Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: DA/01327/2013

THE IMMIGRATION ACTS

Heard at Field House **Determination Promulgated**

On 28 June 2016 **On 19 July 2016**

Before

UPPER TRIBUNAL JUDGE SMITH

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

MR DAMION FORRESTER

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Akinbolu, Counsel instructed on a direct access basis

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

No anonymity order was made by the First-tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

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DECISION AND REASONS

Background

1. The Appellant appeals the Respondent's decision dated 28 June 2013 that section 32 UK Borders Act 2007 applies to him and making a deportation order against him also of that date. His appeal has been allowed on two occasions by the First-tier Tribunal, by Judge Lester and more recently by Judge Gibb on 1 May 2015. The Upper Tribunal found there to be an error of law in Judge Lester's decision and remitted it for re-hearing in the First-tier Tribunal. By a decision promulgated on 5 February 2016 I found there to be an error of law in Judge Gibb's decision but, since there were no disputes of fact, I retained the appeal in this Tribunal. I directed however that there be a further hearing in order that the Appellant and his daughter could give evidence of the up-to-date position in light of the passage of time.

2. My Error of Law Decision is included in this decision as an Appendix. As a result, there is no need for us to repeat the factual background in this case, save as it affects our assessment of the Appellant's case. We note also that it was agreed on the occasion of the last hearing in the First-tier Tribunal before Judge Gibb that the factual findings from Judge Lester's decision should be preserved. As noted at [13] of my Error of Law Decision, it was agreed also for this hearing that there were no factual disputes. Accordingly, we incorporate into our decision the earlier factual findings. Those are set out at [4] of Judge Gibb's decision promulgated on 1 May 2015 and we do not need to repeat them.

3. Some facts have however changed. The Appellant's daughter is now an adult. The Appellant is no longer in a relationship with Ms Foster to whom he was previously engaged. He is now in a relationship with Ms Williams. We deal with that below. There is also before us updated documentary evidence in relation to the Appellant's employment and updated reports from his former probation officer and from OASys which we have recorded below. There are also updated statements from various family members which we have taken into account. We heard evidence from the Appellant and his daughter at the hearing. We set that out insofar as it touches on the factors which we need to consider in this case. We do the same in relation to the submissions and the documentary evidence which we have received. We have though taken into account all of the evidence and the submissions which we received.

Legal background

4. Before turning to assess the relevant factors in the Appellant's case, we set out the Immigration Rules and statutory provisions which apply or have a bearing on his case.

   Immigration Rules

   "**Deportation and Article 8**

   A398. These rules apply where:

   (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;.....

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

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

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

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, 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.

399. This paragraph applies where paragraph 398 (b) or (c) applies 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 7 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 and 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 and above those described in paragraph EX.2. of Appendix FM; and

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

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

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

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

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

Nationality, Immigration and Asylum Act 2002: Section 117A-C ("Section 117")

"**PART 5A** ARTICLE 8 OF THE **ECHR:** PUBLIC INTEREST CONSIDERATIONS

117A Application of this Part

(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).

117B 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.

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

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

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

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

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

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

117DInterpretation of this Part

(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).

(2) In this Part, "foreign criminal" means a person—

(a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who—

(i) has been sentenced to a period of imprisonment of at least 12 months,

(ii) has been convicted of an offence that has caused serious harm, or
(iii) is a persistent offender."

5. The starting point is that the Appellant is a person who is liable to automatic deportation under section 32 UK Borders Act 2007 and his deportation is conducive to the public good. It is common ground that the Appellant, having been convicted and sentenced to a term of imprisonment of four years, cannot benefit from paragraphs 399 or 399A of the Immigration Rules. Section 117C(6) applies. His appeal can succeed only if there are very compelling circumstances over and above the exceptions laid down in those paragraphs and section 117C. However, as the Court of Appeal made clear in Secretary of State for the Home Department v JZ (Zambia) [2016] EWCA Civ 116, that is not to say that the sorts of factors provided for in those exceptions do not feature in consideration of whether there are such compelling circumstances (see in particular [29] of the judgment). We turn then to consider the Appellant's case in that legal context.

