Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01448/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 18 January 2016	**On 21 March 2016**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HUSSAIN SHAIBU TAMRIN

Respondent

Representation:

For the Appellant: Mr S. Walker, Home Office Presenting Officer
For the Respondent: Mr A. Otchie, Counsel instructed by Calices Solicitors

DECISION AND REASONS

Background

1. For the sake of continuity I will refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

2. The appellant appealed against the respondent's decision to make a deportation order. First-tier Tribunal Judge Finch ("the judge") allowed the appeal in a decision promulgated on 27 January 2015. She considered the appellant's immigration history and length of residence in the UK. The appellant said that he entered the UK illegally in January 1998 and remained in the UK unlawfully until he came to the attention of the authorities when he was arrested for possession of a controlled Class B drug in May 2011 [2]. He applied for leave to remain on human rights grounds. The application was refused on 09 September 2011. The judge set out the appellant's criminal conviction, for which he received a 12 month sentence of imprisonment, and the reasons given by the respondent for making a deportation order [3]. The respondent considered the fact that the appellant was in a genuine and subsisting relationship with a British partner and that they had three children together. She considered that it would not be unduly harsh for them to live in Ghana or to remain in the UK without him.

3. The judge summarised the proceedings and the submissions made at the hearing and outlined the relevant legal framework [5-8]. She went on to make detailed findings on the facts of the case within the context of the exceptions outlined in section 33 of the UK Borders Act 2007. The appellant did not assert that he would be at risk on return. The judge correctly identified the fact that the case focussed on an assessment of Article 8 of the European Convention [12]. In assessing whether he met the requirements of the exceptions to deportation she considered the public interest considerations outlined in sections 117B-C of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"). She considered the appellant's immigration history in some detail and took into account the fact that he had remained in the UK unlawfully [12]. She noted that the appellant speaks English. He was financially dependent on his partner. There was no evidence to suggest that he had been dependent on public funds [13-14]. She gave little weight to the relationship with his partner, which was established at a time when he was in the UK unlawfully [15].

4. The judge then turned to consider the public interest considerations relating to deportation appeals contained in section 117C. She reminded herself that deportation of a foreign criminal is in the public interest and that the more serious the offence the greater the public interest is in deportation. She recognised the serious nature of offences involving drugs and took into account the remarks made by the sentencing judge. The judge also noted that the appellant had no previous convictions and that he was sentenced at the lowest end of the scale for the offence [16].

5. The judge went on to consider the impact that deportation would have on the appellant and his family with reference to the exceptions outlined in section 117C(5). The appellant's partner and children are British citizens and were 'qualifying persons' for the purpose of section 117D [17]. The judge then went into a detailed analysis of the history and strength of the

family relationships and the impact that deportation would have on each member of the family [18-24]. She considered whether it would be "unduly harsh" to expect his partner and children to accompany him to Ghana. She took into account the rights of the partner and children arising from their citizenship as well as their absence of connection to Ghana. She reminded herself that the best interests of the children are a primary consideration and referred to relevant case law. The judge concluded that in all the circumstances of the case it would be "unduly harsh" to expect the family to accompany the appellant to Ghana [19-22].

6. The judge also considered what the position would be if the appellant were deported but his partner and children remained in the UK. She took into account the evidence given by the appellant's partner about her history of depression and the difficulties that she would face if she was left to care for three children on her own. The judge found that the difficulties that the mother would face would inevitably impact on the experience of the three children [23]. Having considered all the circumstances of the case the judge concluded that it would be "unduly harsh" on the three children to deport the appellant from the United Kingdom [24]

7. The respondent seeks to appeal the First-tier Tribunal decision on the following grounds:

   (i) The First-tier Tribunal erred in failing to assess the appeal through the 'lens of the immigration rules': *SSHD v AJ (Angola)* [2014] EWCA Civ 1636.

   (ii) The First-tier Tribunal erred in failing to consider whether the consequences of separation would be unduly harsh.

   (iii) The First-tier Tribunal erred in focussing on the best interests of the children in assessing whether deportation would be unduly harsh.

