Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15065/2017

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 18 March 2019	**On 20 March 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KADOOVEL MOOTHIA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Mills, Senior Presenting Officer
For the Respondent: Ms Ali, instructed by Zakk Associates

DECISION AND REASONS

1. I shall refer to the appellant as the respondent and the respondent as the appellant (as they respectively appeared before the First-tier Tribunal). The appellant was born on 6 February 1971 and is a citizen of Mauritius. He entered the United Kingdom in December 2005. He lives with his wife who is a British citizen naturalised in 2017. The couple have twin daughters who are aged over 18 years. On 16 May 2017, the appellant pleaded guilty at Nottingham Crown Court to a charge of fraud by abuse of position. Whilst a manager of a care home, he had stolen £8000 from a patient's bank account. He was sentenced to 12 months imprisonment. On 13 November 2017,

a deportation order was made against the appellant and on 14 November 2017 the Secretary of State gave reasons for refusing the appellant's human rights claim. The appellant appealed against that decision to the First-tier Tribunal which, in a decision promulgated on 28 December 2018, allowed the appeal on human rights grounds (Article 8 ECHR). The Secretary of State now appeals with permission to the Upper Tribunal.

Giving Weight to Immaterial Matters

2. The Secretary of State challenges the decision on the basis that the judge has improperly had regard to matters which were relevant or immaterial. As at the date of the hearing before the First-tier Tribunal, the twin daughters of the appellant were aged over 18 years. Notwithstanding that fact, the judge proceeded to carry out an analysis applying paragraph 399(a) of HC 395 (as amended). At [55], the judge wrote:

> "Human rights law recognises 'no bright line' principle with regard to children who have turned 18 but remain embedded in a close-knit family units with their parents. I have no doubt that the children continue to enjoy family life with their parents and that the *Kugathas* criteria continue to be met. The fact that their pastor 18th birthday does not mean that their emotional dependency on their parents has been switched off."

3. It is clear that the judge was aware that paragraph 399(a) did not apply in terms on account of the age of the children. He was wrong, in my opinion, to hold that there was no 'bright line' in the application of the provisions of the Immigration Rules. It is the case that the principle enunciated in *Kugathas [2003] EWCA Civ 31* has been qualified by the acknowledgement that children do not cease to be dependent members of a family simply by achieving the age of 18 years. However, that acknowledgement is relevant to the analysis of the appeal on Article 8 ECHR grounds outside the rules, not to that under the Immigration Rules or by reference to the 2002 Act. Ultimately, there was no error in the judge's approach because, although his application of the rule to the children in this instance was nugatory, the matters which he considers in applying the rule, such as the dependence of the adult children on their parents, remained a relevant consideration in an appeal on Article 8 ECHR grounds. Whether the judge should have considered Article 8 ECHR outside the rules is discussed below but I am not satisfied that this error *per se* materially affects the outcome of the appeal.

Very compelling circumstances over and above Ex 2 (Section 117C of the 2002 Act)

4. The judge, having considered the application of the Immigration Rules, proceeded also to consider section 117C of the 2002 Act (as amended):

> 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.

5. It is clear that the judge had regard to the authority of *NA (Pakistan)* [2016] EWCA Civ 662, noting that 'the appellant cannot avail himself of this safety net [Exceptions 1 and 2 of section 117C] and so he must fall back on very compelling circumstances, over and above those described in Exceptions 1 or 2.'

6. *NA* provides guidance which is particularly relevant to this appeal at [27], [33] and [36]:

> "27. For all these reasons we shall proceed on the basis that fall back protection of the kind stated in section 117C(6) avails both (a) serious offenders and (b) medium offenders who fall outside Exceptions 1 and 2. On a proper construction of section 117C(3), it provides that for medium offenders "the public interest requires C's deportation unless Exception 1 or Exception 2 applies or unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2. ...
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> 33. Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient. ...
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> 36. In relation to a medium offender, first see whether he falls within Exception 1 or Exception 2. If he does, then the Article 8 claim succeeds. If he does not, then the next stage is to consider whether there are "sufficiently compelling

> circumstances, over and above those described in Exceptions 1 and 2". If there are, then the Article 8 claim succeeds. If there are not, then the Article 8 claim fails. As was the case under the 2012 rules (as explained in MF (Nigeria)), there is no room for a general Article 8 evaluation outside the 2014 rules, read with sections 117A-117D of the 2002 Act."

7. The rules read with the statutory provisions of section 117 should leave little, if any, room for an appeal to succeed on Article 8 ECHR grounds. In the instant appeal, the judge found that, 'distressing and destabilising as her husband's [and, by extension, the children's father's] absence will be, it is hard to see…how the consequences would be any different from any disruption of a genuine and subsisting marital [and parental] relationship arising from deportation' [72]. Having reached that conclusion, the judge proceeded to consider Article 8 ECHR outside the rules. He does not appear to have appreciated that, as the Court of Appeal stressed in *NA*, the margin for the appellant succeed was very narrow indeed. Instead, after a very thorough analysis of the immigration rules and the statutory provision, the judge's decision ends somewhat abruptly. The judge found that the appellant was genuinely remorseful, that his offending was out of character and that he presented a very low risk of reoffending. He found that 'it is in the appellant's favour that he is at the bottom end of the scale in terms of being a medium offender.' The judge found that the appellant speaks good English and is well integrated into UK society. Then, at [82], he concluded his analysis as follows:

> "On the Article 8 (1) side of the equation, there are the factors contributing a strong Article 8 claim which I previously identified in the context of my discussion at the extent to which the appellant meets the exceptions to deportation provided in the Rules. In summary, the effect of deportation will be to split up a close-knit family of lawfully-settled migrants."

8. I find that the judge has done little more than to recycle considerations which had failed to satisfy the exceptions set out in the statute but which, for reasons which are not clear, the judge finds do occupy that very narrow margin 'over and above' those exceptions. He has, in effect, found that the splitting up of a close-knit family of lawfully-settled migrants is the natural consequence of deportation but is also a very compelling circumstance. As Court of Appeal observed in *NA*, 'there is no room for a general Article 8 evaluation outside the 2014 rules, read with sections 117A-117D of the 2002 Act'. That evaluation is, in effect, is what the judge has carried out here, giving decisive weight to considerations which he had already rejected as not being unduly harsh.

9. I have no doubt that the judge had sympathy for this family, as I do. Unfortunately, that sympathy has led the judge into legal error. I have no doubt that the deportation of the appellant will have a very distressing effect not only upon him but upon his adult children and his wife. However, there are no circumstances attaching to this family which are so compelling as to distinguish their distress from that of any family faced with the deportation of a father/husband. The tribunal has no option but to set aside the decision of the First-tier Tribunal and, on the same facts, to

remake the decision dismissing the appellant's appeal against the Secretary of State's decision to deport him.

Notice of Decision

10. The decision of the First-tier Tribunal promulgated on 28 December 2018 is set aside. I have re-made the decision. The appellant's decision against the decision of the Secretary of State to refuse his human rights claim is dated 14 November 2017 is dismissed.

Signed Date 18 March 2019

Upper Tribunal Judge Lane