IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01397/2014

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 1 June 2015	**On 18 June 2015**

Before

UPPER TRIBUNAL JUDGE COKER
DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KIMANI GEORGE PRINCE
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:
For the Appellant: Mr Tufan, Specialist Appeals Team
For the Respondent/
Claimant: Mr Collins, Counsel instructed by Caulker & Co, Solicitors

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Bart-Stewart sitting at Royal Courts of Justice on 17 September 2014) allowing the claimant's appeal against the decision of the Secretary of State to make a deportation order against him by virtue of Section 32(5) of the UK Borders Act 2007. The First-tier Tribunal did not make an anonymity direction, and we do

not consider that the claimant or his child (whose name and the name of his primary carer we have anonymised in this decision) require to be accorded the protection of an anonymity direction for these proceedings in the Upper Tribunal.

The Reasons for Granting Permission

2. On 13 March 2015 Deputy Upper Tribunal Judge McWilliam granted permission to appeal for the following reasons:

   (1) The [claimant] is a citizen of Jamaica and he appealed against the decision of the [SSHD] to make a deportation order. His appeal was allowed by FtTJ Bart-Stewart. The [claimant] was sentenced to twenty months for possession with intent to supply a class A drug.

   (2) The grounds are arguable. It is arguable that the judge did not give adequate reasons for finding in favour of the [claimant] in respect of Section 117(5) [this should read Section 117B(v)]. In any event, it is arguable that she applied the wrong test. It is arguable that she did not attach sufficient weight to the public interest. It is also arguable that inadequate reasons were given for finding that there would be significant obstacles to the [claimant's] integration into Jamaica.

The Claimant's Material History

3. The claimant, who was born on 19 June 1988, came to the United Kingdom as a visitor on 14 November 1999 aged 11. He did not leave the UK on the expiry of his visit visa. On 10 June 2003, when aged nearly 15, he was granted indefinite leave to remain as a dependant of his mother under the "seven year child concession". On 21 November 2013, aged 25, he was convicted and sentenced to twenty months' imprisonment and an ASBO preventing him from entering the London Borough of Enfield for three years, save to visit his son and girlfriend. The conviction was for the supply of a class A drug.

The Judge's Sentencing Remarks

4. In his sentencing remarks, Judge Lyons accepted that the claimant was in a category of a street runner, and that gave him a starting point of three years. The judge continued:

> "When deciding what sentence is actually appropriate in this case, a number of factors come into play; firstly, most importantly, is the immediate plea of guilty; secondly, is the record which shows that although you have cannabis, you have had no dealing whatsoever with class A drugs before. For a 25 year old coming before this court, you are, indeed, lightly convicted in comparison with many others who come here. I take into account the remorse that has been expressed on your behalf.
>
> It is not necessary for this court to expand on the dangers to society and individuals to class A drugs; that is reflected in the various guidelines and starting points for the offences. Looking at your particular offending, there were two offences and two types of drug. Nevertheless, the quantity of that drug was quite low, being, in total, less than one gram.

> The Crown are concerned, in all the many cases with which I will be dealing as a result of this operation, about gangs being funded by street dealing. They are concerned that all who are caught in that operation, if they do not have direct links with the predominant gang in that area – the 'Get-Money' Gang – could not be dealing there without, at the very least, acquiescence on behalf of that gang, were it otherwise, it would be an extremely risky activity to undertake.
>
> I do not, in this case, make any suggestion of association or membership an aggravating feature; that will appear in other cases. Where it comes into play has been pointed out by Mr Potter; the courts have wide powers with ASBOs; they are often exercised too widely; they are an interference with the liberty of the subject and must be used sparingly. I have no doubt whatsoever that hampering (a) drug dealing and (b) any association or activities, however loosely connected with gangs which are a blight on Enfield, makes an ASBO necessary…
>
> Resorting to the sentencing matter; the starting point of three years, I think the full three years not wholly necessary, and looking at it and applying all the factors I have spoken about, including a plea of guilty, the age, the number of offences, and the number of drugs, the previous character and the weight, I come to a sentence of twenty months' imprisonment, that is on count 1; twenty months on count 2; they are to run concurrently – at the same time. I pass an ASBO of duration, in your case three years, and it is you must not have in your possession any mobile phone or SIM card which is other than registered to you. You must not enter the London Borough of Enfield save for visiting – and there will have to be a name put on it; you do not need to do it now, the details can be done later – name – girlfriend, name – child, and is not to be at large in Enfield unless in their company – unless in the company of either of them."

