Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00272/2013

THE IMMIGRATION ACTS

Heard at Field House
On 26 January 2016

Decision and Reasons Promulgated

On 14 March 2016

Before
UPPER TRIBUNAL JUDGE GLEESON

Between

JASON JAMORY SMYTHE
aka
JASON JAMARY
JASON JAMOR SMYTH
JASON JAMARY SMYTH
JASON JAMARI SMYTHE
JASON JAMARY SMYTHE
[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr P Haywood of Counsel, instructed by Owens Stevens solicitors
For the respondent: Mr I Jarvis, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal to dismiss his appeal against the respondent's deportation order made on 22 January 2013, pursuant to sections 32 and 33 of the UK Borders Act 2007 on the basis that he is a foreign criminal. The appellant is a citizen of Jamaica.

Background

2. The appellant was born in Jamaica in 1980 and came to the United Kingdom in December 1997, age 17, seeking leave to enter as a visitor, which was refused at Gatwick airport. He was given temporary admission and absconded. In January 1998 he made an asylum claim which was refused and certified in March 2001. The appellant appealed: his appeal rights were exhausted on 1 November 2001.

3. In his original witness statement, the appellant said that his parents had left Jamaica for the United States, leaving him in the care of his grandmother, and close to his aunt who moved to the United Kingdom. He was generally well-behaved at school but did not make much progress because of undiagnosed dyslexia. He wanted to become a footballer. He began taking drugs when he was about 15 (when he would still have been in Jamaica) and he dropped out of school at 16, deciding to join his aunt in the United Kingdom. He thought that the drugs had probably had an effect on his mental health.

4. On 12 November 2001 the appellant sought leave to remain as the spouse of a British citizen. The application was refused. Further representations on human rights grounds were also refused. A judicial review application was refused, both on the papers and orally. The judicial review proceedings concluded on 23 September 2002.

5. The appellant's account is that he resumed taking drugs (ecstasy, cocaine and cannabis) not long after he entered the United Kingdom, and he contends that his criminal history occurred because he was using drugs and 'hanging around with the wrong crowd'.

6. The appellant has a lengthy criminal history: his early offences led to a hospital order, because the appellant was mentally unwell. The Police National Computer printout shows 12 convictions for 20 offences between 10 December 1999 and 22 April 2014, including 11 convictions for theft and kindred offence, 4 offences relating to police, court or prisons, 2 drugs offences, and 2 offences relating to bladed articles.

7. On 2 August 2006 the appellant was convicted at the Central Criminal Court of wounding with intent to do grievous bodily harm and sentenced to indeterminate detention for public protection. He had attacked a man who had previously attacked him, and who had made threats to the appellant's family. On the night in question, both the appellant and the victim were armed, the victim with a knife and the appellant with a machete. The sentencing judge described the attack thus:

> "Even accepting what you say, what you did to [the victim] that day went far beyond defending yourself. You aimed blow after blow onto [the victim] in a chopping

> motion, inflicting a series of injuries upon him including a fracture to the right arm and a number of lacerations to his body. He had to have two operations and was detained in hospital for 5 days. It was a serious and sustained attack and it is, perhaps, by sheer luck that you are not facing a more serious charge. You carried on this attack even when the police arrived and told you to put down the machete. As the author of the pre-sentence report says, your attitude was one of aggression and retaliation rather than self-defence.
>
> The offence for which you pleaded guilty is a serious, specified violent offence. …Your record shows that you have committed serious specified offences in the past and I refer in particular to the offence of robbery of which you were convicted in 1999. …I have taken into account the information I have been given about those offences of robbery and the information I have been given as to the pattern of behaviour you have exhibited in carrying bladed articles as recently as 2004 and 2005. You committed this offence within 4 months of being sentenced for the second of those offences. … I have concluded that you do, indeed, pose a significant risk to members of the public of serious harm by the commission of further serious offences. …"

8. The sentencing judge considered that a life sentence was not required but that he must pass a sentence of imprisonment for public protection (IPP). He held that the determinate sentence he would have imposed was 6 years and 8 months, and directed that the applicant should serve a minimum sentence of 3 years and 4 months before parole could be considered.