Discussion

6. The Appellant is now aged nearly thirty-six years old. He arrived in the UK in November 1994 as a visitor to see his father who had come here to settle. He was then aged thirteen years. He has not lived in Jamaica though since 1983/84 when he was aged three or four years old. At that time he went to live with his mother who had settled in the US. He did not have a good relationship with his stepfather and his mother and stepfather had other children. Accordingly, his father applied for him to remain in the UK (during the currency of his visit visa). Although his application was initially refused, his appeal succeeded finally when the Respondent agreed to grant him indefinite leave to remain in July 2000.

7. The Appellant has therefore resided in the UK lawfully until the date of the deportation decision against him, albeit the early years of his stay were with leave under section 3C of the Immigration Act 1971 and his status was during that period precarious. His entry was as a visitor at a time when it might well have been the case that his father had always intended that he should remain (given the very short time from the date of his arrival to the date of the application to remain). However, the Appellant was at that date still a child and should not be blamed for the intentions of his father, even if those intentions were to circumvent the Immigration Rules.

8. The Appellant completed his secondary education here but left school before completing his GCSEs. He then attended college but did not complete his course because, at that stage, in December 1997, his partner gave birth to their daughter, Keira. He therefore entered into employment. He has never claimed benefits albeit he has changed his employment regularly.

9. The Appellant has therefore spent all of his formative years outside Jamaica, albeit not all in the UK. He arrived in the UK aged thirteen years. His father and extended family are all in the UK. His mother remains in the US. The Appellant told us in evidence that he does retain contact with her but that is limited. He has a close relationship with his extended family in the UK. His father, stepmother, uncle, aunts and partner attended the hearing before us and we have received written statements from those persons. The

Appellant told us that he has no family members in Jamaica. That is borne out also by a statement from his grandmother.

10. The Appellant frankly admitted that he has travelled to Jamaica on two occasions. Both were with a friend of his from school who is a British citizen but whose father lived in Jamaica. The first time was in 2000 for a holiday with that friend during which they stayed with his friend's family. The second was in 2005/6 when his friend's father died and he attended the funeral in recognition of the kindness his friend's father had shown him during the previous visit. He confirmed that this friend remains living in the UK. He has no friends in Jamaica having left there at a very young age.

11. Ms Akinbola submits and we accept that if this were a case of an offence of between twelve months and four years then the Appellant might succeed under paragraph 399A/ section 117C (Exception 2) if it were accepted that there would be very significant obstacles to his integration in Jamaica. We note however that the Appellant has managed to find employment in the UK and has carried out various training courses which have broadened his skills. He has a medical condition but not one which prevents him (generally) from working or which is relied upon as a reason for him to stay in the UK. He is generally able-bodied. Even though he has no friends or family in Jamaica and he does not have experience of living there except at a very young age, we do not accept that this amounts to a very significant obstacle to his ability to integrate in that country. There are many young people who move to foreign countries with which they are not familiar in order, for example, to find work. The main language of Jamaica is English.

12. We note that, according to the facts set out in Judge Gibb's decision at [4(6)] the Appellant also owns a property in the UK which he let to tenants when he was in prison in order to pay the mortgage. He confirmed in his oral evidence before us that he still owns a property but we do not consider such property ownership to be material to our consideration of the impact on him of deportation. The Appellant has shown his ability to adapt and survive in the UK in adverse circumstances (it cannot have been easy for him, for example, to find work as an ex offender). We have no reason to think he could not do likewise in Jamaica. We do not therefore consider that there are very significant obstacles to his integration in Jamaica and accordingly he could not succeed under paragraph 399A/Exception 2 even if those provisions applied to him.

13. We move on then to consider the relationship between the Appellant and his daughter Keira. It is evident from the earlier decisions of Judge Lester and Judge Gibb that the extent and nature of this relationship forms the core of the claim that there are very compelling circumstances in this case. It is for that reason that I directed in the Error of Law Decision that I would wish to hear evidence from Keira as well as the Appellant, particularly in light of Keira having reached her majority last December.

