Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/20909/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th December 2021	**On 14th January 2022**

Before

UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE STOUT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR G A O
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr E Raw instructed by Caulker & Co Solicitors
For the Respondent: Mr D Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

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

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings. We have imposed an anonymity direction

because the appeal not only involves children but also children and a vulnerable adult with mental health problems

1. The appellant is a citizen of Jamaica born on 1st December 1971 and he appealed the decision of the Secretary of State dated 4th October 2018 refusing the appellant's human rights claim following a decision to sign a deportation order against him on 19th August 2017. His appeal was allowed by the First-tier Tribunal ("the FtT") but the Secretary of State was granted permission to appeal. In a decision dated 26th October 2021 the Upper Tribunal found an error of law on the basis of inadequate reasoning and set the FtT decision aside, save that the findings at paragraphs 65 and 74 were preserved, that is that the appellant would not face very significant obstacles to his integration in Jamaica and that it would not be unduly harsh to expect the appellant's wife to relocate to Jamaica with the appellant. _

2. The appellant had arrived in the UK on 23rd December 1998 and was given six months' leave to enter as a visitor. On 1st April 2004 he made an application for indefinite leave to remain as the spouse of a settled person and was granted indefinite leave to remain on the same day. The appellant was, however, convicted on 27th January 2017 at Wood Green Crown Court of possession with intent to supply a controlled drug of class A heroin for which he was sentenced on 27th January 2017 to five years' imprisonment. At the same time, he was also convicted of possession with intent to supply a controlled drug class A other (cocaine) for which he was sentenced to five years' imprisonment concurrently.

3. For the resumed hearing the appellant produced further material which we admitted under Rule 15(2)A of The Tribunal Procedure (Upper Tribunal) Rules 2008. The evidence was not available before the FtT and it was in the interests of justice to admit the documentation. This included updated statements from the appellant dated 25th November 2021, his wife dated 18th November 2021 and his daughter OO (born on 10th January 2008), and his stepson IA dated 3rd December 2021 and a statement of the aunt, Ms C S, dated 3rd December 2021. There was a further letter from Alex Mthobi, independent social worker ("ISW") dated 4th December 2021 by way of addendum to his previous report. Additionally, there was a report from IA's, the appellant's stepson's support worker at St Mungo, Ms S Adeymir, and a letter from Adrienne Spell from the Free Chapel Gainesville Georgia USA dated 20th June 2019. Mr Raw stated that this latter letter was available but not produced before the First-tier Tribunal but there was no objection from Mr Walker and in the interests of justice we permitted its admission. We also admitted an email dated 3rd December 2021 from CAMHS in relation to the appellant's children.

4. At the hearing the appellant and his wife both attended and adopted their statements. Their daughter OO also attended and adopted her statement

and gave oral evidence. We have referred to their evidence as pertinent within the body of our assessment.

5. Mr Raw submitted that the children could not relocate to Jamaica and further evidence had been provided which demonstrated there were very compelling circumstances such that the father should not be removed from the United Kingdom and separated from his children.

6. Mr Walker conceded, having heard the evidence, that with regards the children there were very compelling circumstances.

Analysis

7. Section 117A of the Nationality Immigration and Asylum Act 2002 Act ("the 2002 Act") so far as material provides:

> "**117A Application of this Part** (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts
>
> > (a) breaches a person's right to respect for private and family life under Article 8, and
> >
> > (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> > (a) in all cases, to the considerations listed in section 117B, and
> >
> > (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
>
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)"

Section 117B of the 2002 Act, so far as relevant, provides:

> "**117B Article 8: public interest considerations applicable in all cases**
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> > (a) are less of a burden on taxpayers, and
> >
> > (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to

enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

…

Section 117C of the 2002 Act, so far as relevant, provides:

"**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.

(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. ..." [our underlining]

8. The approach to the application of the exceptions under Section 117C(4) and the application of Section 117C(6) for an individual who has been sentenced to a term of imprisonment over 4 years, as in this appeal, was set out in **NA (Pakistan) v SSHD** [2016] EWCA Civ 662 :

"37. In relation to a serious offender, it will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are 'very compelling circumstances,

> *over and above those described in Exceptions 1 and 2' as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6)."*

9. Consequences for an individual will be "harsh" if they are "severe" or "bleak" and they will be "unduly" so if they are "inordinately" or "excessively" harsh taking into account "all of the circumstances of the individual". As per **HA (Iraq) v SSHD** [2020] EWCA Civ 1176**,** it is necessary to look at the emotional harm on each of the children individually. The focus in relation to the exceptions should be the effect of the deportation on the partner or child. It is also relevant to consider the importance to be attached to the British citizenship of the children.