9. The appellant has 2 daughters, both British citizens, who were 5 years and 18 months old when he went to prison. They are 14 and 11 now. He has not lived with his children since September 2005, although they visited him in prison in 2010 and 2011 on a number of occasions. His elder daughter provided a letter of support and was present at court but not called, when the First-tier Tribunal heard this appeal: she said that she and her sister enjoyed their fortnightly visits with the appellant and would be really upset if he were deported. It would be very expensive for them to visit him in Jamaica, and their mother would not allow them to do so unaccompanied. She would not see him till she was 'a grown adult having missed all the time they could have shared together when she and her sister were kids' as the First-tier Tribunal decision records.

10. In March 2012, the appellant became eligible for day and overnight releases prior to resettlement, and he did see the children then. It is not in dispute that the children's best interests lie in remaining in the United Kingdom with their mother, who is their primary carer. The children's mother visited the appellant in prison with the children in 2010 and 2011 on a number of occasions but by October 2012, the relationship had failed, although they remained friends.

11. The appellant was paroled from his IPP sentence in December 2012 but then re-detained on immigration detention in January 2013. The respondent gave the appellant an opportunity to show cause why he should not be deported under the automatic deportation provisions of the 2007 Act. On 22 January 2013, she served a deportation order upon him.

12. On 7 March 2014, while on bail, the appellant committed a domestic burglary, stealing property worth well over £4000 while the householder slept. He was convicted of burglary at Snaresbrook Crown Court on 22 April 2014 and returned to prison with a determinate sentence of 14 months' imprisonment. He was released again on 19 December 2014.

13. The appellant stated that he no longer had any family in Jamaica, where he had not lived since he was 17. He is 36 years old. However, the mother of his children still has connections to Jamaica: her father and her brother live there and she had visited, as recently as 2013, with her sister, for a renewal of vows ceremony between her sister and her brother-in-law who live in Jamaica.

14. The appellant told the First-tier Tribunal that he had fortnightly contact with his children: his new partner would drive him over to see them, on a Saturday or a Sunday. He stated that his new partner was not a positive role model for him, and he blamed his further offending on a 'rough patch' and her influence. The appellant's current partner is a British citizen and wishes to marry him. She is unwilling to go to Jamaica with him. She supports him financially in the United Kingdom but would not do so if he were living in Jamaica. She has a Jamaican father who now lives in the United States. Her mother was not Jamaican and the appellant's partner was born in the United Kingdom.

15. On 6 October 2014, the respondent wrote to the appellant to say that she maintained her deportation decision but that additional circumstances required consideration, in this case the appellant's burglary conviction on 21 April 2014. She applied paragraphs A398 to 399D of the Immigration Rules HC395 (as amended) and part 5A of the Nationality, Immigration and Asylum Act 2002 (as amended) and quoted extensively from the sentencing remarks of the Snaresbrook Crown Court judge in relation to the latest offence. The appellant had made no attempt to rehabilitate himself and had committed the latest offence while on bail and in the full knowledge that the respondent was already pursuing deportation action in relation to his previous offending.

First-tier Tribunal decision

16. The appellant appealed against the respondent's original deportation order. On 20 June 2013, the First-tier Tribunal heard it and allowed the appeal on human rights grounds. The Secretary of State appealed and on 13 September 2013 the Upper Tribunal (Lord Bannatyne and Upper Tribunal Judge Warr) found an error of law and directed that the appeal be reheard.

17. The appeal was reheard in the First-tier Tribunal before First-tier Tribunal Judge Monson, who dismissed the appeal on all grounds. He applied section 117C of the 2002 Act, on the basis that the IPP sentence should be treated as a sentence in excess of 4 years, because the sentencing judge had indicated that the determinate sentence he would have imposed was 6 years and 8 months, with a minimum to be served before parole could be considered of 3 years and 4 months.

18. The First-tier Tribunal Judge considered whether any of the Exceptions in section 117C(2) was applicable. Exception 1 did not apply because it required lawful residence. The appellant had never been lawfully in the United Kingdom after his temporary admission in December 1997 and subsequent absconding. There was clear evidence that the appellant did still have a network of family support available in Jamaica.

