Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09702/2016

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal on 7 September 2017	**Decision & Reasons promulgated on 31 October 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

GARFIELD ALEXANDER WRIGHT
(anonymity direction not made)
Respondent

Representation:
For the Appellant: Mr Mills – Senior Home Office Presenting Officer
For the Respondent: Mr Vokes instructed by Rashid & Co Solicitors

ERROR OF LAW FINDING AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Butler who allowed the appeal on human rights grounds against the decision to deport the appellant from the United Kingdom.

© CROWN COPYRIGHT 2017

Background

2. Mr Wright is a national of Jamaica born in 1978 who entered the UK on 22 March 1997 using a false identity. Various applications for leave to remain have been made and granted, periodically, including a period of discretionary leave granted to 12 March 2015. On 11 March 2015, Mr Wright applied for leave to remain on the grounds of family life and 10 years residence which was refused on 18 August 2016 although the decision was subsequently reviewed and withdrawn by the Home Office.
3. On 22 May 2015, Mr Wright was convicted of possession with intent to supply cannabis and possession of cannabis/cannabis resin and on 24 June 2015 sentenced to 12 months imprisonment and on 17 July 2015 served with notice of a decision to deport him from the United Kingdom.
4. Mr Wright relies on an exception to deportation, namely that his removal will breach a Convention right. The basis of the claim is set out at [3 – 4] of the decision under challenge.
5. The Judge sets out the evidence and submissions made before moving on to findings of fact from [34] of the decision under challenge.
6. The Judge did not find Mr Wrights account of attacks and threats he and his wife claimed to have suffered in the UK and in Jamaica to be credible [36]. The Judge did not believe Mr Wrights account of having been lured to a friend's house to be accused of an affair with the mother of that friend's child and being beaten, yet himself being charged with committing grievous bodily harm and that, even if this account was true, there was no indication of how it was relevant to his fear of persecution in Jamaica [37]. The Judge did not believe the account of the threat to Mr Wright's wife in Jamaica finding it rather convenient that it was alleged to have taken place whilst he was out [38]. The Judge found that Mr Wrights account was not believed by another judge in a previous appeal and was not believed now and that it was found to be so lacking in credibility that it was a fabrication designed to bolster his asylum claim; leading to the conclusion Mr Wright had not made out a well-founded fear of persecution on return to Jamaica or that there was a real risk of suffering treatment contrary to articles 2 and 3 or other serious harm or an entitlement to humanitarian protection [39]. These are all arguably sustainable findings on the facts of this case.
7. The Judge notes Mr Wright's representative submitted that the main thrust of the claim is article 8 ECHR. The Presenting Officer did not seek to rely upon the assertion in the refusal letter that there was no genuine subsisting relationship such as to establish family life when the evidence showed there was. The Judge finds that with nine children of Mr Wright and his wife, including a new-born baby, it will be implausible to reach any other conclusion [41].
8. The Judge noted the issue in the appeal was whether deportation was proportionate [42].

9. The Judge noted that six of the children are under the age of 18 and British nationals. The Judge found that it will be unduly harsh for the children to live in Jamaica as they live under one roof with their parents, attend school, their mother has a job, and in addition to her wages is in receipt of substantial benefits. The family also have access to the NHS as is the right of British citizens and the standard of living enjoyed in the UK could not be replicated in Jamaica where the Judge finds they would surely be destitute [45].
10. The Judge considered whether it will be unduly harsh for the children to remain in the UK without their father, in relation to which evidence was given by Mr Wright, his wife, and his mother. The evidence received was that Mr Wright played a significant part in the lives of his children by caring for them, taking them to and from school, taking them to the park and preparing their meals. The Judge noted that when Mr Wright was in prison his wife could not work and needed to be at home to look after the children with help from Mr Wright's mother. The Judge attached some weight to the letters from the children regarding how their father had influence their lives and the importance of him to them before finding at [46] that it will be unduly harsh for the children to remain in the UK with Mr Wright being removed to Jamaica.
11. The Judge thereafter finds that Mr Wright has satisfied the Rules and that the situation of his children constitute exceptional and compassionate circumstances [47].
12. The Judge, in the alternative, considered the matter outside the Rules by reference to section 117C of the 2002 Act in relation to which the Judge repeats his finding that the effect of deportation on the children would be unduly harsh. The Judge thereafter considers the effect on Mr Wright's partner before concluding at [53] that it would not be proportionate to remove him in the face of the compelling circumstances set out in the decision.
13. The Secretary of State sought permission to appeal which was granted by another judge of the First-tier Tribunal on the basis it was arguable the Judge erred in law by making findings as to hardship to the Mr Wright's partner and children without sufficient evidence to ground those findings.

