant. He argued that at paragraph 29 the judge merely said that the offence was serious. He did not mention the nature of the offence which involved the supply of cannabis worth £250,000. According to the sentencing judge the claimant was a significant part of the operation. By saying the offence was serious the judge was glossing over the serious nature of the offence. He further argued that the judge did not approach the unduly harsh test in an even-handed way.
10. Mr Avery submitted that there were two technical errors on the approach to Section 117C. The judge said that because he had found in favour of the claimant, under Section 117C(5), then it means that it was not in the public interest to deport the claimant. Mr Avery said that this was wrong. The approach requires the judge to look at the overall situation. His failure to do that undermined his findings.
11. With regard to the unduly harsh test, Mr Avery submitted that it is not sufficient to find that the circumstances of the claimant are harsh. The test is "unduly" harsh.

The judge therefore needed to identify what makes the claimant's circumstances more serious than harsh. The judge finds that it would be difficult for the claimant's wife to cope with the care of three children. The only point that might set this case apart is the illness of one of the daughters but the judge does not identify this as the determining factor. The judge's overall view was that the difficulties the family would face in the absence of the claimant satisfies the test. This is the wrong approach.

12. Counsel took me through the key facts in this case starting with the claimant's immigration history and the fact that he has a wife and three children who are all British. He said that prior to committing the offence, the claimant was of good character. He has been rehabilitated. The risk of the claimant re-offending and causing harm is low. Counsel took me through the health problems of the claimant's wife and the three children. In particular he referred to the second child, Maliyah who according to the evidence was 5 years old at the time of the hearing and suffered from ADHD in respect of which she has been recognised as disabled and is paid a disability living allowance.
13. Counsel submitted that the grant of leave which said that the judge failed to give adequate reasons why the factors identified therein would be unduly harsh is not a ground for appeal because the respondent has not challenged the conclusion that the effect of deportation of the claimant would be unduly harsh on the wife and the children. The application was put in this way that notwithstanding the judge's findings, the unduly harsh requirement has not been properly weighed with other factors. Counsel submitted that the appellant's argument that the judge has not engaged with the facts of the offence is incorrect when we look at paragraph 6 and 9 of the determination. It is also incorrect for the appellant to argue that the judge failed to give proper weight to the public interest if we look at the findings that the judge made at paragraphs 29 and 28. The judge applied the correct test in respect of his consideration of unduly harsh by setting it out at paragraphs 24 and 30. The judge gave reasons why considering all the evidence and the facts it would be unduly harsh for the claimant's wife and three children for him to be deported.
14. Having considered all the arguments, I find that the judge did not make an error of law and I give my reasons below.
15. The judge set out the facts of claimant's case from paragraphs 6 to 17. The appellant does not dispute any of these facts. They included the claimant's description of the nature of the offence. He became addicted to online gambling and incurred significant gambling debts which amounted in the end to £15,000. He told the probation officer who prepared the pre-sentence report that he thought he was borrowing money from a loan shark but it turned out to be from a drug dealer. He agreed to look after a quantity of drugs in return for the debt being cancelled. He arranged to store the drugs at his sister's flat from where they were due to be collected. He admitted to the probation officer that he knew that what he was doing was criminal but he was anxious to clear the gambling debt. He explained that as he had looked after the drugs and even though he was caught, the gambling debt had

been cancelled and he did not owe anybody money. Whilst in prison he had undertaken a course to control his gambling addiction. To make sure that he could learn the lessons, he had actually done the course twice. He had also studied and obtained a diploma in criminology.