14. Keira has produced three statements in support of her father's case in these proceedings, two in 2013 and one more recent. She has given evidence for him at the previous hearings. She gave evidence also before us. She was visibly distressed throughout her evidence. She told us that although she is now aged eighteen she continues to live with her father. She is at college but says that she has no friends there. She is due to finish her college course next year. She was due to complete the practical stage of her course (she is studying to be a nurse) but due to the uncertainty of her father's position, she has been unable to focus sufficiently to do this. She told us that she spends a lot of her time with

her father. He takes her shopping, they go for walks in the park together and he is teaching her to drive. He is supporting her financially through college so that she does not have to work to maintain herself.

15. The evidence contained in her earlier statements which clearly impressed the First-tier Tribunal Judges concerns the impact which the Appellant's imprisonment had on her. She said in her statements then that following his imprisonment, her grades and behaviour went down. The position was turned around when he came out. She says that her attitude towards school changed and her grades improved. She describes his term of imprisonment as "one of the hardest parts of [her] life". She says that if he were deported it would "break [her] heart". Having seen them together and seen her give evidence we accept that she would indeed find the Appellant's deportation devastating.

16. Keira's evidence as to the impact on her of her father's absence is attested to by both her school at the time and by her mother's statement. Her mother, Davina Francis, expresses "great concern" for the impact of separation on Keira. Her recent statement also confirms that the proceedings concerning her father's deportation have affected Keira's ability to focus.

17. We have regard to the fact that Keira's mother (the Appellant's ex-partner) remains in the UK. Keira said in answer to a question from Mr Walker that she does maintain contact with her mother and retains a room at her mother's house. However, she says that she only visits her mother once or twice per week to collect clothes and then returns to stay with her father. We also have regard to the fact that Keira could return to Jamaica with her father if she so wished. We note however that she remains in education and that if she were to leave this would disrupt her education. It would also remove her from her mother and her father's extended family. She has only visited Jamaica when she was a very young child and she would have no experience of that country. However, she is now a young adult and could make a choice if her father were deported whether to remain here with her mother and her father's family or accompany her father.

18. Ms Akinbola again submitted that if this were a case of a sentence of under four years, then it is likely that the Appellant would have satisfied rule 399(a)/Section 117C (Exception 2) if that were available to him. We remind ourselves though that this exception is not available to him because of his length of sentence and also because Keira is now aged eighteen. As the Court of Appeal held in MM (Uganda) and another v Secretary of State for the Home Department [2016] EWCA Civ 450 the question for us is not in any event whether the Appellant's deportation would have a harsh result for Keira nor even whether the result would reach a threshold of being extremely harsh but whether, balancing the impact on her against the public interest, the result would be more than extremely harsh (bearing in mind that Exception 2 cannot apply). Of course, there is the additional consideration here that Keira is no longer a child and so strictly Exception 2 could not apply in any event.

19. There are other factors in favour of the Appellant's remaining in the UK on which Ms Akinbola relied. Those are the presence of his extended family and his partner, Shana Williams. The Appellant's relationship with Ms Williams is short-lived albeit they have been friends for a number of years. We note that the Appellant was in fact in another relationship (with Ms Foster) at the time of his previous appeal hearing but that this relationship broke down. We therefore give limited weight also to this relationship. We

note that Ms Williams says that she would not go with the Appellant if he returned as she has children and other commitments of her own in the UK. However, in circumstances where the relationship as partners has been ongoing for only about one year, that could not amount to a very compelling reason to prevent the Appellant's deportation (although is of course a factor to be added to the overall balance).

20. We turn then to the significant public interest in deportation. The Appellant was sentenced to a term of four years. This was for an offence involving Class A drugs. Ms Akinbola submitted at one point that this offending, committed she said when the Appellant was twenty-eight years old, was a one-off (an anomaly as she put it). Whilst it is the case that the Appellant's previous offending is of a more minor nature, that at least one offence was committed when he was a juvenile, that the convictions appear now to be spent and that none culminated in a period of imprisonment, those convictions are nonetheless factors to which we must have regard when considering the Appellant's risk of reoffending and the weight to be given to the public interest.