10. **KM v Secretary of State** [2021] EWCA Civ 693 confirmed some underlying principles in relation to deportation including that the evaluation of the public interest balanced against Article 8 factors requires a "wide-ranging exercise" **(NA (Pakistan) v SSHD** [2016] EWCA Civ 662), applying Strasbourg principles to ensure compatibility with the ECHR. The flexible approach is relevant to the analysis under s. 117C(6), and an assessment of both private and family life is necessary.

11. We first consider the effect on the children of the appellant's deportation. We have considered the best interests of each child separately and with reference to **Zoumbas v Secretary of State** [2013] UKSC 74. The best interests of the children are not necessarily are 'trump' card but a primary matter to be considered.

12. The written evidence of Mr Mbothi before the UT comprised his original report and further an additional letter which was unchallenged. Overall, the evidence persuaded us that the removal of the appellant from the UK would be unduly harsh for the reasons we give below. We found that the original report described upsetting and harsh circumstances should the children be separated from their father, but did not independently found very compelling circumstances. We found, however, the oral testimony of OO in the Upper Tribunal in conjunction with the additional report from Mr Mbothi, very compelling and this persuaded us that the removal of the appellant from the children's lives would not only be unduly harsh but additionally was one of very compelling circumstances for the reasons which follow.

13. Mr Walker, in our view sensibly, conceded that it was not expected that the children should return to Jamaica and that there were very compelling circumstances in relation to the removal of the father from the United Kingdom with reference to the children. He made this concession

because of the reports subsequently produced and having heard the oral evidence in particular of OO.

14. The children living at home with their parents are OO (female) born on 10th January 2008, RO (male) born on 15th April 2009 and SO (female) born on 25th August 2016. All three are British citizens and the eldest child, OO, is at secondary school in Year 9. The younger two are at primary school. We conclude that it would be not only unduly harsh to expect the children to remove to Jamaica, but there are very compelling circumstances why they should not do so, particularly OO, who has commenced her secondary education and has previously experienced disruption in her school career when removed abroad and has evident mental health problems. Although not a trump card the three children have British citizenship which is an important factor; they have lived most of their lives in the UK and are entitled to access the education and health care systems. Two of the children are also receiving counselling and care for their mental health problems. Removal would disrupt this. We accept the evidence of the mother that all three children were sent to stay with family in the USA because of and during the incarceration of the father. The mother works nightshifts at an NHS Hospital caring for vulnerable people with mental health difficulties and could not cope with caring for the children on her own. OO and RO had to attend school in the USA, the effect of which separation caused emotional disturbance and RO received counselling while in the USA. Even the youngest, SO, went to the USA albeit for a few months only.

15. OO, who is nearly 14 years old, told us herself, in terms which were frank and credible, that she had suffered and struggled to adapt to the US school and her then new environment and experienced bullying. Although she was content to give evidence, we found her to be a vulnerable child. The school reports from the USA indicated that the children were progressing, but there were references to emotional instability and we accept together with the oral evidence from OO that she suffered when separated from her family in the USA and that she was particularly attached to and dependent on her father and upset to be separated. She stated in her witness statement that she was ‘very upset when I was sent to live in America’ because she ‘missed both parents‘. She expressed hope in her statement and orally that her father would never be sent to Jamaica. The bond with her father appears to have deepened since his release as she described how her father is the primary carer in terms of emotional and practical support, cooking, attending to their uniforms, cleaning, personal hygiene, school duties and listening to and talking to her and her siblings and disciplining them. We accept this evidence as credible and because it is clear that as the mother works five nightshifts per week, her contact with the children is necessarily limited. The letter from the school of RO and SO confirmed that the father delivered and collected the children from school, talked to schoolteachers and was supportive of the children.

16. The initial report of the ISW described the difficulty the children had going to the USA and how difficult the separation from the father would be for the children particularly RO who was closely attached to his father. His fragility was described in the report of the ISW who recorded that he had broken down in tears at the thought of losing his father on a number of occasions during the interview with the social worker and who stated 'it will devastate me if Dad was to leave us'.

17. The youngest child is only four years old and as the ISW reflected that there was a closeness between her and her father, but her age prevented an interview, and she was very young when he was in prison and so the damage to her was 'not yet evident'.

18. The ISW's second letter or report dated 4th December 2021, however, more directly addressed the effect of the deportation of the appellant on his children should they be left in the UK and described the emotional distress at the thought of OO losing her father and her dependence on him and that 'she has had thoughts of ending her life'. The ISW stated:

> '*it would appear that OO's mental health [is] taking a downward trend as she has attempted suicide linked to the prospects of the father's potential deportation looming over the children's heads.*
>
> *OO's and RO's schools have now provided a (sic) counselling for both of the siblings. Both children's mental health distress has been triggered by the possibility of their father being deported back to Jamaica'.*

19. The Social Emotional Wellbeing and Interventions Manager from OO's school also confirmed on 14th July 2021 that RO received school counselling and had been referred to Child and Adolescent Mental Health Service for suicidal thoughts and self-harm. Indeed, a letter from CAMHS indicated that that referral had taken place although we were not privy to any further detail.