16. The judge recorded the evidence of the claimant and his wife as to the health problems and difficulties of the children, partly caused by their enforced separation whilst he was in prison. The claimant himself said he suffered from depression and suicidal thoughts, including one attempted suicide on 26 April 2013. His eldest daughter, Maya, had suffered from panic attacks and behavioural problems when he was sent to prison but was much better since he had been released. His second daughter, Maliyah, had had severe behavioural problems from a very young age and had been diagnosed with attention deficit hyperactivity disorder (ADHD) which was the subject of medical treatment from the Child and Adolescent Mental Health Services of East London NHS Foundation Trust. The claimant produced a bundle containing a report from Dr Helen Reynolds dated 16 August 2013 and a letter from the Department for Work and Pensions dated 7 October 2013 which confirmed the payment of disability living allowance in respect of Maliyah. The claimant testified that although her behaviour had improved since he had been released, she remained a very challenging child and he feared for her continued wellbeing if he was deported. The youngest child, Mikaela, had been too young to really be aware that he was away in prison and had not suffered any particular behavioural problems, although Mrs Lewis-Wilson said that while the claimant was in prison, Mikaela had started to stutter when she was at school. She had been referred for speech therapy but the problem had now improved.
17. The claimant's wife said she had suffered health problems and stress whilst he was in prison because of the difficulties of coping with the three young children. She had not been aware of his gambling addiction nor his arrangement to look after the drugs, until her bank had contacted her about some transactions showing on her bank account, which he had initiated. She was not happy and thought that he had broken her trust in him. When he was in prison she found it very difficult to cope with the three children and had to seek help from her own mother and medical assistance. She receives weekly therapy at St. Leonards Hospital because of her depression. She takes sleeping tablets and suffers from vertigo and skin problems for which she is prescribed medication. She said her conditions had improved considerably since the claimant was released from prison. She also confirmed that her mother is awaiting major heart surgery within the next few weeks and that she operates as her mother's primary carer. Although she has a brother in the UK who provides some care, he has been diagnosed as paranoid schizophrenic which causes additional problems.
18. Mrs Lewis confirmed that she would not move to live in Ghana with the claimant because of the arrangements for the children's schooling and medical care, even though she had found it extremely difficult to look after the children while the claimant was in prison. She did not know the language, culture or customs of Ghana, having lived in the UK for 21 years. She confirmed that one of the causes of the behavioural and physical problems of her children was the stress and turmoil

caused by the claimant's imprisonment. The unsettlement in the home life had had a drastic effect on Maliyah.

19. The judge then set out his findings and conclusions at paragraphs 20 to 32. At paragraph 20 he rightly said that the appeal arises under the automatic deportation provisions contained in Section 32 of the UK Borders Act 2007. He set out that the claimant is a national of Ghana and was convicted in the UK of conspiracy to supply a class B drug. He is therefore a foreign criminal within the definition set out in Section 32(1). By Section 32(4) there is a declaration that the deportation of a foreign criminal is conducive to the public good and by Section 32(5) the Secretary of State must make a deportation order. The judge then said that there are five exceptions to the provisions set out in Section 33. The only one relevant to this appeal is Exception 1 which is set out in Section 33(2). That exception to the automatic deportation provisions arises "where removal of a foreign criminal in pursuance of a deportation order would breach (a) a person's Convention rights, or (b) the United Kingdom's obligations under the Refugee Convention.
20. The judge at paragraph 21 properly directed himself that in assessing whether the decision to deport the claimant amounts to a breach of Article 8 of the ECHR, he must take into consideration the provisions of Part 5A of the Nationality, Immigration and Asylum Act 2002 and in particular, the provisions of Sections 117B and 117C. The judge rightly found that Exception 1 in Section 117C(4) does not apply and this is because the claimant did not argue that there were significant obstacles to his integration in Ghana.
21. The judge then considered Exception 2 in Section 117C(5) which applies where the foreign criminal has a genuine and subsisting relationship with a qualifying partner or qualifying child and "the effect of the claimant's deportation on the partner or child would be unduly harsh". In addition the judge said the provisions of paragraphs 398 and 399 of the Immigration Rules must be taken into consideration. He found that 399(b) applies the same provisions where the person has a genuine and subsisting relationship with a partner who is a British citizen or settled in the UK provided that the relationship was formed at a time when the immigration status of the person to be deported was "not precarious" and it would be unduly harsh for the partner to live in the country to which the person would be deported "because of compelling circumstances over and above those described in paragraph EX.2 of Appendix FM" and it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.
22. The judge said at paragraph 24 that the basis of the case put forward by the claimant is that there would be unduly harsh consequences on his wife and children if he is deported. I find that this meant that the judge was required to consider Exception 2 in Section 117C(5). It also means that if the judge accepted that Exception 2 applied as in this case then the public interest does not require the claimant's deportation as in subsection 3 of 117C. That, in my considered opinion, seems to be interpretation of Section 117C(3). Consequently Mr. Avery's submission that the judge erred in adopting this approach was without merit.

