Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06186/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 15 June 2017	**On 22 June 2017**

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

S'PHAMANDLA BRAIN SHAZI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss C M Fielden, of Counsel, instructed by MNS Solicitors
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

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1. The appellant, a citizen of South Africa born, on 4 December 1986, appeals with permission against a decision of Judge of the First-tier Tribunal Nightingale, promulgated on 23 September 2016 in which she dismissed the appellant's appeal against a decision of the Secretary of State to maintain her decision to deport the appellant following his conviction for supplying class A controlled drugs.

2. The appellant arrived in Britain in 2003 at the age of 17 as a dependant of his mother. He has lived in Britain since that date. He has a British citizen partner, [KL], with whom he has been in a relationship for approximately ten years. They have three daughters, the first born on [ ] 2008 and the second born on [ ] 2015. Their third daughter was born on [ ] 2017, that is, after the promulgation of the determination in the First-tier.

3. On 6 August 2014 the appellant was convicted of eleven counts of supplying class A drugs (cocaine and heroin) and sentenced to 32 months' imprisonment. He did not appeal against the conviction or sentence. On 13 July 2015 he was served with a notice of intention to deport. He then made representations on human rights grounds. He appeals against the decision to refuse that application.

4. The judge set out in paragraphs 6 onwards the Secretary of State's position which was that although the welfare of the British citizen children had been considered in accordance with the respondent's duty under Section 55 of the Borders, Citizenship and Immigration Act 2009 these had to be balanced against the relevant factors including public interest in deporting foreign criminals. While it was accepted that he had a genuine and subsisting parental relationship with his first daughter it was not accepted that he had such a relationship with his second daughter because she had been born after he had been sent to prison.

5. It is not accepted that it would be unduly harsh for the children to live in South Africa as they were South African by descent as well as British citizens – it was considered they would be young enough to adapt to living in South Africa with the support of their parents. It was also not accepted that it would be unduly harsh for the children to remain in Britain because there was no evidence to show a significant detrimental effect upon them and they would be able to continue to attend school and receive necessary support and care from their mother, who had been their sole carer. Contact could be maintained by visits and modern methods of communication.

6. While it was accepted that the appellant's partner was a British citizen and that they had a genuine and subsisting relationship it was noted that they did not actually live together. While it was accepted that the relationship had been formed while the appellant was in Britain lawfully and his immigration status was not precarious it was not considered unduly harsh to expect the appellant's partner to live in South Africa if she chose to do

so and there was no evidence that it would be unduly harsh for her children to live there.

7. In any event it was pointed out that the appellant did not meet the exception in paragraph 399A as he had not been lawfully resident in Britain for most of his life. He was a South African national and had spent his childhood and until he was 17 in South Africa. He had maintained contact with South Africa and he had returned on a visit in 2007. He had acquired education in South Africa and skills in Britain that he could use to find a job in South Africa.

8. The judge noted documentary evidence before her including the OASys assessment dated 2 August 2016 and a copy of a printout from the Police National Computer regarding the appellant’s criminal conviction. She noted a witness statement from the appellant, a letter from a Mr Neil and from a Miss Smith, who was the appellant’s offender manager.

9. She noted that the appellant’s representative stated that he was arguing the exceptions found in paragraph 399(a) and 399(b) but would not be arguing the provisions of Section 399A. The argument would be that there were compelling circumstances which rendered the deportation a breach of Article 8 of the ECHR.

10. The judge heard oral evidence both from the appellant and his partner and heard submissions from both representatives and set out the provisions of Sections 32 and 33 of the UK Borders Act 2007 and the terms of the Immigration Rules relating to deportation including Rules 390A, 398 and 399.