Error of law

14. Mr Mills adopted a professional and pragmatic approach to the decision which is that whilst allowing the appeal may have been within the range of possible findings open to the Judge, this conclusion could only be reached if the Judge had made adequate findings in relation to the key components when assessing the question of whether it was unduly harsh for the children to remain in the United Kingdom if their father is deported.
15. On behalf of Mr Wright Mr Vokes argued that whilst it may have been preferable for the Judge to have structured the decision to ensure that all required findings were in one place, when the decision is read as a

whole, it is clear the Judge did consider all the elements he was required to consider and the finding that Mr Wrights deportation will be unduly harsh was a finding fully open to the Judge on the evidence.

16. Mr Vokes sought to rely on the recent decision of the Court of Appeal in *Secretary of State for the Home Department v Mandibya [2017] EWCA Civ 1002* in which that Court found:

> 13. The correctness of the legal threshold to be surmounted by a foreign criminal whose case falls outside paras. 399 and 399A of the Immigration Rules, as identified by this court in *MF (Nigeria),* has been affirmed by the Supreme Court in *Ali v Secretary of State to the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799, at [37]-[38] and [46]. Accordingly, I am left in no doubt that the FTT failed to apply the correct test when considering the case under Article 8. Therefore, the appeal must be allowed and the FTT's decision and that of the Beauty must be set aside.
>
> 14. Miss Rowlands for the Secretary of State submits that it is clear that, on application of the correct test, the respondent's article 8 claim must fail. Therefore, she says this court should itself decide here and now that the respondent's appeal against the Secretary of State's decision to deport him should be dismissed.
>
> 15. I do not agree. Upon remission of the case to the FTT for fresh consideration, it is possible that on full exploration of the facts the Article 8 interests of the family, taken as a whole, might be found to provide reasons to the "very compelling reasons" standard, as explained in the *Ali* case, sufficient to outweigh the great weight of the public interest in deportation of a foreign criminal sentenced to 20 months' imprisonment. In making the reassessment, the FTT is required to treat the interests of the children is a primary consideration, although not, of course, as a trump card: see *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166 and *Zoumbas v Secretary of State of the Home Department* [2013] UKSC 74; [2013] 1 WLR 3690. I do not consider that this court can say, on the limited and very out of date material before us, that there is no real prospect of the respondent being able to make out his claim based on Article 8 to avoid deportation.

17. In *Hesham Ali* the Supreme Court found:

> 37. How is the reference in rule 398 to "exceptional circumstances" to be understood, compatibly with Convention rights? That question was considered in the case of MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192; [2014] 1 WLR 544. The Court of Appeal accepted the submission made on behalf of the Secretary of State that the reference to exceptional circumstances (an expression which had been derived from the Jeunesse line of case law) served the purpose of emphasising that, in the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who did not satisfy rules 398 and 399 or 399A, and that it was only

exceptionally that such foreign criminals would succeed in showing that their rights under article 8 trumped the public interest in their deportation (paras 40 and 41). The court went on to explain that this did not mean that a test of exceptionality was being applied. Rather, the word "exceptional" denoted a departure from a general rule:

"The general rule in the present context is that, in the case of a foreign prisoner (sic) to whom paragraphs 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the 'exceptional circumstances'." (para 43)

The court added that "the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence" (para 44). As explained in the next paragraph, those dicta summarise the effect of the new rules, construed compatibly with Convention rights.

