Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01826/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 16th July 2015	**On 23rd July 2015**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR O W W
ANONYMITY DIRECTION MADE

Respondent

Representation:
For the Appellant: Miss A Holmes (Senior Home Office Presenting Officer)
For the Respondents: Mr A Gilbert (instructed by Turpin & Miller Solicitors)

DETERMINATION AND REASONS

1. This is an appeal to the Upper Tribunal, with permission, by the Secretary of State with regard to a decision of the First-tier Tribunal (Judge Dineen and Mr M E Olszewski) promulgated on 25th November 2014 by which it allowed the Respondent's appeal against the Secretary of State's decision to deport him to Jamaica.

2. The grounds upon which permission to appeal was granted are lengthy but essentially assert that in finding that it ought to consider the Immigration Rules in force at the time of the Secretary of State's decision the Tribunal

erred. It is clear since YM (Uganda) [2014] EWCA Civ 1292 and that the Tribunal's duty was to consider the Immigration Rules at the date of its decision. Accordingly it considered the incorrect version of the rules.

3. Furthermore it is asserted that the Tribunal erred in failing to take into account s.117 of the Nationality, Immigration and Asylum Act 2002 brought into force by section 19 of the Immigration Act 2014.

4. It is unfortunate in this case that the Tribunal heard the appeal on 18th June 2014 but did not promulgate its decision until 25th November 2014. The Immigration Rules changed between the two dates. The Tribunal's decision is dated 25th November 2014 therefore not the date of hearing and thus the appeal should have been considered under the Rules as they were in force at that time. Furthermore, section 19 of the 2014 Act which brought in section 117A-D of the 2002 Act came into force on 28th July 2014. That also therefore should have formed part of the First-tier Tribunal's deliberations requiring as it does a Tribunal to take its provisions into account. It is a mandatory requirement and thus the Tribunal was obliged to take it into account.

5. Both representatives before me accepted that in those respects the First-tier Tribunal had erred.

6. The question then, and again accepted by both representatives, is whether the error is material or indeed whether if I were to redecide the appeal taking into account the current Immigration Rules and s.117A-D, the result would have been any different.

7. In the remainder of this determination, for the sake of continuity and clarity, I shall continue to refer to Mr OWW as the Appellant and to the Secretary of State as the Respondent.

8. The Secretary of State's decision to deport the Appellant to Jamaica arose following a conviction on 2nd December 2011 of possessing a prohibited weapon and a sentence of five years imprisonment.

9. As the Appellant was sentenced to more than five years imprisonment, paragraph 398 of the Immigration Rules provides that where a person claims that the deportation is contrary to the U.K.'s obligations under Article 8 of ECHR and that the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced a period of imprisonment of at least four years, the Secretary of State in assessing that claim, will consider whether paragraphs 399 or 399A apply and, if they does not, 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.

10. Paragraphs 399 and 399A do not apply this case because they do not apply where a person has been convicted and sentenced to a period in

excess of four years. It is therefore necessary in this case for there to be very compelling circumstances over and above those described in paragraphs 399 and 399A if the Appellant is to succeed in resisting deportation on Article 8 grounds.

11. However in deciding whether there are factors over and above those in paragraphs 399 and 399A, those paragraphs must be considered. Paragraph 399 has application if:-

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

(i) the child is a British citizen; or

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

(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; or

(b) the person has a genuine subsisting relationship with a partner who is in the UK and is a British citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over above those described in paragraph Ex .2 of Appendix FM; and

(iii) it will be unduly harsh for that partner to remain in the UK without the person who is to be deported.

12. At this stage it is therefore appropriate to consider the provisions of paragraph Ex.2 of Appendix FM. Ex.1 contains the same provisions as paragraph 399 set out above. EX .2 provides the meaning of "insurmountable obstacles" as “the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner”.

13. Additionally paragraph 399A is also relevant and provides that it would not be in the public interest to deport someone if:-

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

(b) he is socially and culturally integrated in the UK; and

(c) there will be very significant obstacles to his integration into the country to which it is proposed he is deported.