19. Exception 2 was also inapplicable. The appellant's current partner was not a partner as defined in Appendix FM because they had not lived together in a relationship akin to marriage for at least 2 years. As regards the children, even accepting that the appellant had a genuine and subsisting relationship with them, and that it would not be in their best interests for him to be deported, his deportation was not gravely inimical to their best interests because they had not lived with him since they were very small and neither of them could remember that time; he was not their primary carer; there were no concerns about their mother's ability to meet the children's needs; and the family life between the appellant and his children had always been attenuated, either because he was in prison or because contact between them had been relatively restricted when he was not.

20. The judge considered the OASys report to be flawed, for the reasons set out at [77]-[79] and noted that even with the family support of his aunt and partner, the appellant had reoffended. He found the appellant to pose a medium risk of re-offending and a medium risk of harm to the community. He did not consider that removal of the appellant would have an unduly harsh effect on his children or that there were any compelling circumstances over and above Exception 1 and 2 which outweighed the public interest in deportation.

21. The First-tier Tribunal dismissed the appeal.

Permission to appeal

22. The appellant sought permission to appeal from the First-tier Tribunal, which refused permission. The appellant then renewed his application for permission to the Upper Tribunal, on three grounds: ground 1 contended that the First-tier Tribunal had erred in its approach to the IPP sentence and that the respondent was required before releasing him to assess the risk posed by the appellant in the community, not just in the United Kingdom but in Jamaica. He relied on the decision of the House of Lords in *Clift, R (on the application of) v Secretary of State for the Home Department* [2006] UKHL 54 and contended that it was not open to the First-tier Tribunal not to consider the risk to the community in Jamaica as well as in the United Kingdom. The appellant contended that the respondent's decision therefore was not in accordance with law and that the First-tier Tribunal had erred in not engaging with the *Clift* point.

23. Ground 2 concerned the length of the appellant's IPP sentence, and whether it should be treated as being more or less than 4 years for the purposes of section 117C.

24. Ground 3 concerned the application of the Exceptions in section 117C. He contended that the First-tier Tribunal had not applied the correct definition of 'qualifying partner'

as set out in section 117D(1) of the Act and that the definition in Appendix FM was not relevant for this purpose. He contended that the First-tier Tribunal had failed properly to apply the 'unduly harsh' test in relation to the children and had not applied it at all in relation to the appellant's partner.

25. Permission to appeal was granted on all grounds, but in granting permission Deputy Upper Tribunal Judge Doyle stated that there was no substance to the first ground.

Rule 24 Reply

26. The respondent in her Reply treated the observation of a lack of substance in Ground 1 as a refusal on that grounds. She argued that the IPP sentence should be treated as amounting to a sentence of over 4 years and that section 117C(6) required 'very compelling circumstances' before the public interest in deportation could be outweighed. She further relied on the Immigration Rules being a complete code on deportation, as held by the Court of Appeal in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192 and subsequent decisions. Nothing in the facts of this particular appeal amounted to very compelling circumstances over and above those described in Exceptions 1 and 2.

27. The Reply concludes with the following curious paragraph:

> "10. It will be submitted that the words used by Judge Monson are a matter of semantics and make no material difference to this appeal."

28. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

29. For the appellant, Mr Haywood relied on his skeleton argument and on the provisions section 225(1)(b) of the Criminal Justice Act 2003 and section 117D(4)(d) of the 2002 Act. The IPP sentence was a sentence for less than 4 years and section 117C(6) was not applicable. The appellant's circumstances should be considered under section 117C(3), (4) and (5), whereby the public interest required deportation unless Exception 1 or Exception 2 could be shown to apply.

30. Mr Haywood did not seek to argue that Exception 1 applied. That was for migrants who had been lawfully resident in the United Kingdom for most of their lives, which was not this appellant's case.

31. The relevant considerations were those in Exception 2, that is to say, whether the effect on the appellant's partner or children would be 'unduly harsh'. It was accepted that the appellant had a strong relationship with his children and that it was not in their best interests for him to be removed. He relied on *Sanade and others* (British children - *Zambrano - Dereci*) India [2012] UKUT 48 (IAC) which held that British citizen children could not be expected to follow a non-citizen parent to that parent's country of origin, *Ogundimu* (Article 8 - new rules) Nigeria [2013] UKUT 60 (IAC) which held that:

> *"3. Paragraph 399(a) of the Immigration Rules conflicts with the Secretary of State's duties under Article 3 of the UN Convention on the Rights of the Child 1989 and section 55 of the Borders, Citizenship and Immigration Act 2009. Little weight should be attached to this Rule when consideration is being given to the assessment of proportionality under Article 8 of the Human Rights Convention."*

It is not suggested here that the children should follow the appellant to Jamaica. Accordingly, the principle in *Ogundimu* has been respected.