38. The implication of the new rules is that rules 399 and 399A identify particular categories of case in which the Secretary of State accepts that the public interest in the deportation of the offender is outweighed under article 8 by countervailing factors. Cases not covered by those rules (that is to say, foreign offenders who have received sentences of at least four years, or who have received sentences of between 12 months and four years but whose private or family life does not meet the requirements of rules 399 and 399A) will be dealt with on the basis that great weight should generally be given to the public interest in the deportation of such offenders, but that it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed, as Laws LJ put it in SS (Nigeria). The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State. The Strasbourg jurisprudence indicates relevant factors to consider, and rules 399 and 399A provide an indication of the sorts of matters which the Secretary of State regards as very compelling. As explained at para 26 above, they can include factors bearing on the weight of the public interest in the deportation of the particular offender, such as his conduct since the offence was committed, as well as factors relating to his private or family life. Cases falling within the scope of section 32 of the 2007 Act in which the public interest in deportation is outweighed, other than those specified in the new rules themselves, are likely to be a very small minority (particularly in non-settled cases). They need not necessarily involve any circumstance which is exceptional in the sense of being extraordinary (as counsel for the Secretary of State accepted, consistently with Huang [2007] 2 AC 167, para 20), but they can be said to involve "exceptional circumstances" in the sense that they involve a departure from the general rule.

.....

> 46. These observations apply a fortiori to tribunals hearing appeals against deportation decisions. The special feature in that context is that the decision under review has involved the application of rules which have been made by the Secretary of State in the exercise of a responsibility entrusted to her by Parliament, and which Parliament has approved. It is the duty of appellate tribunals, as independent judicial bodies, to make their own assessment of the proportionality of deportation in any particular case on the basis of their own findings as to the facts and their understanding of the relevant law. But, where the Secretary of State has adopted a policy based on a general assessment of proportionality, as in the present case, they should attach considerable weight to that assessment: in particular, that a custodial sentence of four years or more represents such a serious level of offending that the public interest in the offender's deportation almost always outweighs countervailing considerations of private or family life; that great weight should generally be given to the public interest in the deportation of a foreign offender who has received a custodial sentence of more than 12 months; and that, where the circumstances do not fall within rules 399 or 399A, the public interest in the deportation of such offenders can generally be outweighed only by countervailing factors which are very compelling, as explained in paras 37-38 above.

18. It is not disputed that the wife and children will not accompany Mr Wright to Jamaica if he is deported which means this is a family splitting case. It is not disputed that the Court of Appeal made it clear that it is a fact sensitive assessment in relation to whether the facts allow a finding that the decision is unduly harsh. Mr Mills argues [46] is not adequately reasoned and that on the facts the appellant was not able to show he can overcome the significant hurdle and high threshold.
19. Mr Vokes argued the decision was not infected by arguable legal error. Mr Wright has lived in the United Kingdom for 20 years lawfully, the conviction was for a period of 12 months, the appellant has developed family life with his children which was accepted by the respondent. There is a reference to an earlier decision and it is argued the Judge adequately reasons the finding on a fact sensitive basis.
20. In *MM (Uganda) and [2016] EWCA Civ 450* it was held that the phrase 'unduly harsh' plainly meant the same in section 117C(5) of the 2002 Act as it did in paragraph 399 of the Immigration Rules. It was an ordinary English expression coloured by its context. The context invited emphasis on two factors: first, the public interest in the removal of foreign criminals and, secondly, the need for a proportionate assessment of any interference with Article 8 rights. The public interest factor was expressly vouched by Parliament in section 117C(1). Section 117C(2) provided that the more serious the offence committed, the greater the public interest in deportation. That steered the tribunals and the court towards a proportionate assessment of the

