Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00486/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 November 2018	**On 18 December 2018**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

G W
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Rahman, instructed by Immigration Law Practice
For the Respondent: Miss A Holmes, Senior Home Office Presenting Officer

DECISION AND REASONS

1. On 18 March 2014 the Secretary of State made a deportation order against the appellant on the basis that he is a foreign criminal. That decision was taken in consequence of his conviction on 13 December 2013 for the possession with intent to supply class A controlled drugs for which he was sentenced to thirteen months' imprisonment. There is a long procedural history to this case, it first having come before the First-tier Tribunal on 5 September 2014. That appeal was allowed but that decision was subsequently set aside and remitted to the First-tier Tribunal. The appeal then came before Judge Herlihy on 26 March 2018. She allowed

the appeal on 11 April 2018 and the Secretary of State sought permission to appeal against that decision also. It is for those reasons that the matter then came before me on 14 August 2018 when I set the matter aside for the reasons set out in the decision annexed to this decision.

2. That decision and indeed Judge Herlihy's decision needs now to be seen in the light of **KO (Nigeria) [2018] UKSC 53**.

Remaking the Appeal

3. As noted in **KO (Nigeria)** at [5] there is little difference between the application of the Rules and Section 117C:

> "5. It is unnecessary to refer in detail to the Changes to the Immigration Rules made at the same time (paragraphs 398-399), since it is not argued that any differences are material to the issues before us. It is to be noted however that the question whether "the effect" of C's deportation would be "unduly harsh" (section 117C(5)) is broken down into two parts in paragraph 399, so that it applies where:
>
> > "(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
> >
> > (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported."

4. In addition, the Supreme Court held:

> "23. On the other hand the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) can it be equated with a requirement to show "very compelling reasons". That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more.
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> …
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> 32. Laws LJ's approach has the advantage of giving full weight to the emphasis on relative seriousness in section 117C(2). However, on closer examination of the language of the two exceptions, and of the relationship of the section with section 117B, as discussed above, I respectfully take a different view. Once one accepts, as the

> Department did at that stage (rightly in my view), that the issue of "reasonableness" under section 117B(6) is focussed on the position of the child, it would be odd to find a different approach in section 117C(5) at least without a much clearer indication of what is intended than one finds in section 117C(2). It is also difficult to reconcile the approach of Judge Southern or Laws LJ with the purpose of reducing the scope for judicial evaluation (see para 15 above). The examples given by Judge Southern illustrate the point. On his view, the tribunal is asked to decide whether consequences which are deemed unduly harsh for the son of an insurance fraudster may be acceptably harsh for the son of a drug-dealer. Quite apart from the difficulty of reaching a rational judicial conclusion on such a question, it seems to me in direct conflict with the *Zoumbas* principle that the child should not be held responsible for the conduct of the parent."

5. The core issue in this case is whether it would be unduly harsh for the appellant's children and partner to remain in the United Kingdom without him if he were deported. It is I consider sensible at this point to set out the findings set out at paragraphs [48] to [50] of Judge Herlihy's decision which have been preserved:

> "48. I have carefully considered all the evidence of the witnesses and to be credible. I was impressed with the evidence of the Appellant's stepdaughter and his daughter Nicole who provided insight into the effects of the Appellant's detention upon the family and particularly the Appellant's wife and minor children. It is clear from the evidence that when the Appellant was detained that his wife relied very heavily upon the support of her eldest daughter Natasha and of the Appellant's daughter Nicole who at the time was herself minor. I note the report of social services in January 2014 which referred to the Appellant as a protective factor for the children. The report supports the evidence of the Appellant's wife with regard to her own history and records that the family were known to children's services initially in 2001 following the mother's overdose. The report also confirms the mother's diagnosis of bipolar/borderline personality disorder and that she had been prescribed mood stabilisers and had suffered with alcohol dependency and that her mental health had significantly impacted upon her parenting capacity in the past and that the Appellant was a key support for her and the children during that time. The report records that the Appellant's wife had stated that she feels she would emotionally struggle should the Appellant not come home and that this was a significant impact upon her mental health and parenting capacity and that her previous assessments have noted that the Appellant had been a positive support for his wife and with her mental health and alcohol abuse. The report also confirms that the Appellant's wife suffers with osteoarthritis which has a significant impact upon her practical ability in the home and that the Appellant's wife and all the children stated that the Appellant had been a major source of practical support in the home and that his absence that had an impact on all of them since he had been imprisoned. The report recommends that the Appellant should be returned to the family home where he continues to have a central role within the family and has a very close relationship with all four children and has been actively involved in their upbringing and that his wife's parenting ability appears to be significantly