The PNC Record and Police Intelligence

5. The claimant's PNC record shows that on 27 April 2009 he was convicted at Wood Green Crown Court of possessing a knife/sharp pointed article in a public place on 2 October 2007, and was sentenced to a community order and a curfew requirement of four months; on 5 April 2009 he was cautioned by Thames Valley Police for possessing a controlled class B drug; and on 23 June 2011 he was convicted at Uxbridge Magistrates' Court of possessing a controlled class B drug (cannabis/cannabis resin) on 2 June 2011 for which he received a fine of £60.

6. In a witness statement dated 18 March 2014, PC Finnigan said he had interrogated the police intelligence systems so as to provide the following information from that research regarding the claimant. The police ran a covert operation on Enfield Borough targeting the Get-Money Gang ("GMG"). The operation started in June 2013 and lasted for four months, ending in September 2013. The reason why the operation was initiated was to tackle the escalation in gang and violent crime in Enfield, specifically targeting the GMG in order to combat their funding through drug dealing. As a result of this operation, the claimant was identified as supplying class A drugs and subsequently arrested and convicted of that offence. He was part of an operation that brought convictions relating to eighteen named gang members who all received custodial sentences. As well as the claimant being the subject of a gang ASBO, he was named as an associate on four other ASBOs of high ranking GMG gang members. As well as being known to deal in drugs on numerous

occasions, the claimant also had warning markers on his police record due to him carrying knives, consistent with practices that gang nominals were involved with. His association with gang members was he believed clear and his involvement in the drug dealing in that area suggests that his involvement was very active.

The NOMS Report

7. An OASys assessment was completed on 21 March 2014. The claimant was assessed as posing a medium risk of serious harm to the public in that he had supplied class A drugs to those vulnerable to drug use and addictions. The author of the NOMS Report said he had no information about the circumstances surrounding the index offence, or the claimant's previous convictions. He added that the claimant's ROSH could be reassessed on release. His risk of reconviction within one year was assessed as 29%, and within two years as 46%, on the OGRS predictor. These scores placed the claimant into the category of a low risk reoffender.

The Claimant's Case

8. The deportation order was signed against the claimant on 9 July 2014, and he appealed against the decision to make a deportation order against him on the ground that he came within Exception 1 under Section 33(2) of the 2007 Act. Initially he indicated that he might be pursuing an asylum claim, but this was withdrawn.

9. His case before the First-tier Tribunal was that the deportation order would breach his rights under Article 8 ECHR. As at the date of the hearing in the First-tier Tribunal, the claimant had a child aged two by F, a Swedish national who had first entered the country in 2009. He had never lived with F. They were allegedly secretly engaged to be married. He had a paternal grandmother, siblings and his mother in the UK. His father had died when he was aged seven.

The Case for the Secretary of State

10. The case for the Secretary of State, set out in a decision letter dated 9 July 2014, was that the claimant did not satisfy all the criteria contained within paragraph 399(a) of the Rules in order for his parental relationship with his child to outweigh the public interest in his deportation. He was in a genuine and subsisting relationship with his child A and it would be unreasonable to expect child A to leave the UK. But it was not accepted that child A was British, or had been living in the UK continuously for at least seven years immediately preceding the date of the immigration decision, and it was considered there was another family member who was able to care for child A. Child A was currently cared for by his mother, which had been the arrangement since his birth. The appellant had stated in response to the notice of liability to automatic deportation letter that he was not living with child A prior to his imprisonment, although he said he was at the family home most of the time. He had failed to submit evidence that he provided financial support for child A. His mother had been his primary carer, and had thus been able to support and maintain his development and wellbeing without any support or intervention. He would not live as a functioning family unit with child A if he remained in the UK, as the ASBO

prevented him from living with child A and his mother in Enfield. He had put child A at risk of being exposed to drugs, which could have resulted in serious consequences. So it was in the best interests for child A to remain in the UK with his mother.