11. In paragraphs 50 of the determination the judge set out her findings and reasons for her decision. She carefully weighed up the evidence of the appellant and of his partner and considered in detail the rights of the appellant’s two existing children. She considered that the deportation of the appellant to South Africa would have virtually no impact on his then youngest daughter before concluding that the eldest daughter would have made friendships at school and other aspects of private life here but stated that although she accepted that there was a genuine and subsisting parental relationship between the appellant and that child that had been interrupted by the appellant’s offending and the time he spent in prison. There was no evidence before her that that separation had caused particular difficulties with his eldest daughter. She considers the evidence of the appellant’s partner’s mother but noted that she worked full-time as did the appellant’s partner and stated that therefore she was not satisfied that there was a relationship of the claimed closeness between the maternal grandmother and the children.

12. She accepted that the offender management professionals had assessed that the appellant currently posed little risk of reoffending and a low risk of

causing serious harm. She noted that the appellant had a series of offences relating to drugs and stated that that could not be discounted.

13. When considering whether or not it would be unduly harsh to expect the appellant's two British citizen children to relocate to South Africa she took into account the determination of the Tribunal in **KMO**, which had been confirmed as the correct approach by the Court of Appeal in **MM (Uganda)**. She accepts that it would be harsh for the elder child to lose contact with her father but stated that she had already been separated from him for a lengthy period of time due to his prison sentence. She accepted also that relocation would present challenges in the short term but noted that the appellant had said that he thought that he could find something by way of employment in South Africa.

14. She considered that while the appellant's partner might wish to choose to remain in Britain, as she was entitled to do as a British citizen, that was not the same as saying that there were insurmountable obstacles to her relocation to South Africa. She was not in employment in the United Kingdom and had not established a career here.

15. In any event the judge did not consider that the relationship was as close as suggested. Her conclusion was that it would not be unduly harsh for either of the British citizen children to live in South Africa and stated that she made that finding to be weighed in the balance of the appellant's offending.

16. She referred to the particular dangers that were caused by drugs and stated that she had to balance that against the effect on the appellant's partner and upon his children. She concluded that it would not be unduly harsh for the appellant or his partner to live in South Africa and stated that there were no circumstances over and above those described in paragraph EX.1 of Appendix FM. Moreover, in the alternative she concluded that it would not be unduly harsh for the appellant's daughters to remain in Britain with their mother without the appellant. She pointed out that their mother was the primary carer and that the second child had only recently come to know her father after the release from prison and that the elder child had been separated from her father with little adverse effect on her welfare. The appellant's partner and children would continue to be supported from public funds at the same level as at present and would suffer no material deprivation. She went on to say that although she was prepared to accept that the appellant has assisted his partner in caring for the children she noted that the appellant's partner was not in employment and was a full-time mother and was therefore not in particular need of his assistance.

17. She therefore concluded that paragraph 399(a) and 399(b) did not apply.

18. She then turned to the issue of whether or not there were very compelling circumstances over and above those described in paragraph 399(a) and

(b). She found that no such circumstances exist. She took into account the fact that the appellant's partner was pregnant but stated that when that child was born she would have no existing relationship with the appellant and would know nothing different other than the level of communication enjoyed at the time of birth. She did not consider the pregnancy as a compelling circumstance. She considered that the appellant would be able to find employment in South Africa and found that his removal was lawful and proportionate. She therefore dismissed the appeal.

19. Although permission was refused in the First-tier further grounds were lodged in the Upper Tribunal which were considered by Deputy Upper Tribunal Judge Chapman. Judge Chapman effectively stated that there was no merit in the grounds of appeal as lodged but, in paragraph 6 of her decision granting permission she referred to the judgment in **Hesham Ali [2016] UKSC 60** and stated that given that the applicant was a settled migrant and that the test in **Jeunesse v. the Netherlands** applied the issue was whether a fair balance had been struck between the interests of the appellant and those of the community. She also stated that the judge might have been entitled to find that the pregnancy of the appellant's partner was a material factor as part of the overall proportionality assessment.

20. At the hearing before me Miss Fielden first stated that the appellant's previous representatives had stated that the appellant had no case under paragraph 399A but went on to say that following the decision in **Jeunesse v. the Netherlands** the fact that he had lived lawfully in Britain for a considerable period of time should have been taken into account and could of itself, possibly, amount to compelling circumstances.

