Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13243/2017

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 21 June 2019	**On 18 September 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LR
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Mills, Senior Home Office Presenting Officer
For the Respondent: Mr Trevelyan, instructed by TMC solicitors

DECISION AND REASONS

1. I shall refer to the appellant as the 'respondent' and the respondent as the 'appellant', as they appeared respectively before the First-tier Tribunal. The appellant was born in 1970 and is a citizen of Jamaica. He claims to have entered the United Kingdom illegally in October 1994. He was removed to Jamaica in April 1996. He re-entered the United Kingdom in May 1996 using a fraudulently obtained British passport and was arrested in August 1997 on suspicion of drug offences. On 2 February 1998, he was convicted of two offences of possessing a controlled drug and recommended for deportation. He left the United Kingdom voluntarily in June 1998 but re-entered the

country later the same month, again using a false passport and identity. He was next encountered in October 1998 and deported to Jamaica later that month. He returned the United Kingdom unlawfully in September 1999. He was convicted in 2005 of seven offences, including possession of a firearm and ammunition and was sentenced 2 years and 6 months imprisonment. He was apprehended in July 2010 but absconded and failed to report from November 2016. On 20 February 2017, a decision was taken to deport the appellant to Jamaica. A decision was taken to refuse his human rights claim on 12 October 2017. The appellant appealed against the latter decision to the First-tier Tribunal which, in a decision promulgated on 30 April 2018, allowed the appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. The appellant has two sons, JR, who was born in September 1999 and JM who was born in October 2001. He assists in the care of the children although he has been separated from their mother (AS) since 2006. AS supports both children financially. She works part-time at a Children's Mental Health Unit. AS has another child, a girl JD, who was born in August 2009. Although she is not his natural child, JD has close relationship with the appellant. All three children are British citizens.

3. I shall deal first with the final ground of appeal. The Secretary of State criticises the decision of the judge on the basis that she made no clear findings regarding the appellant's ability to reintegrate into Jamaican society. At [94], the judge wrote:

> "I take into account other factors which are relevant to the issue of whether it would be unduly harsh for the appellant to be separated from his children. I accept the appellant's evidence that he has no ties to Jamaica. His mother is deceased and he has no relationship with his sister. He is now 48 is been absent from Jamaica for the best part 24 years. I find that and is returning have no accommodation and no income and that given his age and absence of not be easy for him to find work. I find it in the circumstances will be difficult for him to even have regular telephone Internet contact with his children in the UK. I find that [AS] is on a very low income and will not be able to afford for all of the children to visit their father in Jamaica regularly. I find it appellant deportation would represent a complete severing of family ties which would be synced a significant contrast to the present situation."

4. This paragraph is problematic. The judge appears to be mixing together different considerations including the ability of the appellant to reintegrate into Jamaican society (see Exception 1, section 117C(4) of the 2002 Act) and whether the effect of separation from his children would be unduly harsh upon the appellant, a consideration which does not appear in section 117 or in any other provision. I agree with the Secretary of State that there is no evidence at all to support the judge's finding that the appellant would be so impecunious in Jamaica that he would not even be able to contact children by telephone or internet. I agree also with the Secretary of State that the judge has not made any clear findings regarding reintegration, if that was indeed what she was intending to do, in this paragraph. If she was seeking to apply Exception 1, the judge has made no finding that the appellant has been lawfully resident the United Kingdom for most of his life (as

required by Exception 1; see sub-paragraph 4(a)). The appellant's immigration history is appalling by any standard. He was first apprehended in 1996 when he claimed to have been using a false passport. He has used a number of false identities on numerous occasions to deceive the immigration authorities and, despite the fact that he appears to have lived in the United Kingdom for a number of years, he has made an application to regularise his immigration status only once, in October 2015 and then unsuccessfully. If, as is by no means clear, the judge considered that the appellant falls within Exception 1, then plainly she erred in law by so finding.

5. The first ground of appeal concerns the test which the judge had applied to the facts she found them. As recorded above, the appellant was sentenced to a period of imprisonment of more than 12 months but less than 4 years. The grounds of appeal, therefore, are in error [2] where they suggest that section 117C(6) should apply in the case of the appellant invoking a test of 'very compelling circumstances over and above those described in Exceptions 1 and 2.' What the grounds appear to be driving at is that the judge was required to apply a more stringent test than 'undue harshness' because the appellant fell within the provisions of paragraph 399D:

> 'Where a foreign criminal has been deported and entered the United Kingdom in breach of a deportation order enforcement of the deportation order it in the public interest and will be implemented unless there are very exceptional circumstances.'