Decision and reasons

8. After having considered the grounds of appeal and oral arguments I satisfied that the First-tier Tribunal decision did not involve the making of an error on a point of law.

9. The date when the judge heard and decided the appeal in early 2015 was only a few months after the commencement of Part 5A of the NIAA 2002, which introduced the public interest considerations contained in sections 117A-D. At the time it was not yet clear how the statutory provisions, including the exceptions to deportation, were likely to interact with the provisions contained within paragraphs 398-399 of the immigration rules. Decisions emphasising the immigration rules as a complete code such as *MF (Nigeria) v SSHD* [2014] 2 All ER 543 and *AJ (Angola)* were decided without reference to those provisions. Further case law relating to the interaction between the two sets of provisions did not emerge until the

beginning of 2015: see *Chege (section 117D Article 8 approach)* [2015] UKUT 165.

10. In view of the fact that section 117A requires a court or tribunal to have regard to the public interest considerations contained in sections 117B-C in deportation cases, the judge's approach cannot be criticised. Changes to the immigration rules coincided with the commencement of the statutory provisions. The test of "unduly harsh" formed part of the exceptions to deportation contained in paragraph 399 of the immigration rules and section 117C(5) of the NIAA 2002. While it seems clear that it was intended that the new provisions should be harmonised with one another the wording of the immigration rules introduced particular steps to the assessment of "unduly harsh". Paragraph 399(a) requires consideration of whether it would be unduly harsh to require a child to live in the country where the person is to be deported as well as whether it would be unduly harsh to remain in the UK without the person who is to be deported. If the intention was to harmonise the provisions so that they could be used together in a sensible way it seems surprising that the wording differed between the two sets of provisions. Nevertheless, it seems clear that the core purpose of the exceptions contained in the immigration rules, which are loosely mirrored in the statutory exceptions, is to assess whether deportation is likely to be "unduly harsh" on a child.

11. Although it has now become clear that the focus of an assessment should still be made, in the first instance, through the 'lens of the rules' I am satisfied that, even if the judge did not specifically refer to the criteria outlined in paragraph 399(a), in substance, she dealt with all the relevant matters. She considered the position of the family as a whole, both in relation to the situation that they would face if they had to accompany the appellant to Ghana, as well as the situation they would face if they remained in the UK without the appellant.

12. The judge took into account and gave due weight to the public interest considerations and was entitled to make findings relating to the best interests of the children. It is not arguable that the best interests of the children are not relevant to the overall assessment of whether the effect of deportation would be "unduly harsh" on a qualifying child. The respondent has a duty to consider the welfare of children by virtue of section 55 of the Borders, Citizenship and Immigration Act 2009 ("BCIA 2009"). The best interests of children are a primary consideration in the assessment of a case under Article 8: see *ZH (Tanzania) v SSHD* [2011] UKSC 4. While the public interest in deportation is an additional and very weighty factor that must be taken into account, the exceptions to deportation contained in paragraph 399 and section 117C(5) accept that the public interest in deportation may be outweighed in circumstances where deportation is likely to be "unduly harsh" on other family members. The public interest is reflected in the stringent nature of the test of "unduly harsh". While I agree that the test is not simply a best interests assessment, it cannot be said that the judge erred in considering the best

interests of the children as part of her overall assessment of whether deportation would be "unduly harsh" on the children in this particular case.

13. For the reasons given above I conclude that even if the judge failed to make close reference to the provisions contained in paragraph 399(a) of the immigration rules it made no material difference to the outcome of the appeal because she had, as a matter of fact, considered all the relevant factors before coming to the conclusion that deportation would be "unduly harsh" on the children. While another judge might have come to a different conclusion on the facts of the case her findings were open to her on the evidence. The judge was required to take into account the best interests of the children as part of that assessment. It could not be said that her conclusions relating to the effect of deportation on the appellant's children were irrational or outside a range of reasonable responses to the evidence.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law

The First-tier Tribunal decision shall stand

Signed  Date 10 March 2016

Upper Tribunal Judge Canavan