32. The appellant relied on the decision of the Upper Tribunal in *MA and SM* (*Zambrano*: EU children outside EU) Iran [2013] UKUT 00380 (IAC) which held that in principle there was no reason why the parent of an European Union child living outside the European Union could not rely on *Zambrano* to seek admission to the United Kingdom to accompany that child, where that parent is the primary carer of the child. It is not clear what the relevance of that might be to the facts of the present appeal.

33. For the respondent, Mr Jarvis contended that none of the arguments relied upon by the appellant was material to the outcome of the appeal. The grounds of appeal did not challenge the public interest in deportation. Whilst it was correct that at [75] the First-tier Tribunal had referred to the appellant's removal not being 'gravely inimical' to the children, that was not the determinative element in its reasoning and the whole paragraph needed to be considered to put that particular phrase in its proper context. At [82] the judge had considered the 'unduly harsh' test.

34. The respondent was aware of a perceived conflict between the Upper Tribunal decisions in *MAB* (para 399; "unduly harsh") [2015] UKUT 435 (IAC) and *KMO* (section 117 - unduly harsh) [2015] UKUT 543 (IAC). He submitted, however, that on the facts it was not determinative which of those decisions correctly expressed the proper approach by the Upper Tribunal to the 'unduly harsh' test because whichever approach was applied, the test was not met.

35. The First-tier Tribunal had assessed the OASys report and reached proper, intelligible and lawful conclusions as to the weight which it would bear.

Discussion

36. I take the grounds of appeal in turn. The first ground, in relation to the risk to the community in Jamaica, has not been raised previously. There was no evidence before the First-tier Tribunal advanced either by the appellant or the respondent that there is any risk, or any differential risk, to the community in Jamaica. The passage relied upon in the *Clift* decision in the House of Lords is at [37] in the opinion of Lord Bingham of Cornhill, giving the judgment of the Court. Lord Bingham referred to an earlier decision in *R v Parole Board, Ex p White* (unreported) 16 December 1994, Divisional Court:

> "37. … it has been authoritatively decided (*R v Parole Board, Ex p White* (unreported) 16 December 1994, Divisional Court) that the risk which the Parole Board must assess is not limited to those within the United Kingdom but extends also to those elsewhere. The potential risk of a person released early on parole in any country to which he is

> removed is, therefore, a risk which the Parole Board is able to and does assess in the case of indeterminate sentence prisoners."

37. That is a direction to the Parole Board and not to immigration judges. There is nothing in this point for the purposes of the present analysis.

38. The next question is how to treat the IPP sentence. That is not difficult: section 117D(4)(d) sets out how the sentence is to be treated for the purposes of part 5A:

> "(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—…(d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time."

39. The IPP sentence must therefore be treated as being one of 3 years and 4 months, because that was the minimum length of time for which might last. The observation in the First-tier Tribunal decision at [67] that such an outcome is 'paradoxical…[in that] he appears to have greater protection from deportation than he would have done if he had not posed such a high risk of serious harm to the public following his conviction' has some force, but in circumstances where the statutory definition is as plain as that in section 117D(4)(d) that is a matter for Parliament, and not for this Tribunal.

40. Accordingly, the test of 'very compelling circumstances' in section 117C(6) is not in play. The Tribunal was required to assess whether the appellant could bring himself within section 117C(5), the 'unduly harsh' exception:

> "(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."

41. Mr Haywood correctly observed that the First-tier Tribunal had misdirected itself as to whether the appellant's partner was a 'qualifying partner' for this purpose. Section 117D(1) defines the meaning of 'qualifying partner' and 'qualifying child' for the purpose of Part 5A as follows:

> "(1)In this Part—
> "Article 8" means Article 8 of the European Convention on Human Rights;
> "qualifying child" means a person who is under the age of 18 and who—
> (a) is a British citizen, or
> (b) has lived in the United Kingdom for a continuous period of seven years or more;
> "qualifying partner" means a partner who—
> (a) is a British citizen, or
> (b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act). "

42. Again, the language of the statute is plain. The appellant's partner and his children by his former partner are all British citizens and are respectively a qualifying partner and qualifying children.