20. We accept therefore on the evidence now produced that the removal of the father would have a calamitous and overwhelming effect on the children and very much more than undue harshness for these children who now, at a critical age, have had the long-term support and care from their father during their waking hours and when not at school. This is the likely effect before we even consider what arrangements the mother would make for caring for the children.

21. The mother gave evidence that there is no other family support available to help with the children. Of the three adult children that either the appellant or his wife has, one (IA) has significant mental health difficulties, the other two live further away and do not have a good relationship with the minor children. We accept the mother's evidence, which was consistent, that no assistance could be derived from the adult children should the father be deported. The ISW considered that if the mother resigned her job to look after the children it would have a negative

emotional impact on the children. Although the loss of work to care for the children is something that may be anticipated in deportation cases in relation to the partner, in this case the indirect impact on the children would nevertheless be profound. We accept, as the ISW pointed out, that the children had already suffered trauma when sent to the USA, not least because of the separation from their father, and separation would trigger further trauma.

22. The ISW confirmed in his previous report that the children had experienced mental health difficulties when in the USA but the letter from Free Chapel Counselling Centre which had been shown to the ISW but not available until produced before the Upper Tribunal, confirmed that RO whilst in the USA received counselling services in March 2019 (towards the end of the period of when the father was in prison) and had 'difficulty coping with feelings of sadness and anger poor self-esteem excessive anxiety or worry due to change of environment after moving to the United States'.

23. We accept the mother's oral evidence, which was consistent and thus credible, that the children were sent to the USA to her mother and sister because she could not cope. It was also noted that the mother suffers from high blood pressure and other health conditions although we did not specifically have medical evidence. The youngest child remained with the mother in the UK save for a few months when she too was sent to the States. The Free Chapel letter continued 'RO has begun discussing difficulty adjusting to new life in the US and hardships prior to moving'. RO was to receive ongoing assessment and treatment. We accept, in conjunction with the ISW reports, that this was a reaction to the separation from his parents and particularly, we accept, his father.

24. The children's mother also confirmed the attachment of the children to their father. She described how from birth the father had spent more time with the children and particularly now as she was working full time on night shifts. This caring role had been maintained by the appellant father for the last 2 ½ years. On this basis we accept that the father had recommenced a more integral and irreplaceable role in the children's lives since his release from prison not least because of the nature of the working life of the mother. This in turn had increased the shift of the emotional load onto the father. The father and daughter clearly had a very close emotional bond that could be discerned from their interaction at court.

25. We do not accept that social services could ameliorate the lacuna in the lives of OO and RO in terms of emotional damage. OO has already been referred to CAMHS and the educational services appear to have offered counselling.

26. The circumstances of the children overall amount to very compelling circumstances as Mr Walker rightly conceded.

27. We were also told that the appellant had an older adult son and two stepsons one of whom (IA) was particularly attached to the appellant and considered him his father. That stepson was provided accommodation by St Mungo's Charity and his support worker from St Mungo's, Veronica Gibbins confirmed that he was a vulnerable young adult with mental health-related support needs. He had been supported since 2016, that is nearly five years. Ms Gibbins confirmed in her letter that IA saw the appellant as having an important role in his life and looked to him for emotional support and 'in the past few months, IA has been recovering after an attempt at taking his own life. He is in a very precarious and delicate situation. In these difficult times, his support network has been particularly important as he improves his mental health and well -being. I have seen that the support of his father has been invaluable'.

28. We acknowledge that IA is not a child but nonetheless is vulnerable with his own mental health needs and bearing in mind the role that the appellant plays in terms of emotional support, we concluded this was a further very compelling circumstance.

29. A's mother, the appellant's wife, told us that his mental health had plummeted since his knowledge that the appellant may be deported, and he was very concerned that he would lose the support of his father should he leave the UK. His removal would, according to Ms Gibbins, severely impact IA.

30. For the reasons given we find that the best interests of the minor children living at home because of their age, schooling, previous disturbance and mental health issues, would be to remain in a single family unit with their mother and father. The removal of the father would have not only an unduly harsh effect on the children but the effect on the children, as a discrete factor, let alone cumulatively would also constitute very compelling circumstances. Additionally, the removal for IA would also constitute a very compelling circumstance.