11. The claimant also did not satisfy all the criteria under paragraph 399(b) of the Rules which had to be satisfied before a genuine and subsisting relationship with a spouse or partner outweighed the public interest in his deportation. It was accepted that he was in a genuine and subsisting relationship with F, and that she was settled in the UK. But he had not been living in the UK with valid leave continuously for at least fifteen years immediately preceding the date of the immigration decision (discounting any periods of imprisonment), and there were not insurmountable obstacles to family life with F being able to continue outside the UK.

The Findings of the First-tier Tribunal Judge

12. The First-tier Tribunal Judge correctly states in paragraph [30] that the appeal is to be determined in accordance with paragraphs 398, 399(a) and (399d) and 399A of the Immigration Rules and that she is also required to have regard to "s117 of the new Act introduced to amend Part 12 of the 2002 Act". By this we assume she means Section 19 Immigration Act 2014 which amended the Nationality, Immigration and Asylum Act 2002 by the insertion of Sections 117A – D in Part 5.

13. The judge comments that the child is in fact a British Citizen having been born to the claimant who had indefinite leave to remain at the time. In paragraph [32] she draws the distinction between a person sentenced to more than four years and a person sentenced to between twelve months and four years. In paragraph [33] she finds that paragraph 399(a) applies because the child is a British citizen and that the issue is whether it is "unreasonable to expect him to leave the UK and if there is another family member who is able to care for him". However she goes on to find:

> "35. ...Having seen and heard the witness, I do not consider it at all likely that the appellant's girlfriend would follow him to Jamaica. There would be a separation possibly permanent, between the appellant and his son. I find it would not be reasonable to expect a young child to leave a mother who has cared for him since his birth and consequently find it would not be reasonable to expect the child to leave the UK and therefore the criteria of paragraph 399(a) is not met.
>
> 36. ...I accept the appellant is in a genuine and subsisting relationship with a partner who is settled in the UK ... [H]e has only had valid leave for ten and a half years prior to the date of the immigration decision. The appellant must therefore show that there are insurmountable obstacles to family life with his partner continuing outside the UK.
>
> 37. ...I consider that there are no insurmountable obstacles to family life with [F] continuing outside of the UK by her accompanying the appellant to Jamaica. It is a matter of choice. Their child is at an age where he does not have a private life independent of his parents and would be able to settle wherever his parents decide to settle and I therefore find that this would not be a factor in concluding that there are insurmountable obstacles to family life continuing outside the UK.

38. In respect of the new Rules and Section 117 I consider whether it would be unduly harsh for the appellant to be deported. I first have regard to the offence and sentence...

39. Supplying drugs of any kind and any quantity is a serious offence. His claim that he did so having been approached by a stranger suggests a distinct lack of judgement and the claim that it is to the appellant that the family would go to for advice. However I note that the sentence was well below the starting point of 3 years which reflects the judge's view of severity.

40. ...[T]he risk of serious harm level as medium. Amongst the matters taken into account for the assessment in his favour he said that the appellant would be returning to a country he does not know. He has no family or friends in Jamaica. He only has two GCSEs and had not left the UK since 2011. He had no previous Class A drug conviction and whilst in prison had completed courses to turn his life around. He is also unusually close to his son.

41. ...

42. I find that exception 1 does apply. The appellant has lawfully resided in the United Kingdom for most of his life. I accept the evidence with regards to his family...I accept that the appellant is socially and culturally integrated in the United Kingdom. Whilst it appears that he does have some relatives in Jamaica...I accept his claim that he personally is not in contact with them…I accept that there would be some difficulties in the appellant integrating into the country to which it is proposed he be deported.