> impacted on by her bipolar/borderline personality disorder for which she is receiving ongoing psychiatric treatment and support and by her osteoarthritis
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> 49. I fully accept the evidence of the Appellant, his wife and the children, that during his period of imprisonment that his eldest daughter Natasha provided significant care and support to the family (moving back into the family home) as did the Appellant's eldest daughter Nicole. I also accept that weekly visits were made by the wife's family and this is confirmed by the report from social services. social services also noted that there was support in the form of visits by the Appellant's sister and a cousin. However I find that the bulk of the support was provided by and Nicole. I also find that the circumstances have now changed since the Appellant's release from detention and that Natasha is no longer in a position to provide the level of support that she did previously as she is now married with two very young children and has moved away from the location of her mother home. I also find that Nicole if unlikely to be able to provide any significant support given her plans to progress her education and career.
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> 50. I have also carefully considered the current evidence in respect of the Appellant's wife's mental health. I note that the Appellant's wife suffers from osteoarthritis which does have a practical impact on her ability to physically support and care for her children. I do not find that the previous arrangements which relied upon very substantial help from Natasha and Nicole are sustainable and I find that in the absence of the Appellant from the family unit that there would not be adequate arrangements in place for the care of the Appellant's minor children."

6. Whilst I note that much of the material dates from 2014, equally there is more recent evidence of the appellant's wife's mental state which confirms first that she is still in receipt of the same medication as noted in the report of Dr Ajayi in which, after recording her various diagnoses including mental and behavioural disorder due to use of cannabis, Emotionally unstable personality disorder, borderline type ICD10 F60.31 and a history of childhood sexual abuse, he says:

> "I am offering my opinion regarding the impact that her husband's deportation would have on her. It is my view that this would be yet another stress which is then likely to cause deterioration of her already unstable mood. The risk resorting to chaotic use of illicit drugs is also heightened by early stressor."

7. It is also recorded in the letter from the GP dated 17 January 2018 that the wife has a complex history of mental and behavioural disorder since 2011; that she is prescribed propranolol for anxiety and depression, zopiclone for low mood, quetiapine for management of her mood disorders as well as promethazine and lamotrigine.

8. In addition, she is also taking tramadol and co-codamol as a result of pain she suffers from arthritis and osteoarthritis. It is also of note that in the assessment by social services conducted by the Royal Borough of Greenwich that it recommended in 2014 as follows: -

> "Based on the information gathered for this assessment, I believe that it would be detrimental to the children should the appellant not return to the family home. it appears that he continues to have a central role within the family. He has a very close relationship with all four children and has been actively involved with their upbringing.
>
> [L]'s parenting ability appears to be significantly impacted by her bipolar/borderline personality disorder for which she received psychiatric treatment and support. She also suffers from osteoarthritis which impacts upon her practical parenting ability. Prior to [G] going to prison he provided significant support for the children which helped ensure the children's basic needs were taken care of. L has relied heavily on her children to support her during [G]'s absence. However, given the previous concerns raised, this appears to be on a temporary measure until [G] is able to resume his support. This is highlighted by a period of separation between L and [G]. During this time G continued to be a protective factor for the children and continued to hold responsibilities for their care."

9. I bear in mind that there are in this case three children who are minors. Whilst the two older are teenagers, they are all still at school.

10. I bear in mind Miss Holmes' submission that the children are now older and as teenagers there is less need for the "hands on" care. That is perhaps less so in the case of the middle child who has his own health problems.

11. I bear in mind also that the finding that the older children of the family who have now established their own families would not be offering no support but I find that any support that they are likely to be able to offer is limited and at the expense of looking after their own children.

12. I consider that deporting the appellant to Jamaica would have a very significant impact on the children given the evidence set out above which I find is still relevant and cogent. I find also that removal is likely to have a significant impact on the appellant's wife given her unstable mental health and significant physical ill health which I accept causes her significant pain and makes it difficult for her to carry out everyday tasks within the home and in looking after her children. I am satisfied on the basis of the medical evidence that there is a real risk of her deteriorating rapidly and again having recourse to chaotic drugtaking, putting not just her life, but that of the children in her care, at significant risk. I consider also that this significant and rapid deterioration in their mother's health and ability to parent them would have a significant and serious impact on the children. I accept the evidence from the school that there are already beginning to be significant problems with the older child's education.

13. The stark consequence of deportation of this appellant will be to have a precipitated and significant deteriorative effect both on his wife and on their children. That is because the day-to-day emotional support provided in particular to the wife will disappear and this is not something that could

be replicated either by social services involvement or by the support of family. Whilst it may be possible for social services to support the family after things have gone wrong, that is after the event. It would not prevent the damage being done to the children nor is it likely that the appellant and his wife's older children would be in a position to offer the support necessary to avoid this.

