Neutral Citation Number: [2018] EWCA Civ 2817

Case No: C5/2016/1880

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM: THE UPPER TRIBUNAL
(Immigration and Asylum Chamber)
Upper Tribunal Judge Lane

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2018

Before:

LORD JUSTICE UNDERHILL
(VICE-PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION)
LORD JUSTICE SIMON
and
LORD JUSTICE COULSON

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Between:

The Secretary of State for the Home Department	**Appellant**
and	
SS (Jamaica)	**Respondent**

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Ms Catherine Rowlands (instructed by the **Government Legal Department**) for the Appellant
Ms Lucy Mair (instructed by **Greater Manchester Immigration Aid**) for the Respondent

Hearing date: 4 December 2018

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Judgment Approved

Lord Justice Simon:

Introduction

1. This is an appeal from the decision of Upper Tribunal Judge Lane promulgated on 12 January 2015, in which he dismissed the appeal of the appellant ('the Secretary of State') against the decision of the First Tier Tribunal ('the FtT'). The FtT (Judge Foudy) had allowed Respondent's appeal against the Secretary of State's decision to deport him for serious drugs offences.

2. The focus of this appeal is on the decision of the FtT and, particularly, whether the FtT applied the right legal test and, if not, whether the facts found were such as to have justified the decision if the right test had been applied.

The background facts

3. The Respondent arrived in the UK in April 1998. In June 2002 he married a British citizen whom it is convenient to refer to as Stacey. They had two children who were British citizens: K (born in August 2003) and S (born in May 2006).

4. Another of the Respondent's sons, J (born in December 1995), and his nephew, M (born in December 1995) and whom he had raised as a son, arrived in the UK as visitors in November 2004. They were aged 9 at the time, and moved into the family home with the Respondent, Stacey, K and (in due course) S. The leave of J and M was belatedly regularized, and they were granted leave to remain in the UK on the basis of their long residence.

5. After a failed application to remain in the UK as Stacey's spouse, the Respondent voluntarily returned to Jamaica to regularize his status in June 2006. He returned to the UK in April 2007 and resumed his family life with Stacey and the four children.

6. In January 2010, the Respondent pleaded guilty to two offences of possessing Class A drugs with intent to supply; and was sentenced to a term of three years and four months imprisonment. Shortly before this the Respondent had developed a relationship with a new partner ID, a Zimbabwean national; and their son, known as JJ, was born in October 2010, while the Respondent was in prison. He was released from immigration detention in April 2012 and began living with ID and JJ.

7. At the time of the FtT hearing the Respondent relied on four family relationships.

8. First, his relationship with his son J and his nephew M. They had both lived in the UK since November 2004 and had both been granted leave to remain based on their long residence. Their futures were accepted by the FtT as being likely to be in the UK. They had lived in the family unit with the Respondent until his imprisonment in October 2010 and thereafter remained living with Stacey, K and S. In September 2012 they had begun living with the Respondent's sister, Sanya. They were both full time college students at the date of the FtT hearing.

9. The second relationship was that with K and S. The Respondent had lived with them and their mother in a family unit from the time of their births until his imprisonment in October 2010. Thereafter he had ongoing contact with them, including overnight stays. Those children's best interests had been comprehensively assessed by

CAFCASS on 30 September 2013. This assessment concluded that his continued involvement in their lives was in their best interests, in the light of their positive relationship both with him and their half-siblings.

10. Thirdly, he relied on his relationship with his son JJ, with whom he lived together with JJ's mother.

11. Fourthly, reliance was placed on the interrelationship of the five siblings with each other, which to a large extent depended on the Respondent remaining in the country.

The correct legal approach

12. The correct approach was largely common ground. The deportation of criminals is governed by the provisions of sections 32 and 33 of the UK Border Act 2007 and paragraphs 398, 399 and 399A of the Immigration Rules, which specifically address a potential deportee's article 8 rights.

13. At the time of the FtT decision, paragraph 398 provided, so far as material:

> Where a person claims that their deportation would be contrary to the UK's obligations under article 8 of the Human Rights Convention, and
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> …
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> (b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years and more than 12 months …
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> …
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> the Secretary of State in assessing the claim will consider whether paragraph 399 or 399A applies, and if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

14. Paragraph 399 did not apply because, although the Respondent had a genuine and subsisting relationship with three children under the age of 18 living in the UK who qualified either under paragraph 399 (a)(i) or (ii) (namely J, S and JJ), in each case there was another family member who was able to look after them, within the meaning of paragraph 399(a)(i) and (ii)(b).

15. It was therefore common ground before the FtT that neither paragraph 399 nor paragraph 399A of the Immigration Rules applied. It followed that the decision to deport turned on whether there were 'other factors' which amounted to exceptional circumstances that outweighed the public interest.

