IAC-HX-MH/11-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02268/2013

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice
On 8 December 2015

Decision & Reasons Promulgated
On 24 February 2016

Before

THE RIGHT HONOURABLE LORD BOYD OF DUNCANSBY
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE CONWAY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RICARDO O'NEIL HARRISON
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Duffy
For the Respondent: Mr Harding

DECISION AND REASONS

1. In this case we maintain the designations as they were before the First-tier Tribunal. Thus Mr Harrison is the Appellant, the Secretary of State the Respondent.

2. The Appellant is a citizen of Jamaica born in 1979. He arrived in the UK as a visitor in August 1999 and was granted leave to enter for six months. Variations of leave followed including as the spouse of a person present

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and settled in the UK. In April 2003 he was granted indefinite leave to remain.

3. In August 2007 he was convicted of possession of a class A drug. He was fined.

4. In November 2011 he was convicted of various offences including assault occasioning actual bodily harm and supplying class A drugs. His sentence in total was four years and nine months' imprisonment.

5. On 31 October 2013 a deportation order was made by virtue of s32(5) of the UK Borders Act 2007.

6. He appealed.

7. Following a hearing at Taylor House on 6 August 2014 and 13 April 2015 Judge of the First-tier Tribunal Tiffen allowed the appeal on human rights grounds (Article 8).

8. In essence, she found that the Appellant has a strong relationship with his teenage son by a previous relationship, his daughter aged 5 and a baby daughter by his present partner. There is also a stepdaughter.

9. She concluded at paragraph 52 of her determination that the effect of the proposed deportation on the children would be '*extremely serious*'. Having '*taken into account the considerable weight to be given to the public interest in the deportation of foreign criminals particularly where … the provision of drugs causes such misery and distress to the community*', she, nonetheless, considered that the Appellant has '*shown deep remorse for his actions and a clear intention to care for his family in the future'.*

10. She went on: '*Taking this into account and the serious effect on his children, I do not believe that the public would wish to see him removed from his family or for three children plus a stepdaughter to be left without a father to whom they can turn for guidance and advice and care in their upbringing. I conclude that the interests of the children in this appeal are very compelling circumstances sufficient to outweigh the public interest in removal of the Appellant'.*

11. Permission to appeal was sought by the Respondent which was granted on 22 May 2015.

12. At the error of law hearing before us Mr Harding, for the Appellant, conceded that the decision showed material errors of law such that it had to be set aside.

13. We agreed.

14. It suffices to note the following: In **<u>Chege</u> (section 117D - Article 8 - approach) [2015] UKUT 00165 (IAC)** the Tribunal stated that the correct approach where an appeal on human rights grounds has been

brought in seeking to resist deportation, is to consider (i) is the Appellant a foreign criminal as defined by s117D (2) (a), (b) or (c); (ii) if so, does he fall within paragraph 399 or 399A of the Immigration Rules; (iii) if not are there very compelling circumstances over and beyond those falling within 399 and 399A relied upon, such identification to be informed by the seriousness of the criminality and taking into account the factors set out in s117B.

15. There is no dispute that the Appellant is a foreign criminal as defined.

16. In this case, however, although the FtT Judge (at [42]) made perfunctory reference to paragraphs 399 and 399A and the need for very compelling circumstances over and above those identified in those paragraphs, she entirely failed to carry out an assessment in accordance with the structured legal framework required.

17. In the refusal letter it is conceded that it would be unduly harsh for the children to live in Jamaica. However, among the other requirements to be considered, the judge failed to consider whether it would be unduly harsh for the children to remain in the UK without him. No findings were made on, for example, whether the children's needs could continue to be adequately met by their mother who has always been their primary carer. Also, no reasoned findings were made to justify the conclusion (at [52]) that the effect of deportation on the children would be '*extremely serious'*.

18. Having failed to consider on the facts whether paragraph 399 or 399A applied, the judge went straight to '*very compelling circumstances*'. She failed to engage with the requirement that the '*very compelling circumstances*' are '*over and above those described in paragraphs 399 and 399A*' (paragraph 398). She also appears not to have considered the provisions of s117C in respect of foreign criminals sentenced to a period of at least four years.

19. Further, (at [52]) she failed to identify any factors which would be '*very compelling circumstances*'.

20. Moreover, the judge erred in stating (at [52]) that she did not believe that '*the public would wish to see* (the Appellant*) removed from his family or for three children plus a stepdaughter to be left without a father to whom they can turn for guidance and advice and care in their upbringing'.*

21. It was not open to the judge to substitute her own view of the public interest in deporting the Appellant since Parliament has set out the public interest in s32 of the UK Borders Act 2007 and Part 5A of the 2002 Act. In **LC (China) v SSHD [2014] EWCA Civ 1310** the Court of Appeal stated that where a person is sentenced to a term of four years or more, weight to be attached to public interest in deportation remains very great.

22. In variously misdirecting herself on material aspects of the law and failing to give adequate reasons she erred in law.

23. By consent the decision was set aside to be remade.

24. The parties were content that as facts will need to be found on material issues, the appeal should be remitted to the First-tier Tribunal to be reheard with no findings preserved.

25. We therefore direct accordingly.

<u>Notice of Decision</u>

The appeal is allowed to the extent of setting aside the FtT decision and remittal for rehearing and fresh decision, to be heard by a differently constituted bench.

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Conway