43. I find that exception 2 applies in respect of the appellant's relationship with his son who is a qualifying child...For reasons I have already given I do not consider it at all likely that if the appellant were deported [F] would accompany him...

44. ...

45. The starting point is the view taken by the sentencing judge....I have also taken account of the situation at the date of hearing with full account of developments since sentence was passed.....

46. Very serious reasons are required to justify expulsion and I have regard to the risk of reconviction which has been reported as low. I find that the threshold for expulsion has not been reached in balancing the public interest against the Article 8 family and private life of the appellant, his child and partner."

Reasons for Finding an Error of Law

14. It is well established that the current legislation and Immigration Rules reflect and incorporate the considerations required in an appeal on Article 8 grounds and in particular the assessment of the proportionality of deportation.

Errors within the Grounds

15. It is unfortunate that although the First-tier Tribunal Judge sets out Section 117C Nationality, Immigration and Asylum Act 2002 (the 2002 Act) and refers to paragraphs 398(b), 399, 399A she has not applied them to her findings of fact.

16. Firstly, the starting point is not the sentencing remarks of the judge but the clearly stated will of Parliament that deportation of foreign criminals is in the public interest. For a person convicted of an offence and sentenced to more than twelve months but less than four years, deportation *is* the proper course of action (see paragraph 398(b)) unless paragraphs 399 or 399A applies. If neither does then 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.

17. The judge found that Exception 1 applied i.e. Section 117C(4) of the 2002 Act. She refers to his personal circumstances in the UK and concludes that "there would be some difficulties in the appellant integrating into [Jamaica]". She has not applied the true construction of Exception 1 which requires a finding that there would be "very significant obstacles". The judge has not made findings of fact consistent with a finding that Exception 1 applies.

18. The judge also finds that Exception 2 i.e. Section 117C(5) applies but other than stating that this deportation would result in the child growing up without his father she has not made a finding of fact either specifically or such as can be inferred, that the effect of the claimant's deportation on the child would be unduly harsh. Again she has failed to make the reasoned finding that is required to enable a conclusion that Exception 2 applies.

19. The judge then goes on to consider the evidence as a whole in the light of her findings of fact, incorrectly as referred to above, taking the starting point as the judge's sentencing remarks. It appears that this may be part of her consideration as to whether Exception 1 applies and may also be an attempt to reflect Section 117C(2) which sets out the obvious assertion that the more serious the offence committed the greater is the public interest in deportation.

20. It is plain from these remarks that we are satisfied that the First-tier Tribunal judge erred in law:

    (a) in failing to make findings of fact consistent with her conclusion that Exception 1 applied;

    (b) in that her finding that there were "some difficulties" in integration did not and could not result in a finding that Exception 1 applied;

    (c) in failing to make any findings as to the child which could be said to result in or infer that it would be unduly harsh for the child to remain in the UK without the claimant;

    (d) in failing to weigh the public interest in deportation as decreed by the clear will of Parliament but rather took as her starting point the judge's sentencing remarks.

Alleged Additional Errors not raised in the Grounds

21. After indicating that we are minded to allow the Secretary of State's appeal on the above grounds, and to re-make the decision ourselves without hearing any further evidence, Mr Tufan raised two additional criticisms which had not been ventilated in the grounds of appeal. We did not accept what appears to have been an oral application, not on notice or in writing, for an amendment to the grounds but for the sake of completeness we comment as follows. The first additional criticism related to the following passage in paragraph 27 of the judge's decision:

> "Whilst [F] was giving evidence a person walked into public gathering whom I recognised. I informed the representatives as I then realised her name is listed as an aunt of the claimant. Mr Kotas took instructions and said the caseworker objected on the basis of bias. The test for determining apparent bias is if a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased. I did not consider the fact I know a relative of the claimant prevented me from evaluating the evidence and making a just decision."

22. Mr Tufan submitted that the judge should have recused herself, and that, insofar as she had found in favour of the claimant, her favourable findings were tainted by apparent bias.