14. Paragraphs 399 and 399A cannot of themselves assist this Appellant as he was sentenced in excess of four years. What has to be decided is whether there are “very compelling circumstances” over and above those matters.

15. Additionally section 117A-D has to be taken into account. Section 117 provides:-

> (1) This part applies where a court or tribunal is required to determine whether the 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 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 interference with a person's right to respect for private and family life is justified under Article 8 (2).

16. Section 117B which applies in all cases provides as follows:-

> (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 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 person who is not liable to deportation, the public interest does not require the persons 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.

17. As this is a deportation case the provisions of section 117C are also relevant and that provides:-

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by the 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 period of imprisonment of four years or more, the public interest requires 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 his life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration to the country to which C is proposed to be deported.

(5) Exception 2 applies 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 is the offence or offences for which the criminal has been convicted.

18. S.117D defines a qualifying child as a person under the age of 18 and who is:-

(a) a British citizen or

(b) has lived in the United Kingdom for a continuous period of seven years or more.

It also defines a qualifying partner as a partner who is:-

(a) a British citizen or

(b) settled in the United Kingdom within the meaning of the Immigration Act 1971.

19. The provisions of the Immigration Rules and the provisions of section 117A-D mirror each other. They make it clear that in the case of an Appellant, such as in this appeal, where the sentence is for four years or more, there has to be something about the case over and above the exceptions which apply to those convicted and sentenced to a lesser term. It is also true to say that the various provisions in the Immigration Rules and s.117 are in line with jurisprudence in relation to the deportation of foreign criminals and in particular to the European line of cases, in particular Uner v Netherlands [2006] ECHR 46410/99 and Maslov v Austria 1638/03 [2008] ECHR 546.

20. In terms of what constitutes very compelling circumstances as quoted in both the Immigration Rules and section 117 there is as yet little guidance although the Secretary of State has herself provided caseworkers with guidance in the form of the Immigration Directorate Instructions, Chapter 13: Criminality Guidance in Article 8 ECHR cases, version 5.0 dated 28th July 2014. Ms Holmes confirmed that these are the relevant and up-to-date guidelines. Section 6 of the IDI refers to very compelling circumstances. Paragraph 6.4 is a reminder that the foreign criminal must show very compelling circumstances over and above the circumstances described in the exceptions to deportation and it also reminds that the best interests of a child in the UK affected by the decision are a primary consideration but are not the paramount consideration. The child's best interests must be not only compelling but very compelling to outweigh the public interest.

21. Paragraph 6.5 reminds the caseworker that decision makers must consider whether family life can continue outside the UK and the impact on the partner or child if the foreign criminal is deported and they have to remain.

22. Paragraph 6.6 provides that when considering whether or not there are very compelling circumstances, decision makers must consider all relevant factors that the foreign criminal raises. It then gives examples of relevant factors as including:

- The best interests of any children who will be affected by the foreign criminal’s deportation,
- The nationalities and immigration status of the foreign criminal and his family members;
- The nature and strengths of the foreign criminal’s relationships with family members;

- The seriousness of the difficulties (if any) the foreign criminal's partner and/or child would be likely to face in the country to which the foreign criminal is to be deported;
- How long the foreign criminal has lived in the UK, and the strength of his social, cultural and family ties to the UK;
- The strength of the foreign criminal's ties to the country to which he will be deported and his ability to integrate into society there;
- Whether there are any factors which might increase the public interest in deportation -see section 2.3;
- Cumulative factors, e.g. where the foreign criminal has family members in the UK but his family life does not provide a basis of stay and he has a significant private life in the UK. Although under the rules family life and private life are considered separately, when considering whether there are very compelling circumstances, both private and family life must be taken into account.

23. Section 2.3 referred to above re-states the provisions in the Rules and in s.117 in terms of the public interest being served by the deportation of foreign criminals and the more serious the offence the greater the public interest in deportation and it also sets out a list of factors which are capable of adding weight to the public interest including;

- Is considered to have a high risk of reoffending; does not accept responsibility for his offending or express remorse;
- has an adverse immigration history or precarious immigration status;
- Has a history of immigration related non-compliance (e.g. failing to co-operate fully and in good faith with the travel document process) or frustrating the removal process in other ways;
- Has previously obtained or attempted to obtain limited or indefinite leave to enter or remain by means of deception;
- Has used deception in any other circumstances (e.g. to secure employment, benefits or free NHS healthcare to which he was not entitled);
- Has entered the UK in breach of a deportation order.