6. The wording here is not the same as that contained in section 117C(6); 'very compelling circumstances' are not the same as 'very exceptional circumstances.' It is clear, however, is that a more stringent requirement is provided for in paragraph 399D, as the Court of Appeal determined in SU [2017] EWCA Civ 1069. At [44-45] the Court held:

> "Mr Yeo submitted that, while the wrong paragraphs may have been applied, there was little difference in the substance of the tests laid down by them. Paragraph 398 provides that, where paragraphs 399 or 399A do not apply (as is common ground that they did not in this case), "the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A". The requirement of "very compelling circumstances" is not, submitted Mr Yeo, in substance different from the "very exceptional circumstances" required by paragraph 399D.
>
> I am unable to accept this submission. The difference in the language of paragraphs 398 and 399D, suggesting a more stringent requirement under paragraph 399D, reflects a real difference in the circumstances covered by each paragraph. Paragraph 398 addresses the question whether a deportation order should be made, or an existing order maintained, against a person who has yet to be deported, whereas paragraph 399D addresses the very different case of a person who has been deported and then re-enters illegally and in breach of the order. In the latter case, any Article 8 claim that was raised by the deportee before his original deportation will, *ex hypothesi*, have been decided against him. It is readily understandable that in the cases covered by paragraph 399D the Secretary of State should have formed the view that there is a particularly strong public interest in maintaining the integrity of the deportation system as it applies to foreign criminals."

7. Section 177C of the 2002 Act provides:

> '**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.
>
> (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (4) Exception 1 applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
>
> (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.'

8. Section 117 and paragraph 339D came into force on the same day, 28 July 2014. The case law which developed immediately after the coming into force of those provisions rendered the application of section 117 of the 2002 Act (as amended) to the facts of any given case relatively straightforward. In *MM (Uganda) v Secretary of State for the Home Department* [2016] EWCA Civ 617, it was held to be correct to take into account all the circumstances of the case, including the seriousness of the offending of an appellant and the views of the Secretary of State as expressed through the Immigration Rules, when determining whether the effects of deportation of a parent upon a child would be unduly harsh. By reference to the jurisprudence, an appellant might be able to show that, whilst the effects of his deportation on his child might otherwise be accurately described as unduly harsh, he would be unable to resist removal because there existed no 'very exceptional circumstances.'

9. Subsequent developments in the jurisprudence have now, however, led to a tension between the statutory provisions and paragraph 399D. In *KO (Nigeria)* 2018 UKSC 53, the Supreme Court held that:

> "32. Laws LJ's approach [in MM (Uganda) [2016] EWCA Civ 450] 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."

10. The Secretary of State has not taken any steps to amend paragraph 399D following *KO (Nigeria).* As a consequence, the force of paragraph 399 has, to use the expression employed by Mr Mills, who appeared for the Secretary of State before the Upper Tribunal, 'largely evaporated.' A Tribunal is required to apply section 117C(5) when the appellant has a genuine and subsisting parental relationship with a qualifying child or a qualifying partner. The test is that of undue harshness and the focus, following *KO*, solely upon the effect upon the child; that those circumstances include the fact that the parent has returned to the United Kingdom in breach of a deportation order or that the offending of the appellant may be particularly serious will not be relevant to the analysis. Following *KO (Nigeria),* it is difficult to see how the absence of 'very exceptional circumstances' will defeat an appeal which meets the requirements of Exception 2

11. In the present appeal, the judge reached the same conclusion, albeit by a rather different route. At [46], she wrote that, 'having considered all the circumstances, I find the paragraph 399D applies to this appellant and on this basis there is no need for me to consider the exceptions and paragraph 399 (a) and (b).' It is not clear to me why she reached that particular conclusion but in the subsequent paragraph she found that she was 'nevertheless' required to consider proportionality and that the Immigration Rules 'do not necessarily represent a complete code in respect of deportation and there may be other very compelling circumstances factors *(sic)* which would warrant a departure from the rules.' She then writes, 'I additionally take into account that section 117C applies and does not preclude consideration of whether deportation would be unduly harsh for a child remain in the UK without its parent in circumstances where the parent has been subject to a previous deportation order. Section 117C is primary legislation and states explicitly that exceptions may apply to those foreign criminals who have been convicted of offences which have attracted prison sentences of less than four years.' She then proceeded to apply the 'undue harshness' test to the facts. In the light of what I have said above, I do not consider that she was wrong in law to do so. Whether or not there exist in this case 'very exceptional circumstances' the judge was still obliged to apply section 117C and to consider, without reference to paragraph 399D, whether the effects of the appellant's deportation upon the qualifying child would be unduly harsh. The

grounds of appeal, therefore, fail to establish that the judge has erred in this part of her analysis.