23. The leading case on apparent bias is Locabail (UK) Ltd v Bayfield Properties Ltd & Another [1999] EWCA Civ 3004. At paragraph [21] the court cited with approval the following observations made by the Constitutional Court of South Africa:

> "It follows from the foregoing that the correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and submissions of Counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is the fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

24. The observations of the South African Constitutional Court are condensed in the test for apparent bias subsequently formulated by the House of Lords in Porter v Magill [2002] 2 AC 357 as follows:

> "Whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased."

25. On the topic of disclosure, the court in Locabail said at paragraph [26]:

> "If, appropriate disclosure having been made by the judge, a party raises no objection to the judge hearing or continuing to hear a case, that party cannot thereafter complain of the matter disclosed as giving rise to a real danger of bias. It would be unjust to the other party and undermine both the reality in the appearance of justice to allow him to do so. What disclosure is appropriate depends in large measure on the stage that the matter has reached. If, before a hearing has begun, the judge is alerted to some matter which might, depending on the full facts, throw doubt on his fitness to sit, the judge should in our view enquire into the full facts, so far as they are ascertainable, in order to make disclosure in the light of them. But if a judge has embarked on a hearing in ignorance of a matter which emerges during the hearing, it is in our view enough if the judge discloses what he then knows. He has no obligation to disclose what he does not know. Nor is he bound to fill any gaps in his knowledge which, if filled, might provide stronger grounds for objection to his hearing or continuing to hear the case. If, of course, he does make further enquiry and learn additional facts not known to him before, then he must make disclosure of those facts also. *It is, however, generally undesirable that the hearings should be aborted unless the reality or the appearance of justice requires that they should* (our emphasis)."

26. We find that the judge acted appropriately in drawing the attention of the representatives to the fact that she realised that she knew a relative of the claimant. She thus gave the representatives the opportunity to make representations as to whether she should recuse herself on that ground. As stated in paragraph [26] of Locabail it is generally undesirable that hearings should be aborted unless the reality or the appearance of justice requires that they should. The judge applied the correct test as to whether there was a real danger of bias or perception of bias, and we are not persuaded that she reached the wrong conclusion in light of the oath of office taken by her to administer justice without fear or favour, and her ability to carry out that oath by reason of her training and experience. It must be assumed that she would not allow herself to be unduly influenced in favour of the claimant on account of knowing an aunt of his, particularly as the aunt was not tendered as a witness.

27. Mr Tufan's other criticism was that the judge had been wrong to proceed on the premise that child A was a British national, and hence a qualifying child for the purposes of Section 117D of the 2002 Act. Although child A held a Swedish passport, and not apparently a British passport, we consider that he is a British national by operation of law, since his father had ILR at the date of his birth. Mr Tufan submitted there were procedural requirements as to proof of paternity which needed to be observed, where the father is not married to the mother. While we accept the formalities may not have been observed, the claimant's name appears on child A's birth certificate as his father, and it is accepted in the deportation letter that the claimant is child A's father; and that at all material times he had ILR. So on the balance of probabilities child A is a qualifying child for the purposes of Section 117D of the 2002 Act, and we are not persuaded that Judge Bart-Stewart erred in law in treating child A as a qualifying child.

The Re-Making of the Decision

28. There was no request by either representative for the hearing to be adjourned. We did not consider it necessary to remit this appeal for further fact-finding evidence.

Although the First-tier Tribunal heard the appeal in September 2014, there has been no application to adduce further evidence and no indication before us as to what further evidence could add to the findings to enable us to reach our own conclusions. There was no challenge to the record of evidence set out by the judge in her determination or to the actual findings drawn from that evidence as opposed to the unreasoned conclusions she reached. We have not disturbed her factual findings on the evidence before her.

