Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/10596/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 October 2017	**On 25 October 2017**

Before

UPPER TRIBUNAL JUDGE SOUTHERN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

D. S.

Respondent

Representation:

For the Appellant: Mrs U. Sood, of Counsel
For the Respondent: Ms Z. Ahmad, Senior Home Office Presenting Officer

DECISION

1. The respondent, who is a citizen of Guyana, moved to the United Kingdom in 1983, then aged 14, to join his mother who had been living here since 1977. He was granted indefinite leave to remain on arrival. On 14 December 2012 he was convicted of offences of conspiracy to supply Class A drugs and of cultivation and possession of Class B drugs and was sentenced to 8 years' imprisonment. A deportation order was signed on 23 February 2015 and he appealed against a decision of the Secretary of State to refuse his protection and human rights claims, the Secretary of State for the Home Department refusing to revoke the deportation order.

2. By a lengthy and detailed determination, First-tier Tribunal Judge Saunders allowed the respondent's appeal on human rights grounds, finding that the public interest did not require his deportation because there were very compelling circumstances over and above those required to satisfy the Exceptions of s117C(3) and (4). She dismissed his appeal against refusal of his protection claim and he does not pursue any challenge to that aspect of her decision.

3. The parties are, of course, well aware of all the facts relevant to that decision and of the reasons given by the judge for arriving at her conclusions and it is not necessary, for present purposes, for me to reproduce here all that has been discussed by the judge in her determination.

4. Although the determination of the judge has been written with evident care, I am entirely satisfied that in reaching her conclusions she made several errors of law and I have no doubt at all that, despite Mrs Sood's valiant efforts to persuade me otherwise, those errors are plainly material to the outcome of this appeal. Therefore, as there will have to be a fresh determination of this appeal, I shall say only that which is necessary to identify the nature of the errors of law made by the judge and make clear the scope of the hearing that is to follow.

5. Plainly, as is evidenced by the length of the sentence of imprisonment imposed upon the respondent and the sentencing remarks of the judge who imposed it, his offences were particularly serious ones so that the public interest in his deportation was significant. This is made unambiguously clear by the opening provisions of Section 117C of the Nationality, Immigration and Asylum Act 2002:

> **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
> …

When one takes together the fact that the sentencing judge considered the offences sufficiently serious to merit a sentence of 8 years' imprisonment, the fact that the offending involved a conspiracy to supply Class A drugs and that this was not the respondent's first offence, he having previously been convicted in 1990 of possession of a Class B drug and in 1993 of supplying a Class B drug (which latter offence the judge felt able to describe as a "relatively minor" offence) it is readily apparent that the respondent faced a formidable challenge in demonstrating that the right to respect for private and family life should outweigh the public interest arguments in support of his deportation.

6. The case advanced by the respondent before the judge disclosed a number of matters that the judge found weighed heavily in his favour. Although the respondent had denied the offence and was convicted after a trial, he now had a real insight into his offending and had been rehabilitated such that there was no continuing risk of him reoffending. Further, he had done rehabilitative work with the prison community and continued to do so after being released on licence. He played an important role with his two minor children, caring for them while his former partner, their mother, was at work and he often saw those children at weekends as well. His three adult children live with him and family life exists, despite them being adults. He cared also for an elderly mother, who lived in sheltered accommodation.

7. The judge found that the respondent had put forward "unusually strong evidence of positive and reparative behaviour whilst in prison"; his remorse for his previous offending behaviour was "genuine and significant"; that his bond with his adult children was "unusually strong"; and that the deportation of their father would be "highly damaging" for the minor children. The judge identified the evidence indicating that there had been a detrimental effect upon the minor children while he was in prison and that "the children were happier now that their father was out of prison". The respondent enjoyed also "a particularly close relationship" with his mother. The judge accepted also that the respondent has not retained close ties with Guyana, although he had returned there twice for family funerals. Although the judge found him to be "undoubtedly a resourceful, intelligent and motivated man", given the time he has been living in the United Kingdom, moving back to Guyana would, the judge found, be an "extremely difficult transition to make".

8. The judge set out a detailed self-direction as to the legal framework in play and recognised that:

> "In the light of his 8-year sentence, therefore, the Appellant must establish that there are very compelling circumstances, over and above those envisaged in the statue and the rules…."