criminal's deportation in any given case. Accordingly, the more pressing the public interest in his removal, the harder it would be to show that the effect on his child or partner would be unduly harsh. Any other approach would dislocate the 'unduly harsh' provisions from their context such that the question of undue hardship would be decided wholly without regard to the force of the public interest in deportation. In such a case 'unduly' would be mistaken for 'excessive', which imported a different idea. What was due or undue depended on all the circumstances, not merely the impact on the child or partner in the given case. The expression 'unduly harsh' in section 117C(5) and paragraph 399(a) and (b) required consideration of all the circumstances, including the criminal's immigration and criminal history. MAB was wrongly decided (paras 22 – 26)

21. In *IT (Jamaica) [2016] EWCA Civ 932* it was held that the First-tier Tribunal had not given appropriate weight to the public interest when revoking a deportation order made against a foreign criminal. The undue harshness standard in section 117C of the Nationality, Immigration and Asylum Act 2002, read in the context of the Immigration Rules, meant that a deportee had to demonstrate that there were very compelling reasons for revoking a deportation order before its expiry.

22. In this appeal, the Judge was fully aware of the public interest argument relied upon by the Secretary of State. The Judge posed the correct question when assessing whether the undue harshness test had been satisfied. The Judge clearly refers at [51] to the view of the Court of Appeal that "very compelling circumstances involves a proportionality test but seen through the lens of strong public interest" and factors in section 117B and 117C. The Judges specific finding at [53] is in the following terms:

> 53. Having considered the appellant's family life with his partner and children, I also take into account the seriousness of the appellant's crime, namely, possessing cannabis with intent to supply it. This was the appellant's first conviction and he has not reoffended since being sentenced on 24 June 2015. The judge referred to him as someone of previous good character and a family man and gave him the most lenient sentence possible. The public interest in deporting those criminals involved in drugs is high. However, in this case, I consider the fact that the appellant plays a significant part in bringing up eight children is compelling. Were the only two or three children in their late teens, my view might have been different. But there are young children and one baby in the appellant's family and I do not consider it would be proportionate to remove him in the face of these compelling circumstances.

23. Whilst that decision may appear unduly generous to some, it cannot be said to be outside the range of findings reasonably open to the judge on the evidence. It is not a decision based upon the number of children as it may appear to be if this paragraph is read in isolation, but assessment upon the impact upon the family unit composed of

two adults and eight children if Mr Wright is removed when balanced against his immigration and offending history.

24. It was accepted by Mr Mills in his opening address that the conclusions are within the range of those reasonably open to the judge, the issue being whether the judge had done enough in the decision to justify those findings. Having considered the material before the Judge and submissions made by the advocates I find that it has not been made out that any error that may have been made is, on the facts, material to the decision to allow the appeal.

25. In *Hesham Ali (Iraq) v SSHD [2016] UKSC 60* Lord Reed noted that "cases falling within the scope of section 32 of the 2007 Act in which the public interest in deportation is outweighed, other than those specified in the new rules themselves, are likely to be a very small minority (particularly in non-settled cases). They need not necessarily involve any circumstance which is exceptional in the sense of being extraordinary (as counsel for the Secretary of State accepted, consistently with **Huang** **[2007] 2 AC 167**, para 20), but they can be said to involve "exceptional circumstances" in the sense that they involve a departure from the general rule".

26. Although the case was decided on its own particular facts, in *CD (Jamaica) v SSHD [2016] EWCA Civ 1433* the Court of Appeal upheld the Upper Tribunal who agreed that it would be unduly harsh on the 4 children of the appellant to remain in the UK without their father who although sentenced to 3 years for dealing in class A drugs was now a very low risk of offending, was committed to change, and there was evidence that the children would find it very difficult to cope if their father were separated from them.

Decision

27. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity

The First-tier Tribunal made no anonymity order. No request for anonymity was made to the Upper Tribunal and no such order is made.

Signed……………………………………………….
Judge of the Upper Tribunal Hanson

Dated the 30 October 2017