21. Whilst we understand that Ms Akinbola might have (wrongly) thought that those offences were no longer relevant to our consideration as they are spent, we are not impressed by her lack of candour in not merely failing to mention them but positively asserting that the two index offences in 2011 are the only ones which the Appellant has committed. Her submission is moreover inconsistent with the findings of fact which we have adopted by agreement of the parties. We therefore take into account that the Appellant has been convicted on six occasions for eight offences which include affray, having an article with blade or point in a public place, possession of class B controlled drugs, using an insurance document with intent to deceive, using a vehicle while uninsured and failing to surrender to custody at the appointed time. His record shows an escalating pattern of offending leading up to the index offence(s).

22. We accept Ms Akinbola's submission that Section 117C(1) requires us to have regard to the seriousness of the offending – the more serious the offence, the greater the weight to be given to the public interest. She submits that as the Appellant was sentenced to four years' imprisonment, this falls to the lower end of the upper scale. Whilst that does not affect the Appellant's inability to rely on the exceptions in the rules and Section 117C, she says that nonetheless, the weight to be given is less than a case where the term of imprisonment is higher. She made that submission dealing with the Court of Appeal's judgment in Secretary of State for the Home Department v CT (Vietnam) [2016] EWCA Civ 488. In that case, the Court of Appeal overturned the decision of the Upper Tribunal allowing an appeal against deportation on the basis that there were very compelling circumstances. Ms Akinbola submitted that in CT the offences were more serious, involving firearms and that the sentence for that offence was seven years.

23. Whilst we accept that the more serious the offence the greater the weight to be given to the public interest, that is not to be measured solely by reference to the term of imprisonment meted out. In CT the offence was one involving a firearm. In this case, the offence involves class A drugs. Both are in our view very serious offences and there is significant public interest in deporting those who commit such crimes.

24. In the Appellant's case he pleaded guilty to two offences of possessing a controlled drug with intent to supply. The drugs in question were 276.359 grams heroin with an estimated street value of £10,300 and 51.845 grams cocaine with an estimated street value of £1000.

The OASys Assessment in 2014 categorises the risk of reoffending as low. As was said by the Court of Appeal in DS (India) v Secretary of State for the Home Department [2009] EWCA Civ 544 however a low risk is still a risk. That is also not the only factor in the public interest in favour of deportation. This point is summarised by the Court of Appeal at [37] as follows:-

> "…I do not read the passage on which Mr Vaughan relies (at para 142, "but this is missing the point") as demonstrating that the tribunal simply put out of their mind DS's good intentions or the low risk that he may have presented. They had already specifically addressed that risk (at para 133). What they were saying was that, even if they could be sure DS would not re-offend, even so the Secretary of State might be entitled to say that his removal from this country was in the public interest. The tribunal made that point both at para 133 and again at para 142 of their determination. In my judgment, when consideration is given to the manifold nature of that public interest (see *N (Kenya)* at para 87, *EO (Turkey)* [2008] EWCA Civ 671, [2008] INLR 295 at para 19 and *OH (Serbia) v Secretary of State for the Home Department* [2008] EWCA Civ 694 at para 15), it cannot be said that the AIT erred in this respect. The public interest in deportation of those who commit serious crimes goes well beyond depriving the offender in question from the chance to re-offend in this country: it extends to deterring and preventing serious crime generally and to upholding public abhorrence of such offending."

25. We take into account the Judge's sentencing remarks when the Appellant was convicted. We note that the Appellant is said to have "gone into business as a low level retailer" and that the Judge was "quite clear in [his] mind that it was a commercial operation". The Appellant was sentenced to a term of four years on one count with two years on the other to run concurrently. It was the sentence in relation to the first count which engages Section 117C(6) and which, for convenience we refer to as 'the offence'.

26. In response to this point the Appellant submits that account should be taken of the steps he has taken towards rehabilitation. The OASys Assessment notes that the reasons for offending were peer influence and immaturity. The Appellant was at the time said to be a drug user which impacted on the offence. The Assessment records that if he were to associate with negative peers, use drugs or did not have enough money and were unemployed this would increase the risk. If however he chose his friends wisely, maintained employment and positive family relationships, then the risk would reduce.