21. She went on to state that the appellant was a settled migrant and that when weighing up relevant factors in an Article 8 exercise outside the terms of the Rules that was a fact that should have been taken into account. The judge, she appeared to argue, had erred in not doing so and in not placing weight on the fact that the appellant's partner was pregnant.

22. In reply Mr Jarvis pointed out that **Jeunesse** was not a deportation case and that in this case the Rules were clear and properly set out the public interest in the deportation of foreign criminals. He stated that the correct test was whether or not there were very compelling circumstances over and above those set out in the Rules which would mean that the appellant would be able to succeed under Article 8 of the ECHR. He emphasised that, in any event, the terms of Section 117C of the 2002 Act had not been considered by the Supreme Court when handing down the judgment in **Hesham Ali** and that that Section, which was binding on the judge emphasised that very compelling circumstances were required. In any event he stated that although the judgment in **Hesham Ali** was correct to the extent that the Rules might not be considered to be a complete code

that was a technical point. He referred to the judgment of Lord Justice Burnett at paragraph 19 in **EJA [2017] EWCA Civ 10**, which emphasised that the judgment in **Hesham Ali** had not lowered the burden which had to be overcome by a foreign criminal to succeed in demonstrating that it would be disproportionate to deport him from the Britain.

23. He referred moreover to the terms of Section 117C(6) of the 2002 Act which referred to very compelling circumstances – he stated that that was the appropriate test to apply. It was appropriate that the judge should have considered that issue as part of the proportionality assessment. In this case at paragraph 59 the judge had carried out a proper proportionality assessment, having considered all the relevant factors and had found that deportation would not be a disproportionate interference with the appellant's Article 8 rights. He had given clear reasons for his decision.

24. Indeed, he argued that the grant of permission indicated an incorrect understanding of the terms of the judgment in **Hesham Ali**.

25. He stated that in any event **Jeunesse** had emphasised only that an applicant's presence in Britain should be taken into account when assessing proportionality of removal. That did not, however, overrule the test laid down by statute.

26. Again, in reply, Miss Fielden stated that it was important to take into account the length of time the appellant had been in Britain.

Discussion

27. I consider that there is no material error of law in the determination of the judge of the First-tier tribunal. The judge made a clear assessment of relevant factors when considering the proportionality of deportation. She considered and reached conclusions that were fully open to her with regard to the appellant's relationship with his children and with his partner and was entitled to come to the conclusion that it would not be unduly harsh for the appellant's partner or the children to relocate to South Africa. She also considered, in the alternative, that it would not be unduly harsh for the children to remain in Britain with their mother, who was their primary carer and had been such all their lives. She was entitled to place weight on the fact that the appellant and his partner were not living in the same home. She did weigh up all relevant factors and the fact that the appellant could not qualify under paragraph 398(a) was merely a statement of fact on which she was entitled to rely. The mere lawful presence of the appellant for a period of less than half his life could not be considered to be a "very compelling" circumstance. I asked Miss Fielden if there were any other factors to be taken into account, in particular what evidence there was of the appellant's work record. There was no such evidence before me although the appellant indicated to Miss Fielden that he had worked here.

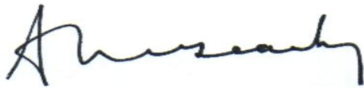
28. The judge did properly weigh up the seriousness of the appellant's offence albeit that she accepted that the likelihood of reoffending was low but she was entitled to place weight thereon and to find that, on balance, it was appropriate that the appellant should face deportation. There is nothing in the judgment of **Hesham Ali** that would have meant that the judge could or should have reached any other conclusion than that which she did reach and which she reached properly having considered all relevant factors.

29. I therefore dismiss this appeal and find that the decision of the First-tier Judge dismissing the appellant's appeal against the refusal of leave to remain on human rights grounds shall stand.

Notice of Decision

This appeal is dismissed.

No anonymity direction is made.



Signed Date 21 June 2017

Upper Tribunal Judge McGeachy