24. It is important to stress at this juncture that the grounds of appeal to the Upper Tribunal did not challenge the factual findings made by the First-tier Tribunal. So much was confirmed by Miss Holmes who accepted that the First-tier Tribunal had carried out a careful and thorough analysis of Article 8.

25. It is also important to note the nature of the offence and the Judge's sentencing remarks as set out in the First-tier Tribunal's decision.

26. The nature of the offence is that the Appellant was convicted of possessing a prohibited weapon. That was a cut-off firearm adapted to fire blank rounds which resembled the appearance of a sub machinegun. It did only fire blank rounds. In his sentencing remarks the judge indicated that the defendant's evidence was far from convincing or satisfactory; it was vague, inconsistent and mostly incredible ranging to the bizarre and that he had been unable to answer simple straightforward questions in a simple straightforward manner. The Judge clearly was unimpressed by the defendant and did not accept the various excuses he gave for being in possession of and using the weapon.

27. The Appellant had two prior convictions. In September 2006 he was convicted of 12 counts of obtaining property by deception and sentenced to a 12 month community order and supervision. A mere two months later, on 7th November 2006 he was convicted of handling stolen goods, possessing a false instrument, driving uninsured and otherwise without a licence and sentenced to 8 weeks imprisonment and fined.

28. The Appellant was released on licence from his sentence in March 2014.

29. The Appellant's history is that he is a Jamaican national who came to the UK in December 1999, aged 14 and was granted indefinite leave to remain as a dependent of his mother on 23rd October 2001. He retained that indefinite leave to remain until the deportation order was made which, if upheld, has the effect of cancelling it. The Appellant was born on 6th May 1985 and is thus now aged 30.

30. The First-tier Tribunal heard evidence from the Appellant, his current partner to whom he is engaged and with whom he has two children and his former partner with whom he also has two children. Additionally the First-tier Tribunal heard from the Appellant's employer and from his mother. It also had before it a report from an independent social worker, Ms Dymphna Pearce. It also had an OASys report dated 19th September 2013 which concluded that he was at low risk of reoffending but a medium risk due to the nature of the offence. The First-tier Tribunal also noted the Appellant had not committed any offences since being released from custody.

31. The First-tier Tribunal referred to a letter from London Probation Trust dated June 2014 which indicated that he had been assessed as posing a low risk of harm and since being released into the community he had adhered to his licence conditions without fault. He had not missed one appointment despite his employment commitments sometimes making his ability to do so challenging and he had always fully engaged in examination of his offending behaviour. It indicated that he had been subject to weekly reporting until it was reduced given the progress that he

had made and the fact that he was also subject to weekly reporting to the immigration authorities.

32. The First-tier Tribunal found there to be an absence of violence in the Appellant's history and that he had no connection with organised crime or drugs culture. He had not used the weapon in question for the purposes of unlawful intimidation in public; rather he discharged it in his girlfriend's flat because he believed the police to be intruders.

33. The First-tier Tribunal found there to be no evidence to suggest the Appellant had made any attempt to convert the weapon for the purpose of firing live rounds.

34. The First-tier Tribunal noted he had no drugs, alcohol or mental health issues and no pattern of misbehaviour during his sentence.

35. The Appellant had shown genuine remorse and had had an exemplary attitude since his conviction.

36. The Appellant had remained on bail after his arrest and prior to conviction during which time he complied with the terms of his bail.

37. The Appellant worked on victim awareness while serving his sentence and had shown a high level of remorse. That was the conclusion of the OASys report.

38. The Appellant had no behaviour warnings during his sentence and no issues with anger management.

39. The First-tier Tribunal, at paragraph 34 found his record in detention to be impressive. He had taken on significant pastoral responsibilities and engaged with the prison chaplaincy department. He had undergone various courses and obtained various certificates while in prison and he was also the equalities representative and an orderly.