27. We note that the Appellant has not reoffended since leaving prison in 2013. He remained on licence until June 2015 (not 2013 as the Appellant said in evidence; although we note that he was not certain of that date and we do not take any point about that evidence). However, as the Court of Appeal said in CT (Vietnam) at [33] compliance with the terms of supervision is not exceptional. It is to be expected. It might also be expected that the Appellant would not reoffend whilst these proceedings were ongoing as they have been since 2013.

28. Of greater weight in the Appellant's favour is his positive attitude towards his rehabilitation. Although he initially denied his part in the offence, he pleaded guilty and has now acknowledged his offence. He says in his evidence that being in prison was "an

eye-opener" for him. He appears to have been particularly impressed by having met the victims of drugs and, having seen the impact of drug dealing, says that he does not want to be involved in that sort of lifestyle in the future. He expresses remorse for his offence. Having seen him give evidence, we have no reason to doubt that his intention is genuine.

29. The OASys report in 2014 says as follows:-

> "It is my assessment that Mr Forrester is in a state of mind currently whereby he would not like to be part of any group who have a detrimental effect on society's wellbeing. It is my assessment that Mr Forrester is a better man than he was at the beginning of his licence in that he is aware of how each of us as individuals contribute to the upkeep of society as a whole and he has a lot of good to contribute".

30. The Appellant's former probation officer has provided a letter of support dated 8 March 2016 confirming that he completed his period on licence in June 2015 and attesting to the change in him since he committed the offence. She goes on to say as follows:-

> "I had the pleasure of meeting with Mr Forrester's daughter as he wanted to introduce her to me and let me explain the work and intervention I would have with him whilst on licence. This was important to him as he wanted to ensure that his daughter could regain trust in him and that she would eventually see that he was committed as a father and wanted to earn his place back in her life after his absence.
>
> This was commendable and I understand from Mr Forrester that his relationship with his daughter has endured and survived the journey to this point in time. He always speaks proudly of her and it is evident that she is a major motivation in his desire to succeed in his life.
>
> In my years of being an offender manager I have encountered many people who continue to repeat negative behaviour and errors of judgement despite Probation intervention.
>
> I am pleased to state that Mr Forrester will remain in my memory as one of my clients who made a decision to be pro-active in turning his life around. He has matured and grown into a man I perceive to hold high moral standards who has learned from his mistake and appreciates his freedom, his family and his life.
>
> I have no hesitation in stating that given the opportunity to do so, he will continue to remain a valuable member of society and an asset to his family…."

31. It is to the Appellant's credit that, since leaving prison, he has managed to find and hold down not one but two jobs. There are letters before us from his employers attesting to his hard work and team spirit and advocating that he should be given a second chance. We take those letters into account but the sentiments expressed in them cannot possibly be sufficient to displace the public interest as expressed by Parliament.

32. Ms Akinbola submitted that the Appellant's rehabilitation is likely to continue because of the support he receives from his extended family and partner and because of the impact of his offending and imprisonment on Kiera. However, we note that he has always had his extended family around him since coming to the UK. We also note that Kiera was born by the time he committed the majority of his offences. This has not therefore deterred him from offending in the past. Perhaps it might be different now that he has served a term of imprisonment for his last offence. However, his rehabilitation and the possibility that he will not reoffend are only part of the public interest in deportation as we have already noted. Deterrence and the expression of the public revulsion for offences of this nature are another important part.

Conclusions

33. As we have noted at [11] above, the fact that the Appellant has not lived in Jamaica since he was aged three or four is not sufficient to outweigh the public interest in his deportation on that account alone. We take into account cases such as Uner v Netherlands (2007) 45 EHRR 14 and Maslov v Austria (application number 1638/03 23 June 2008) as we are directed to do by section 2 Human Rights Act 1998. Equally, however, we have to follow the direction of Parliament as now set out in section 117C of the 2002 Act. The issue whether there are very significant obstacles to a person's integration in the country of that person's birth is fact specific. In this case, as a result of section 117C(6), the Appellant would need to show that the obstacles were even more extreme (ie over and above the very significant obstacles exception). His proven capacity to adapt to his circumstances and the skills which he has accumulated in employment in the UK lead us to the conclusion that his case cannot meet that threshold.