14. I conclude that the consequences for both the appellant's wife and their children would undoubtedly be unduly harsh. The consequences are, I am satisfied, severe and bleak. This is not just the severing of a close parental relationship but it has the effect also of bringing further damage and significant and severe consequences to the appellant's wife and to their children both in separation from their father and in the effect that there would be in their mother no longer being in a position properly to care for them.

15. I bear in mind that there is of course a significant weight in the public interest to be taken into account of the fact that the appellant is a foreign national offender. Further, the offences of which he was convicted involve the supply of class A drugs and whilst the sentencing is at the lower end of the scale for such an offence, equally the public interest in the deportation of those involved in such crimes as a supplier of illegal drugs, given their pernicious and insidious effects on society. Nonetheless for the reasons given above I am satisfied first that the appellant meets the requirements of the Immigration Rules and second that these are cases to which the exceptions in Section 117C apply.

16. Accordingly, for these reasons and as announced at the hearing I remake the decision by allowing the appeal.

Summary of Conclusions

(1) The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

(2) I remake the decision by allowing the appeal, albeit on different grounds.

No anonymity direction is made.

Signed Date 13 December 2018

Upper Tribunal Judge Rintoul

ANNEX – ERROR OF LAW

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: DA/00486/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 August 2018	.....

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GW
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr L Rahman, Counsel

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Herlihy promulgated on 11 April 2018 in which she allowed the respondent's appeal against the decision made on 18 March 2014 make a deportation order against him as a foreign criminal. That decision was taken by the Secretary of State consequent to the respondent's conviction on 13 December 2013 for possession with intent to supply Class A controlled drugs for which he was sentenced to 30

months imprisonment.

2. The respondent is married and has a number of children, the three youngest of whom have British Citizenship. There are also stepchildren. The respondent's wife, LW, has a number of physical and mental health problems; she also has had problems with alcohol and drug abuse.

3. It is not disputed that the applicant has a genuine and subsisting parental relationship with his older daughter, N, his wife and their three minor children. The Secretary of State's case was not that it would be reasonable for the respondent's wife and minor children to accompany him to Jamaica, but that his deportation there, and separation from this family, would be proportionate.

4. In her decision, the judge found [51] that it would be unduly harsh to expect the children to remain in the United Kingdom without him, given the very specific mental and physical needs of their mother; and, having had regard [52] to sections 117B and s117C of the 2002 Act, that the public interest in deportation was outweighed.

5. The Secretary of State sought permission to appeal on the grounds that the judge had erred:

   (i) In failing to identify what would be the unduly harsh consequences for the children if the respondent were deported, given that the family had been able to cope in the past, and that support from Social Services might be available;

   (ii) In failing to demonstrate that she had given the required weight to the public interest.

6. On 6 July 2018 upper Tribunal Judge Jackson granted permission, observing that it was arguable that the judge had at [51] assessed the likely impact on the family in isolation, concluding that it would be unduly harsh for the family to remain with the respondent, and only then at [52] considering separately the public interest rather than balancing the public interests against the effect on family as required following MM (Uganda) v SSHD [2016] EWCA Civ 450

7. Despite Mr Rahman's submissions to the contrary, I conclude that the judge did not properly take into account the public interest in analysing whether the effect on the children of separation would be unduly harsh. Following MM (Uganda) the expression "unduly harsh" in section 117C(5) and Rule 399(a) and (b) requires regard to be had to all the circumstances including the criminal's immigration and criminal history.

8. While it is correct that the judge does refer at [53] to MM (Uganda), that is only after finding that the requirement of paragraph 399(a) of the Immigration Rules was met, and paragraph [52] is worded in such a way that she considered the public interest as mandated by section 117C of the 2002 Act notwithstanding that she had found he met the requirements

of the Immigration Rules. It is thus apparent that the judge had not properly factored the public interest into account in the assessment under the Immigration Rules but had done so afterward. That is also clear from paragraph [54] where the judge says "I have found that it would be unduly harsh for the children to remain in the UK without the [respondent]."

9. Further, I am satisfied that this error is material as the analysis of article 8 outside the Immigration Rules, in effect carried out in the alternative at [52] to [54], there is no proper or sufficient explanation given for the conclusion that the effect on the children outweighed the strong public interest in deportation.

10. In the circumstances, I am satisfied that the decision did involve the making of an error of law, and must be set aside to be remade.

11. I am, however, satisfied that the judge's findings of fact can be preserved, and thus it is appropriate for the remaking of the decision to be carried out in the Upper Tribunal.

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. The appeal will be remade in the Upper Tribunal

3. Any additional evidence on which the parties seek to rely must be served at least 10 working days before the next hearing.

Signed Date: 15 August 2018

Upper Tribunal Judge Rintoul