Having examined the evidence the judge concluded that the deportation of the respondent "would be little short of devastating" for the two minor children. That is because the deportation would spell an end to any meaningful parental relationship because contact by the occasional visits and other electronic means of communication, in the view of the judge could not replace the parental relationship now enjoyed. The judge concluded:

> "I concluded that on the facts as I have found them to be, this damage is likely to be of such severity, for all the reasons already set out

> hereinabove, that on the strength of these facts alone that the Appellant's deportation would have overall consequences that are very compelling and which very significantly exceed the "unduly harsh" threshold… and applying MAB (para 399; "unduly harsh") USA [2015] UKUT 00435 (IAC)"

This discloses the first error of law made by the judge. The approach applied by the judge to her assessment of whether the effect on the children would be unduly harsh was that set out in *MAB*. But as was found by the Court of Appeal in *MM (Uganda) v SSHD* [2016] EWCA Civ 617 (see para 26) that approach was legally incorrect as it left out of account the important public interest considerations that must inform that assessment. This means that the judge took a legally incorrect starting point for her assessment. As the judge has made clear that she applied the MAB approach I cannot be confident that she would necessarily have reached the same conclusion if not for that error.

9. I should make clear that this was an issue that arose in discussion at the hearing and was not a point taken specifically in the Secretary of State's grounds, but Mrs Sood did not suggest that she was unable to respond to this point and did not seek to suggest that the judge did not, in that respect, fall into legal error.

10. The second error of law made by the judge is identified in the Secretary of States grounds as follows:

> "Deportation is not one dimensional in its effect. It has the effect not only of removing the risk of re-offending by the deportee himself, but also of deterring other foreign nationals in a similar position."

Mrs Sood accepts, as indeed she must, that nowhere in the decision of the judge is to be found any indication, at all, that she had any regard to the public interest in the deterrence of others that is achieved by deporting foreign criminals. I am unable to accept Mrs Sood's submission that this error by the judge was not a material one. The consequence of this error is that the judge has left out of account what is perhaps the most significant public interest consideration in this case. It is the respondent's case that he now represents no risk of re-offending or of causing harm to the public. Therefore, the only public interest that would be served by his deportation would be the deterrent effect that may have on others. Indeed, it may be thought that the deportation of a rehabilitated foreign criminal sends a particularly powerful message of deterrence to others that even if, following conviction, they are truly remorseful and have no further propensity to offend, deportation is still a probable consequence.

11. Although that error alone is sufficient to establish that the decision of the judge to allow this appeal cannot stand and must be set aside, the Secretary of State does advance one further ground upon which

permission to appeal was sought and was granted. That ground, distilled to its essence, is that the reasons given by the judge simply do not justify a finding that there had shown to be very compelling circumstances over and above those required to qualify for the statutory exceptions to mandatory deportation of foreign criminals where the sentence imposed is less than four years. As was observed in *SSHD v CT (Vietnam)* [2016] EWCA Civ 488:

> "The starting point in considering exceptional circumstances is not neutral: *SS (Nigeria and MF (Nigeria).* Rather, the scales are heavily weighted in favour of deportation and something very compelling is required to swing the outcome in favour of a foreign criminal whom Parliament has said should be deported.
>
> The best interests of the child, always a primary consideration, are not sole or paramount but to be balanced against other factors, in this case that only the strongest Article 8 claims will outweigh the public interest in deporting someone sentenced to at least four years' imprisonment. It will almost always be proportionate to deport, even taking into account as a primary consideration the best interest of a child."

The position in this case was that the respondent had contact with his minor children, and an active role in their lives but they did not live together as a nuclear family. The respondent submits that if they did, the fact that the father cared for the children while the mother, being the main breadwinner of the family, was at work was something not at all exceptional or compelling, rather it was a routine example as to how families operate. Similarly, it will very often be the case that distress at being separated from a parent who is being deported will be experienced by children who remain behind but, again, the Secretary of State submits it was not reasonably open to the judge to find that this amounts to the very compelling circumstances over and above that required by the statutory exceptions.

12. Given that for the other reasons I have set out above, the judge has made a material error of law, and that the appeal will need to be determined afresh, it seems to me that it is neither helpful nor necessary for me to express a view upon this submission of the Secretary of State as that will be something to be assessed by the judge before whom this remitted appeal is listed.

13. I accept Mrs Sood's submission that, having found that the judge did make a material error of law, the appeal should be remitted for a fresh hearing. That is because the appellant seeks to rely upon the oral evidence of a number of witnesses and it will be well over six months from the date of the last hearing before any substantive hearing could be convened, so that the position may or may not be the same as it was at the date of the hearing before Judge Saunders.

Summary of decision:

14. First-tier Tribunal Judge Saunders made an error of law materials to the outcome of this appeal and her decision to allow the appeal is set aside.

15. The appeal to the Upper Tribunal is allowed to the extent that the appeal is remitted to the First-tier Tribunal to be determined afresh.

Signed 

Upper Tribunal Judge Southern
Date: 24 October 2017