34. Of greater importance to his case is the impact of deportation on Keira. We have noted at [15] the expectation that deportation will have a severe impact on her. However, she is now an adult albeit a young one. She will continue to have her mother to support her as well as her father's family. She will be able to travel independently to visit her father and can, if she so chooses, decide to accompany him to Jamaica. Were this to be a case where paragraph 399(a) and Exception 2 applied, we might have found that the impact on Keira would be sufficient (just) to outweigh the public interest. However, it does not apply partly because she is now an adult but also because of the seriousness of the Appellant's offending. It gives us no pleasure to make a decision which will deprive Keira of a father to whom she is clearly very close. However, as Sedley LJ said in AD Lee v Secretary of State for the Home Department [2011] EWCA Civ 348, that is a consequence of deportation. It is the Appellant who must bear the responsibility for his separation from his daughter.

35. Having noted that the Appellant's case does not meet either of the exceptions in paragraph 399 or 399A it is perhaps otiose to go on to consider whether there are very compelling circumstances over and above those paragraphs which outweigh the public interest in this case. However, since this involves a holistic assessment rather than the application of one single factor and a balancing of the factors weighing in the Appellant's favour as a totality against the public interest, we turn to carry out that exercise. We take into account in the Appellant's favour both his length of residence and his relationship not just with his daughter but also with Ms Williams and his own extended family. It is clear that he will potentially be deprived completely of his relationship with his partner and his relationship

with his daughter and extended family will probably suffer by being conducted at long distance. We take account also of the fact that he has made an effort to rehabilitate and is in employment. He is now making a positive contribution to society. His employers and his former probation officer have spoken highly of him. He is assessed as being of low risk of reoffending.

36. On the other hand, the Appellant's offence is very serious involving Class A drugs. It marks an escalation from his previous offending. The public interest includes not only the risk of reoffending (which we accept here is low) but also deterrence of others and public revulsion at the crime . It is an offence which the public expects and has a right to expect will lead to deportation. Taking into account all the factors weighing in the Appellant's favour we are unable to find that those cumulatively amount to very compelling reasons over and above the exceptions set out in paragraphs 399 and 399A to prevent deportation. We therefore dismiss the Appellant's appeal.

DECISION

We dismiss the Appellant's appeal

Signed Date 6 July 2016

Upper Tribunal Judge Smith

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: DA/01327/2013

THE IMMIGRATION ACTS

Heard at Field House **Determination Promulgated**

On 4 January 2016

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SECRETARY OF STATE FOR THE HOME DEPARTMENT

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and

MR DAMIAN FORRESTER

(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Duffy, Senior Home Office Presenting Officer

For the Respondent: Ms Akinbola, Counsel

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

No anonymity order was made by the First-tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

ERROR OF LAW DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State. For ease of reference, I refer below to the parties as they were in the First-Tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal. The Secretary of State appeals against a decision of First-Tier Tribunal Judge Gibb promulgated on 1 May 2015 ("the Decision") allowing the Appellant's appeal against the Secretary of State's decision dated 28 June 2013 that section 32 UK Borders Act 2007 applies and making a deportation order against him also of that date. By way of further background, the Appellant's appeal was originally allowed by First-Tier Tribunal Judge Lester but that decision was set aside by the Upper Tribunal on the Respondent's appeal and remitted for re-hearing. The Appellant's appeal, as I have noted, was once again allowed on 1 May 2015. Permission was again granted to the Respondent to appeal by First-Tier Tribunal Judge Page on 28 May 2015. The matter comes before me to determine whether there is an error of law in the Decision and if so either to re-make the decision or remit to the First-Tier Tribunal for another re-hearing.