29. We heard submissions from both parties. Mr Collins drew our attention to various passages in the evidence upon which he relied, including the claimant's statement at G14 that he had been involved in his son's life since he was in his mother's womb. He had been at every appointment, and was there throughout the whole pregnancy, and he had been a hands-on father from the day he was born. He had seen what F went through and how good she was with him, so seven months later on Christmas Day, he secretly proposed as he knew he wanted to spend the rest of his life with her and to be a proper family. Every child deserved the right to be brought up by both parents. His fiancée was now saying that he was starting to misbehave because everyone he was used to being around was leaving him: he was away, F was on a course, his (the claimant's) mother was ill and could not look after him, his older brother was also on a course, and his younger brother had his own family. So his son did not have the stability he was used to having, and his fiancée was now relying on friends. There have been countless studies showing that kids in single parent houses did not do as well as kids with both parents, and he believed that his son would suffer mentally and emotionally if he were to be deported. His mother told him that he still walked round the house looking for him and it was very stressful, as he was used to him being there, brushing his teeth, putting him to bed, playing with him and just being around.

30. On behalf of the Secretary of State, Mr Tufan drew our attention to various passages in Chapter 13 of the IDIs, entitled "Criminality Guidance in Article 8 ECHR cases" (Version 5.0 dated 28 July 2014).

Discussion and Findings on Re-Making

31. We are mandated by Parliament to give effect to the new Part 5A of the Nationality, Immigration and Asylum Act 2002. Part 5A is entitled "Article 8 of the ECHR: public interest considerations". Section 117A provides:

> '(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> (a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), 'the public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).'

32. Section 117B lists the following "Article 8: public interest considerations applicable in all cases":

'(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.'

33. Section 117C sets out additional public interest considerations in cases involving foreign criminals. These considerations are:

'(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 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; and

(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. '

34. Accordingly, in determining the question of whether the apprehended interference with the right to respect for private and family life is justified under Article 8(2), we are enjoined to have regard to the considerations specified in Section 117B and Section 117C.

35. Under Section 117B, a consideration in the claimant's favour is that he is able to speak English. On the debit side, the claimant is not financially independent, and there is no evidence that he has ever undertaken any gainful employment, save possibly when he worked as an apprentice trainee chef. Mr Tufan relied on Paragraph 2.57 of the IDIs which states that if a foreign criminal cannot demonstrate he is financially independent, it will be more difficult for him to show that the effect of deportation on his qualifying partner or qualifying child will be unduly harsh.

36. Under Section 117C we acknowledge Parliament's unambiguous declaration that deportation of foreign criminals is in the public interest, the more so according to the seriousness of the offence committed. We recognise that the claimant's offending occupies a position of moderate gravity in the notional scale of criminality, based on the length of the sentence of imprisonment that was imposed. (The statute does not distinguish between different types of offence or the level of harm that C thereby poses to the public.) As the sentence falls within the band of one to four years, the claimant can potentially benefit from either Exception 1 or Exception 2.

37. It is convenient to note at this stage that Exception 1 is reproduced verbatim in Paragraph 399A of the deportation rules, as from 28 July 2014. Exception 2 is also reflected in the latest version of Paragraph 399, but the current deportation rules provide greater specificity on what needs to be shown in order for the proposed deportation to be treated as having an unduly harsh impact on partner or child.

Exception 1

38. We find that Exception 1 does not apply as the claimant has not been lawfully resident in the United Kingdom for most of his life. Although Judge Bart-Stewart

found that he had, her conclusion was unreasoned – and wrong. At the time he arrived in the UK, he had resided for some eleven years in Jamaica. Judge Bart-Stewart calculated that his period of lawful residence in the UK since arrival is ten years and six months. We infer that this figure was arrived at by excluding the period from when the claimant's visit visa expired until he was granted ILR in line with his mother. Thereafter, the claimant was lawfully resident until he went to prison. The claimant is currently in immigration detention, and he has apparently been in immigration detention since his notional release on licence. The deportation order which was made against him after his conviction had the effect of immediately curtailing his ILR. We infer from the judge's calculation that the claimant was in prison on remand for four months leading up to his conviction. This would tally with the claimant being arrested in the summer of 2013, in the middle of the police operation against the GMG. Given the police's perception of him, it is unlikely that the claimant was released on bail pending his criminal trial.