43. The First-tier Tribunal did consider whether the appellant's removal to Jamaica would be unduly harsh for his children, at [75]:

> "75. I accept the appellant has a genuine and subsisting parental relationship with two qualifying children and I am also prepared to accept that it is not in the children's best interests that he should be deported. From the children's perspective, the ideal outcome is that they should continue to have regular and direct contact with their father. However, his deportation is not gravely inimical to their best interests, for a combination of reasons. The children cannot remember a time when they lived with their father under the same roof. He is not their primary carer, and there are no concerns about their mother's ability to meet all their needs. Their enjoyment of family life with their father has always been very attenuated, either because he has been in prison or because, when he is out of prison, contact between them has been relatively restricted."

44. In context, that is a perfectly proper assessment. In *MAB*, the Upper Tribunal said that 'unduly harsh' was a high standard:

> *"1. The phrase "unduly harsh" in para 399 of the Rules (and s.117C(5) of the 2002 Act) does not import a balancing exercise requiring the public interest to be weighed against the circumstances of the individual (whether child or partner of the deportee). The focus is solely upon an evaluation of the consequences and impact upon the individual concerned.*
> *2. Whether the consequences of deportation will be "unduly harsh" for an individual involves more than "uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging" consequences and imposes a considerably more elevated or higher threshold.*
> *3. The consequences for an individual will be "harsh" if they are "severe" or "bleak" and they will be "unduly" so if they are 'inordinately' or 'excessively' harsh taking into account of all the circumstances of the individual.*

The evidence before the First-tier Tribunal was no more than that his daughters enjoyed seeing him and would miss him if he were in Jamaica, because it would be expensive to travel there to see him and they would not be able to do so unaccompanied until they were adults. That is nowhere near the standard of 'severe' or 'bleak' or inordinately or excessively harsh.

45. The Tribunal in *KMO* put it differently:

> "*The Immigration Rules, when applied in the context of the deportation of a foreign criminal, are a complete code. Where an assessment is required to be made as to whether a person meets the requirements of para 399 of the Immigration Rules, as that comprises an assessment of that person's claim under article 8 of the ECHR, it is necessary to have regard, in making that assessment, to the matters to which the Tribunal must have regard as a consequence of the provisions of s117C. In particular, those include that the more serious the offence committed, the greater is the public interest in deportation of a foreign criminal. Therefore, the word "unduly" in the phrase "unduly harsh" requires consideration of whether, in the light of the seriousness of the offences committed by the foreign criminal and the public interest considerations that come into play, the impact on the child, children or partner of the foreign criminal being deported is inordinately or excessively harsh.*"

The offence in this case was so serious that the Central Criminal Court imposed an IPP sentence. The public interest considerations are therefore substantial. Again, the

evidence before the First-tier Tribunal did not come close to showing that the effect on the appellant's children would be inordinately or excessively harsh.

46. The First-tier Tribunal did not consider whether the appellant's removal to Jamaica would be unduly harsh for his current partner. However, in the light of the limited evidence from her, similar considerations apply. His partner cannot be expected to go to Jamaica with him and is not prepared to continue to support him financially if he has to go. The relationship is relatively recent and although the parties are living together, there was nothing in the evidence before the First-tier Tribunal which would indicate that the effect on the appellant's current partner would be bleak, severe, or excessively or inordinately harsh.

47. The appellant has not discharged the burden upon him of showing that the errors of law made by the First-tier Tribunal in relation to section 117C and 117D are such as to be material to the outcome of the appeal. I decline to reopen the First-tier Tribunal decision, which shall stand.

DECISION

48. For the foregoing reasons, my decision is as follows:
The making of the previous decision involved the making of an error on a point of law.
I do not set aside the decision but order that it shall stand.

Date: 3 March 2016 Signed *Judith AJC Gleeson*
Upper Tribunal Judge Gleeson