2. The background facts so far as it is necessary to recite them at this stage are that the Appellant who is a national of Jamaica arrived in the UK on 23 November 1994 aged fourteen years. He came as a visitor to join his father, apparently from the US where he was living with his mother. An application was made on his behalf to remain as a dependent child. Although that application was initially refused, the Respondent granted the Appellant indefinite leave to remain on 18 July 2000. The Appellant says that he has no ties in Jamaica and all his close relatives are now in either the UK or the USA. The Appellant is now aged thirty-five years.

3. On 12 August 2011, the Appellant was convicted of possession of class A controlled drugs (heroin and cocaine) with intent to supply. He was sentenced to four years' imprisonment. He was also made subject to a confiscation order under the Proceeds of Crime Act 2002 for £20,905 or in default to serve twelve months' imprisonment consecutive to his original sentence. The benefit was calculated at £62,307.46.

4. In addition to his lengthy residence in the UK from a young age, the Appellant relies on his relationship with his daughter, born 8 December 1997. She is therefore now aged eighteen. She was aged seventeen at the date of the hearing before the First-Tier Tribunal. The Appellant has not been in a relationship with his daughter's mother since his daughter was aged five or six years but the Judge accepted in the Decision that he retained a genuine parental relationship with her and she has provided letters in support of her father and gave evidence for him at the hearing before the First-Tier Tribunal. Indeed, the focus of the finding that the Appellant has such a strong family life in the UK that it is not outweighed by his offending depends on his relationship with his daughter.

5. It appears from the Decision, that the Appellant was at an earlier stage in the proceedings also in an unmarried relationship with Ms Foster to whom he was engaged to be married. She was in the UK with indefinite leave to remain but came originally from Jamaica. Since that relationship was no longer subsisting at the date of the hearing which led to the Decision, I need say no more about that.

6. The Judge allowed the Appellant's appeal on human rights grounds, finding that, although the Appellant could not avail himself of the exceptions to automatic deportation in paragraphs 399 and 399A on account of the length of his sentence, there were very compelling circumstances in his case over and above those paragraphs.

Error of law decision and reasons

7. The Respondent challenges the Decision on the basis that the Judge failed to properly assess whether there were very compelling circumstances over and above paragraphs 399 and 399A and misdirected himself in law by considering that the ability to meet the test in both paragraphs amounted to a sufficiently compelling circumstance without more (ground one). The Respondent also challenged the Decision on the basis that, in any event, the Judge had not properly understood the test in paragraphs 399 and 399A when considering whether the Appellant could meet either or both (if the exceptions had been available to him) (grounds two and three). The Respondent also challenged the Judge's assessment of what constituted very compelling circumstances over and above paragraphs 399 and 399A by taking into account the Appellant's remorse for his offending (ground four). The Respondent also took issue with the Judge's final analysis where he indicated that others may take a different view of the case. The Respondent submits that on this basis, it was not open to the Judge to allow the appeal as it should only be in the clearest case that an appeal against deportation involving a sentence of four years or more should be allowed (ground five).

8. I start by considering ground one. It is common ground that the Appellant cannot benefit from the exceptions in paragraphs 399 and 399A of the Immigration Rules and something "over and above" those paragraphs is required in order to outweigh the very strong public interest in deportation where the sentence is one of four years or more. It is convenient to begin therefore with how the Judge approached the assessment of what constitutes "very compelling circumstances" "over and above" those paragraphs.

9. The Judge's principal finding as to how the Appellant met that test is set out as follows:-

> "[33] It is clear and accepted that success on either the family life or private life exceptions is not sufficient because those exceptions are closed to the appellant because of the length of his sentence. The question to be answered is whether there are very compelling circumstances over and above these exceptions. The first reason for my decision that there are is that the two can be combined. If the appellant would have succeeded on one or the other, then the combination of both is a matter over and above either exception…"

10. The way in which Ms Akinbola set out her submission to me on that ground and with which the Judge obviously found favour relies on the wording of the Rules. She suggested that a combination of both paragraphs 399 and 399A being satisfied would be sufficient to outweigh either based on what she submitted was the clear wording of paragraph 398 and section 117C(6). She relies on the use of the word "or" in the sentence which I have underlined below. However, that fails to recognise the use of the word "and" at the end which makes quite clear that what is required is something over and above both exceptions whether by there being something which is not encompassed within those exceptions or because the interference with the Appellant's family and private life is at a higher level.