12. The second ground of appeal proceeds on the assumption that the test of undue harshness did apply in this case. At [7] the ground state:

> "There is no suggestion in the determination that the children would not be adequately cared for by social services if necessary if the appellant was deported or there exist any special circumstances such as illness that require the appellant's continual presence in the UK to secure their well-being. The only factor identified [88-93] is that the father cares for the children as any father would; this is in turn normal expected behaviour and fails to reach the high threshold of being and duly harsh, much less the even higher threshold required in this instance. It is generally accepted that it is in the best interests of children to remain in contact with their biological interests (sic) but in deportation context the splitting of families is generally proportionate, notwithstanding the interests of the child or children."

13. I have already dealt above with the 'even higher threshold required in this instance.' At [88-93], the judge observed that the absence of the appellant would significantly impact upon the education of the child JM 'because his father is so supportive of him and he is at a crucial stage in his education.' She found that the absence of the appellant would 'also represent a loss' in the life of the child, JD. The judge found that the appellant assisted the child's mother with child care in the holidays and when she is working at the weekends. At [91], the judge criticised the cramped living arrangements for the children at their mother's home. She noted that if the appellant is deported AS would be unlikely to be able to maintain the mortgage and that the home which has been part of JM's life 12 years will no longer be available. At [92], she expressed concerns regarding JM's welfare noting that he is 'just about to undertake important exams [GCSEs].' She found that 'the prospects for JM, in particular, do not just involve difficult or inconvenient circumstances but were have excessively severe consequences for him in terms of his emotional, educational and future development as well as in terms of his daily living circumstances.'

14. Mr Mills submitted that there was no evidence at all for that last finding. I note that the judge did accept in full the conclusions of the social work report of Mrs Prempeh [86] but her conclusions are more tentative than the more trenchant finding of the judge. The expert regarded the separation of the appellant from the children is likely to be a 'significant loss' and considered that 'any further disruption is unlikely to be conducive to JM's educational achievement and attainment. I am of the view that if [the appellant] remains in the UK, it would help promote consistency stability and emotional well-being for J, JM and JD.' These conclusions are both generalised and, with respect, bland. The presence of a parent is likely to 'promote' the 'consistency, stability and emotional well-being' of any child; the question which the expert fails to address is whether JM will suffer unduly harsh consequences if his 'consistency, stability and emotional well-being' are not promoted by his father. I find that the judge's finding which I have quoted at [13] above is not supported by the evidence.

15. Mr Mills also submitted that the judge had placed excessive weight upon the fact that the First-tier Tribunal hearing in April 2018 was taking place a month or so before JM

undertook his GCSE examinations. He submitted that determining whether the effect of the appellant's deportation on JM would be unduly harsh necessarily involved going beyond circumstances peculiar to the date of the Tribunal hearing; the test involved an assessment of what the effects of deportation may be in the foreseeable future.

16. In his submissions, Mr Trevelyan told me that the decision of the judge had been 'possibly generous, but not outside the margin of generosity' within which the Tribunal was required to operate. The judge had considered all the relevant circumstances and reached a conclusion which was available to her.

17. I have considered all the evidence which was before the First-tier Tribunal very carefully. I agree with Mr Mills that the social worker report does not support the finding of the judge at [92]. The judge was required to consider the facts as they existed at the date of the hearing but I consider there is force in Mr Mills's submission that the judge has given excess weight to the fact that the hearing was taking place whilst JM was revising and preparing for his GCSEs. In my opinion, a proper application of the test involved looking further than the next 4 to 6 weeks after the hearing. The impact of deportation upon a child's education, including the effect on his/her performance in forthcoming examinations, is a relevant consideration but it cannot be right that an appeal might succeed if it is heard in April, immediately before the examinations take place, whereas it might not succeed had it taken place in December or February. I also agree with Mr Mills that, notwithstanding the closeness of the relationship between the children and their father, the fact remains that he is not their primary carer. The assistance which he provides to AS is not different in kind from that which any separated father might provide.

18. I do not criticise the judge for allowing her analysis to be tainted by her undoubted sympathy for these children but I admit that I have struggled to identify any circumstance in this appeal which might establish that the effects of the appellant's deportation would have unduly harsh consequences for JM. In *KO (Nigeria)* at [23], the Supreme Court held that: '… 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.' My view, all of the likely effects of deportation in this appeal as indicated by the evidence fall firmly into the category of likely or 'due' hardship. The Secretary of State contends that the judge, on the facts, has reached a conclusion which was not available to her had she applied the test correctly. I agree. It follows that the judge erred in law and I set aside her decision. Neither representative indicated to me that, should I find an error of law set aside the decision, it would be necessary for the Tribunal to receive fresh evidence before re-making the decision. The family's circumstances are not controversial. I do so because I find that the effects of the

appellant's deportation upon the children would not be unduly harsh. I dismiss the appeal on human rights grounds.

Notice of Decision

I set aside the decision of the First-tier Tribunal. I have remade the decision. The appellant's appeal against the decision of the Secretary of State dated 12 October 2017 is dismissed.

Signed Date 16 August 2019

Upper Tribunal Judge Lane

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.