23. I find that it is inaccurate for the appellant to argue that the judge failed to consider whether the circumstances, although harsh, would be unduly harsh. Throughout his findings at paragraph 24 to 30 the judge was considering whether the circumstances of the claimant's wife and children were such that it would be unduly harsh on them were the claimant to be deported from the UK. The judge considered the significant health problems of Maliyah who has been diagnosed with ADHD. He noted from the full report of Dr Helen Reynolds dated 16 August 2013 that this is a serious condition giving rise to some very difficult problems. The seriousness of the child's condition is clearly demonstrated by the decision to pay disability living allowance for her. At the date of the hearing she was still only 5 years of age. Her mother testified that she has recently shown signs of epilepsy from which, apparently, the claimant suffered as a child. Whilst there was no direct medical evidence to support that testimony, the judge said it was consistent with everything else and he had no hesitation in accepting it on a balance of probabilities. I note that this finding was not challenged by the respondent.
24. The judge noted that Maliyah has a comprehensive medical care package which is amply demonstrated in the documents. The child's school is very well aware of the problems and there is a close liaison between the school and home. He had no direct evidence about the availability of such a care package in Ghana but in his experience of other appeals, it is unlikely that a co-ordinated and consistent approach between the educational, medical and home services would be readily arranged. The judge accepted the evidence that the disruption of those care arrangements would be likely to have serious consequences for this small child. I find that the judge's use of the words "serious consequences" fits in with the consideration of unduly harsh.
25. The judge was impressed by the evidence that was given by both the claimant and his wife about the circumstances and the impact on the children of his arrest and imprisonment. The judge accepted the claimant's wife's evidence that she would not take the children to live in Ghana because of the disruption to their education and health plans, as well as her own problems of her health and her lack of knowledge of life in that country. The judge accepted the claimant's wife's evidence that while he was imprisoned both of the two children exhibited behavioural problems, although they have now improved since the claimant was released in April 2014. The judge said there is no medical diagnosis in either case but the disruption caused by the sudden disappearance of one of the parents must be recognised and cannot be underestimated. In light of all this evidence the judge found that if the claimant were to be deported, that would cause a separation of this family which would last for the minimum of ten years specified for deportations.
26. The judge then assessed the best interests of the children as a primary consideration. He took into account the general character of the claimant which is shown in the supportive documents he produced from the Prison Chaplain at HM Brixton, the Volunteers' Project Manager of WWV, his Offender Manager at the London Probation Service, the letter from the pastor of his church and his general behaviour while in prison. The judge said he saw nothing in his demeanour at the hearing that was inconsistent with the positive comments that were made in the various character references and he gave weight to those comments. He said there was nothing in the

evidence which suggested that the three children would be better off by losing day-to-day contact with their father.

27. He found that the claimant had demonstrated to the required standard of probability that if he is deported from the UK it will not be in the best interests of the three vulnerable children on whom his removal is likely to have a serious adverse effect.
28. I find that the judge properly engaged with the public interest consideration. At paragraph 21 the judge recognised the statutory declaration that the deportation of foreign criminals is in the public interest and that the more serious the offence, the greater is that public interest. This is a direct quotation from **SS (Nigeria)** although the judge does not mention this. I accept that the judge does. At paragraph 28 the judge again mentions that the public interest in the deportation of foreign criminals is declared by statute and is a substantial and weighty consideration. At paragraph 29 the judge accepted Counsel's submission that the offence which the claimant committed was serious, as the sentencing remarks of the trial judge amply demonstrated. I accept that the judge did not mention the nature of the offence which involved the supply of cannabis worth £250,000. This is however not material in light of Counsel's acceptance that the offence which the claimant committed was serious, as the sentencing remarks of the trial judge amply demonstrated. Consequently, I do not find that by saying the offence was serious the judge was glossing over the serious nature of the offence.
29. Furthermore, I find that the judge was entitled to consider all of the reports before him about the claimant which demonstrated his remorse, his rehabilitation and make an assessment that he has a low risk of re-offending. The offender manager reported very positively on his progress since his release from prison and confirmed that low risk assessment. The judge was particularly impressed by the reference from the project manager at WWV and the confirmation of the positive contribution the claimant is now making.
30. Taking all these factors into account the judge arrived at the conclusions at paragraphs 30 and 31. I find that the judge's conclusions do not disclose an error of law.
31. The judge's decision allowing the claimant's appeal shall stand.

Signed

Date **18 November 2014**

Upper Tribunal Judge Eshun