40. The First-tier Tribunal heard evidence from the director of the executive car company which employs the Appellant. He confirmed that he held the Appellant in high regard. The Appellant was a key holder for the company premises and he oversees another member of staff. He had been working as a driver for a production assistant with media clients and is regularly requested by such clients due to his affability and calmness which are key qualities in what is a specialist and stressful role.

41. So far as the Appellant's family life is concerned, he is engaged to be married to a young lady with whom he has been in a relationship for eight years.

42. The Appellant has four children in all, two born in 2005 and 2006 to his former partner and two born in 2006 and 2011 with his current partner. All are British and all save the youngest have lived in the UK continuously for more than seven years.

43. The First-tier Tribunal heard evidence from both women and accepted that the overall relationship is rather like an extended family. The ex-partner lives quite close to the Appellant and his current partner and the entire family regularly have outings together. The two women have an amicable relationship and the First-tier Tribunal was clearly impressed by the evidence of both and accepted the relationships as claimed.

44. The third child, the eldest with his current partner born in October 2006, has been diagnosed with autism. Throughout the period in custody the Appellant contacted her by telephone every day and there was evidence from her teacher that it was noticeable during one week in the autumn term of 2011 when the child was much more lively and cheerful at school. That coincided with a period when the Appellant was home on bail. She would be taken to and collected from school by her father and she talked about him with fondness.

45. The report by the independent social worker reported that the children would suffer adverse consequences if the father were to be deported particularly the child with autism.

46. So far as the Appellant's wider family is concerned, the First-tier Tribunal heard evidence from his mother and accepted that there exists a close family relationship particularly between them and between the Appellant and his 15-year-old brother.

47. Having come to the UK from Jamaica aged 14 he has no connections with that country whatsoever and no family members there. All of his wider family are in the UK. As far as the Appellant's relationship with his mother is concerned the First-tier Tribunal found that she had a strong attachment to him and that he was a dutiful son and in the absence of a husband she is very close to him and is receiving medication for depression. The First-tier Tribunal found there to be a degree of emotional dependence between the two such that their relationship did constitute family life for the purposes of Article 8 and it similarly found family life to exist between the Appellant and his 15-year-old brother.

48. Taking into account the IDIs and the provisions of the Immigration Rules and s.117 it is clear that the Appellant meets each and every requirement. All of the factors referred to in the IDIs apply to him. It is not a case where it could be said that he meets only one or two of the requirements; he meets all of them.

49. True it is that the offence was very serious. However, it was the first offence of its kind and there has been no suggestion of any criminality since. He holds down a responsible job in relation to which he is held in high regard. He is fully integrated into the UK having spent more than half of his life here and has no ties left with Jamaica. The entirety of his family in terms of his immediate partner and his children and his wider family are all in the United Kingdom. One of his children is autistic and is very close to him. There is evidence that the children would be adversely affected by

his departure. His partner and all of his children are British citizens. He has been praised by the probation service as well as in the OASys report and there is no suggestion that he will reoffend. He is in full-time employment and therefore not a burden on the UK financially. His first language is English.

50. Having taken all of the above matters into account and the findings carefully set out and reasoned by the First-tier Tribunal it cannot be said that even had it applied the new version of the Immigration Rules and section 117 as it ought to have done, ,that it would have reached any other conclusion. This is one of the rare cases where, despite the gravity of the offence, the Appellant's circumstances and those of his family outweigh the public interest in deportation.

51. Miss Holmes did not seek to persuade me otherwise.

52. Accordingly, although the First-tier Tribunal did make errors of law, seemingly as a direct consequence of the extreme delay between the hearing and promulgation of its decision, the errors were not material and would not, had they not been made, have led to a different result.

53. The Secretary of State's appeal to the Upper Tribunal is dismissed.

54. As a result of the nature of this case and that there are innocent parties, in particular four children, I make an anonymity order.

Signed Date 22nd July 2015

Upper Tribunal Judge Martin

Direction regarding anonymity – rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of Court proceedings.

Signed Date 22nd July 2015

Upper Tribunal Judge Martin