39. We accept that the claimant is socially and culturally integrated in the United Kingdom. But there is insufficient evidence to warrant a finding that there would be very significant obstacles to his reintegration into his country of origin. Although he has not lived in Jamaica since the age of 11, he came to this country with his mother and other family members have followed or were already here. So it is likely that the claimant continued to grow up within a Jamaican diaspora, and thereby he had through family members continued exposure to Jamaican culture and customs. On the question of his employability on return to Jamaica, Mr Collins submitted that the claimant had only obtained a few GCSEs. But in the deportation letter, presumably echoing claims made by the claimant in his completed questionnaire, it was said that the claimant had gained a CSCS card, a certificate in health and safety and had gained employment as an apprentice trainee chef. In her evidence to the First-tier Tribunal, the claimant's mother admitted that she had left behind four brothers in Jamaica, and she had attended the wedding of one of them in Jamaica about five years ago. In re-examination, she said that the claimant knew her brothers when he was younger, but he was not in contact with them now. The judge accepted this, and we do not disturb her finding. But while the claimant's family ties in Jamaica are weak ties, they are ties which can be revived. In Bossadi (paragraph 276ADE; suitability; ties) [2015] UKUT 00042 (IAC) the UT held at [15] that the decision-maker is required to take into account both subjective and objective considerations, "and also to consider what lies within the choice of a claimant to achieve"; and at [16] that such an assessment must also consider, "whether ties that are dormant can be revived." The weak family ties which the claimant has in Jamaica "could be pursued and strengthened" by him if he chooses: see Balogun v UK [2012] ECHR 614 at [51].

40. The reasons given by Judge Bart-Stewart in paragraph [37] for finding there are not insurmountable obstacles to F living in Jamaica with the claimant are also supportive of the proposition that there are not very significant obstacles to the claimant going back on his own.

Exception 2 – Paragraph 339(a) – Whether unduly harsh impact on F

41. We do not find that Exception 2 applies in respect of the claimant's relationship with F. As submitted by Mr Tufan, F is not shown to be a person who is settled in the UK, within the meaning of Section 117D (1) and Section 33(2) of the Immigration Act 1971, to which Section 117D(1) cross-refers. She is not shown to be ordinarily resident here "without being subject under the immigration laws to any restriction on the period for which [she] may remain". There has been no attempt to show that she has exercised treaty rights as an EEA national for a continuous five year period so as to qualify for the issue of a permanent residence card. So she is not a "qualifying" partner pursuant to Section 117D(1).

42. We acknowledge that the deportation letter accepted that F was settled in the UK. But the concession was unanalysed, and while the Tribunal must accept a factual concession, it should not accept a concession that is erroneous in law. There is no procedural unfairness as Exception 2 does not apply for other reasons.

43. The judge's finding at paragraph [37] that there are no insurmountable obstacles to F carrying on family life with the claimant in Jamaica support a finding that it would not be unduly harsh for her to accompany the claimant to Jamaica, if that is the choice which she makes.

44. Another relevant consideration is that F is not a partner within the meaning of Appendix FM. This is because she is not married to the claimant, and she has also not lived with him in a relationship akin to marriage for at least two years. The finding by the judge at paragraph [37] is that prior to his imprisonment the claimant had been receiving jobseeker's allowance for four years and housing benefit, and no attempt was made by him to obtain accommodation "nearer to his partner and child". The claimant gave evidence (paragraph 23) that at the inception of his relationship with F he was living in Slough, and she was living in Crawley, an hour and a half away by train. The judge held at paragraph [35] that at the time the claimant claimed to have become secretly engaged on Christmas Day 2012, just before his arrest (which was actually in the summer of 2013 – see above), the claimant was living in Slough and his partner F was living in Crawley. The judge rejected the claimant's evidence that there was a secret engagement. Although F moved with child A to Enfield, the claimant did not cohabit with F in Enfield despite operating in Enfield as a drug dealer. Hence the claimant admitted in the deportation questionnaire that he was not living under the same roof as his F and child A at the time of his arrest. As observed by the judge at paragraph [37], there was no suggestion that F had made any enquiries about moving out of the borough so that they could live together during the currency of the ASBO. So while the claimant and F are partners in a loose sense, it is a boyfriend-girlfriend relationship, rather than a relationship which is akin to marriage. Hence F is also not a "partner" within the meaning of Section 117D(1).