31. The evidence of the appellant and his wife as to the impact of his imprisonment on the family was not challenged either in the FtT or in the Upper Tribunal. We accept as did the FtT that it would be unduly harsh to expect the appellant's wife to remain in the United Kingdom without him not least because of her oral evidence of being unable to cope with caring for the children whilst the appellant was in prison because they were sent to her mother and sister in the USA. As indicated, however, the finding of the FtT that it would not be unduly harsh to expect the appellant's wife to relocate to Jamaica with the appellant was preserved. The wife had friends in Jamaica which she had made since she first visited the country and which she visited when she was struggling to cope whilst the appellant was in prison. Although a British citizen she was born in Monserrat and only moved to the United Kingdom in 1997. If considering the appeal on the basis of the wife alone the exception of Section 117C(4) would not be fulfilled.

32. In terms of Section 117C (4) and the appellant's private life, the appellant himself is now 50 years old and has lived in the United Kingdom for nearly 23 years. He was granted indefinite leave to remain on 1st April 2004 and save for the criminal convictions is integrated in the United Kingdom by virtue of the length of his residence and his connections with his immediate family and his mother and sister. Although it cannot be said that to date, he has had a general regard for the law because of his specific and serous conviction, until that date he had not offended, and subsequent to his release in July 2019 he has not committed further offences. We take into account that his status was not precarious. We accept that, despite his offending, owing to the length of his time in the UK and his ties and family here (he has his wife and three British citizen dependent children living with him), he is socially and culturally integrated. He asserted he no longer had immediate family in Jamaica since the death of his father although he had spent his formative life there. He had last visited Jamaica in 2016. There was no evidence to suggest that the appellant had any health or other problems and had work experience including as an Uber drive and in supermarkets.

33. We do not find even considering the length of time he has lived in the UK, using the test in **Secretary of State v Kamara** [2016] EWCA Civ 813, (a broad evaluative approach of whether the appellant would be able to reintegrate should he be returned) that the appellant would encounter very significant obstacles to return to Jamaica where he spent much of his formative years. Indeed, he did not attempt to persuade the court otherwise and we preserved a finding to that effect made by the FtT.

34. The public interest "almost always" outweighs countervailing considerations of private or family life in a case involving a 'serious offender', although a "very strong claim" may be successful. We are aware that following **Hesham Ali v Secretary of State for the Home Department** [2016] UKSC 60 paragraph 38 it was stated "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. …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)."

35. We are cognisant that the appellant has very serious convictions for the possession and supply of class A drugs both heroin and cocaine and have regard to the wider public interest in the appellant's deportation. As set out in **OH (Serbia) v Secretary of State for the Home Department** [2008] EWCA Civ 694 it is not only the risk of the reoffending by the person concerned but further the need to deter foreign nationals from committing serious crimes and that deportation can express society's revulsion at serious crimes. The supply of drugs causes untold misery to many people and can be described as a scourge on society. The factors in

favour of deportation can be referenced by the appellant's concurrent prison sentence of five years on two counts of possession.

36. Rehabilitation would not ordinarily bear material weight as per paragraph 33 of **RA (s.117C: "unduly harsh"; offence: seriousness)** Iraq [2019] UKUT 123. As identified at paragraph 141 of **HA (Iraq),** however**,** rehabilitation should not necessarily be excluded from the frame altogether, although any weight to be attached to the latter will be fact sensitive.

37. His failure to offend in such a short period (he was only released in 2019) would add no weight were it not for the letter of Charlie McKenzie Probation Officer dated 24th November 2021, who stated that the appellant 'progressed well while he was on probation…[and] has been pro-active in the community by helping associates with painting and decorating while on his order…[and] has been pro-active in gaining employment and has complied well with interventions'. He confirmed that the appellant had 'received no warnings while being on probation and understands the reasons for why he offended and there has been no evidence of [the appellant] further offending. [He] presents as pro-social and [he] recently gained a full-time job and a construction qualification'. The appellant told us that he had registered with an agency and expected to start some work in the New Year. We take this into account.

38. In terms of Section 117B the appellant can speak English and his wife would appear to be the breadwinner preventing the appellant from relying on public funds. He had worked and was seeking work with an agency when he appeared before the Upper Tribunal. His family life in the UK had been established whilst he was here lawfully. These factors are neutral. They do not decrease the weight to be attached to the public interests but neither do they add to it.

39. The appellant needs to satisfy not just the exception under Section 117C(4) but additionally Section 117C(6). For the reasons given above we conclude that the effect on the children would not only be unduly harsh if the appellant be removed but the effect on the children would amount to very compelling circumstances such that he can fulfil Section 117C(6). Further to **Beoku-Betts** [2008] UKHL 39 we also factor in the effect that the removal of the appellant would have on his stepson. There are thus individual factors which we find fall into the 'very compelling category' and further, in the round the circumstances, as the Home Office conceded, are very compelling and thus sufficient to outweigh the public interest in deportation.

40. We therefore allow the appeal.

Notice of Decision

The appeal of Mr GAO is allowed.

Signed H Rimington Date 20th December 2021

Upper Tribunal Judge Rimington