> "398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
> (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months;
> or
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,
> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, 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"
> "Section 117C
> (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."
> [my emphasis]

11. I am satisfied that this was an error of law. I go on to consider whether that can be said to be material by looking at whether there are other factors which, when considered cumulatively with the Judge's findings that paragraph 399 and 399A would be met (if available), might be said to amount to very compelling circumstances to outweigh the public interest. The Judge did go on to consider what other reasons there might be which could be said to be over and above the exceptions. Some of the reasons he identifies are matters which are subsumed in any event within in particular paragraph 399A (such as the ties with relatives in the UK, lack of ties in Jamaica, the Appellant's age when he left Jamaica and the "Maslov" point). The Judge identifies also a number of issues surrounding the Appellant's conduct, work record and reform and rehabilitation. Whilst I do not find that the Judge erred in taking into account those matters (which is the Respondent's ground four), the factors set out at [35] and [36] can probably best be described as a makeweight.

12. I am therefore satisfied that the Decision contains a material error of law in relation to the Judge's approach to the question of whether there exist in this case very compelling circumstances which can be described as being over and above the circumstances set out in paragraphs 399 and 399A. In those circumstances, I am satisfied that the Decision should be set aside. There is no need at this juncture for me to consider the Respondent's other grounds as the Decision will need to be retaken which will require a re-evaluation of all the evidence on which the Appellant relies.

13. Mr Duffy and Ms Akinbola invited me to retain the appeal in the Upper Tribunal if I found an error of law on the basis that there are no disputes of fact which require any further factual findings. I agree that this is the appropriate course. I have however found that the Judge failed to apply the proper approach to the evaluation which is required of the Appellant's Article 8 rights when balancing those against the public interest. That is particularly relevant where, as here, the case falls to be considered not by application of paragraphs 399 and 399A but on an overall approach to the Article 8 claim in order to consider whether there are very compelling circumstances over and above the circumstances envisaged by those paragraphs. The Appellant's appeal has been allowed by the First-Tier Tribunal on not one but two occasions. The last hearing before the First-Tier Tribunal was in March 2015 (at which time the Appellant's daughter was still a minor). It appears from the Decision that the Judge was heavily influenced to allow the appeal by the effect on the Appellant's daughter. I do not therefore consider it appropriate to re-make the Decision based on the written evidence before me without giving the Appellant the opportunity to present his evidence orally and for me to receive oral submissions on the Appellant's case. I have therefore given directions below for the case to come back before me at a resumed hearing to consider the re-making of the decision.

DECISION

14. The Decision did involve the making of a material error of law. I set it aside. I adjourn the re-making of the Decision to a resumed hearing to be listed. I make the following directions in relation to the resumed hearing.

DIRECTIONS

1. Within 4 weeks from the date of promulgation of this decision, the Appellant shall file with the Tribunal and serve on the Presenting Officer any further evidence on which he seeks to rely at the resumed hearing.
2. The resumed hearing is to be listed for hearing before me on the first available date after 8 weeks from the promulgation of this decision with a time estimate of 3 hours. I would be assisted by hearing oral evidence from (at least) the Appellant and his daughter.
3. The Appellant's solicitors are to file with the Tribunal and serve on the Presenting Officer at least 7 days prior to the resumed hearing a paginated and indexed bundle including all witness statements and other documentary evidence relied upon, previous appeal decisions and the Respondent's decisions in relation to the Appellant.

4. Both parties are to file with the Tribunal and serve on the other party at least 48 hours prior to the resumed hearing a skeleton argument setting out their legal arguments and drawing my attention to relevant case law and evidence on which they rely. If the parties rely on any legal authorities, they are to provide copies to the Tribunal and serve those on the other party prior to the hearing.

Signed Date 2 February 2016

Upper Tribunal Judge Smith