45. Under Rule 399(b) the unduly harsh question is broken down into two distinct limbs. It has to be shown it would be unduly harsh for the partner to live in the country to

which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2 of Appendix FM; and that it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

46. The claimant's case under Rule 399(b) falls at the first hurdle, as there are not insurmountable obstacles to family life with F continuing in Jamaica, within the meaning of Paragraph EX.2 of Appendix FM. So it would not be unduly harsh for F to live in Jamaica with the claimant. The fact that it is unlikely that F will follow the claimant to Jamaica, as the judge found at paragraph [35], does not change the fact that the first limb of the test is not satisfied.

Exception 2 – Paragraph 399(b) – Whether unduly harsh impact on Child

47. As to paragraph 399(b) of the Rules, it must be shown in respect of a qualifying child:

    (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

    (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported.

48. It would not be unduly harsh for child A to go with both his parents to Jamaica at this stage of his life. Although he is a British citizen, he is also a Jamaican national and thereby entitled to the benefits of Jamaican citizenship. He is still very young, and with the support of both parents he would be able to adapt to life in Jamaica, one of the countries of which he is a national. Insofar as he is part of a family unit comprising his mother and his father, at this stage of his life it is more important that this family unit be preserved, wherever his parents happen to be, than that he should continue to live in the country of his birth for the next ten years.

49. The more likely outcome on the basis of the accepted evidence is that his mother will not take him to Jamaica. We accept that the removal of his father to Jamaica will be contrary to his best interests. The level of contact with his father has been very restricted for more than half his life (being restricted to visits to see his father in prison or detention) and his father is not and never has been his primary carer. His father has not been part of his home environment since the summer of 2013. The claimant's claim to have put the child to bed as frequently as he did before his arrest is not credible given the distance between the two households and the lack of any other corroborative evidence. Also, there is no evidence that there was any talk between the couple of living together to enable the claimant to take an active role in Child A's care more easily. The claimant has never been a source of financial support. Child A is likely to have become used to not having the claimant as a central father figure in his life, and although it would be better for his development to be able to continue to have some direct contact with his father, we are unable to find it would be unduly harsh for him to remain in the UK without the claimant.

50. As neither Exception 1 nor Exception 2 applies, 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 or over and above those described in Exceptions 1 and 2.

Whether Very Compelling Circumstances

51. The judge found at paragraph [38] that there was no evidence of the claimant having any direct links with gangs, although there had to be concern that one of the people he described as a friend with whom he went out and had drinks had a number of cautions for offences of dishonesty and three convictions of possession of drugs, including offering to supply a class A drug (cocaine). At paragraph [45], the judge noted that at the beginning of the sentence of imprisonment it appeared the claimant was a cannabis user, which he admitted, but the drug tests carried out in March 2014 when he was transferred from Pentonville Prison were all negative; and that most of the references in the medical notes were to his back pains caused by him being stabbed (in 2007).

52. The judge appears not to have made the connection between the police intelligence of the claimant being an active gang member who was involved in knife crime and the claimant's account of being seriously wounded in 2007 through being attacked with a knife. But assuming in the claimant's favour that he has put his past behind him (as the judge does, and we do not disturb her finding in this regard) and reaching our conclusions on the basis that he was not an active gang member, we are unable to see any circumstances that have not already been taken into account or that amount to very compelling circumstances which militate against the public interest in the claimant's deportation.

Conclusion

53. Both by reference to the statute, and by reference to the deportation Rules, the claimant has not shown that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the ECHR.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimant's appeal against deportation on Article 8 ECHR grounds is dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Monson