16. What may amount to exceptional circumstances has been the subject of consideration in a number of cases to which we were referred: *MF (Nigeria) v. Secretary of State for the Home Department* [2013] EWCA Civ 1192; *Secretary of State for the Home*

Department v. AJ (Zimbabwe) and VH (Vietnam) [2016] EWCA Civ 1012; *Hesham Ali (Iraq) v. Secretary of State for the Home Department* [2016] UKSC 60; and *Assad v. Secretary of State for the Home Department* [2017] EWCA Civ 10.

17. These cases indicate the following approach.

18. First, the phrase 'exceptional circumstances' serves the purpose of emphasizing that, in the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who do not satisfy paras 398 and 399 or 399A. It is only exceptionally that such foreign criminals will succeed in showing that their rights under article 8(1) 'trump' the public interest in their deportation, see *MF (Nigeria)* at [40]-[42].

19. Second, if a claimant cannot bring himself or herself within paragraphs 399 or 399A of the Rules:

> … it is necessary to consider whether there are circumstances which are sufficiently compelling (and therefore exceptional) to outweigh the public interest in deportation;

see *MF (Nigeria)* at [43] and [46].

20. Third, and perhaps by way of summary on this aspect, there is the following passage from the judgment of Lord Reed in *Hesham Ali (Iraq)*, with which 5 other members of the Court agreed:

> 38. The implication of the new rules is that rules 399 and 399A identify particular categories of case in which the Secretary of State accepts that the public interest in the deportation of the offender is outweighed under article 8 by countervailing factors. Cases not covered by those rules (that is to say, foreign offenders who have received sentences of … between 12 months and four years but whose private or family life does not meet the requirements of rules 399 and 399A) will be dealt with on the basis that great weight should generally be given to the public interest in the deportation of such offenders, but that it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed, as Laws LJ put it in *SS (Nigeria)*. 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. The Strasbourg jurisprudence indicates relevant factors to consider, and rules 399 and 399A provide an indication of the sorts of matters which the Secretary of State regards as very compelling. As explained at para 26 above, they can include factors bearing on the weight of the public interest in the deportation of the particular offender, such as his conduct since the offence was committed, as well as factors relating to his private or family life. 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). They need not necessarily involve any circumstance which is exceptional in the sense of being extraordinary (as counsel for the Secretary of State accepted, consistently with *Huang* [2007] 2 AC 167, para 20), but they can be said to involve "exceptional circumstances" in the sense that they involve a departure from the general rule.

21. Fourth, while plainly separation of a parent from his or her child or children will impact on the child's best interests, what may be an inevitable lengthy separation will not amount to exceptional circumstances. The point was expressed in the judgment of Elias LJ in *AJ (Zimbabwe) and VH (Vietnam)* at [17], after a review of a number of cases, starting with *MF (Nigeria)*:

> These cases show that it will be rare for the best interests of the children to outweigh the strong public interest in deporting foreign criminals. Something more than a lengthy separation from a parent is required, even though such separation is detrimental to the child's best interests. That is commonplace and not a compelling circumstance. Neither is it looking at the concept of exceptional circumstances through the lens of the Immigration Rules. It would undermine the specific exceptions in the Rules if the interests of the children in maintaining a close and immediate relationship with the deported parent were as a matter of course to trump the strong public interest in deportation. Rule 399(a) identifies the particular circumstances where it is accepted that the interests of the child will outweigh the public interest in deportation. The conditions are onerous and will only rarely arise. They include the requirement that it would not be reasonable for the child to leave the UK and that no other family member is able to look after the child in the UK. In many, if not most, cases where this exception is potentially engaged there will be the normal relationship of love and affection between parent and child and it is virtually always in the best interests of the child for that relationship to continue. If that were enough to render deportation a disproportionate interference with family life, it would drain the rule of any practical significance. It would mean that deportation would constitute a disproportionate interference with private life in the ordinary run of cases where children are adversely affected and the carefully framed conditions in rule 399(a) would be largely otiose. In order to establish a very compelling justification overriding the high public interest in deportation, there must be some additional feature or features affecting the nature or quality of the relationship which take the case out of the ordinary.

22. Fifth, it is important not to overlook that the primary responsibility for the public interest vests in the Secretary of State, see Wilson LJ in *OH (Serbia) v. Secretary of State for the Home Department* [2008] EWCA Civ 694 at [15(d)]:

> Primary responsibility for the public interest, whose view of it is likely to be wider and better informed than that of a tribunal, resides in the [Secretary of State] and accordingly a tribunal hearing an appeal against a decision to deport should not only consider for itself all the facets of the public interest but should weigh, as a linked but independent feature, the approach to them adopted by the [Secretary of State] in the context of the facts of the case. Speaking for myself, I would not however describe the tribunal's duty in this regard as being higher than 'to weigh' this feature.

See also, to similar effect, the observations of Maurice Kay LJ at [29].

23. In the present case the Secretary of State's decision letter of 15 January 2013 covered the Respondent's background and the familial relationships in considerable detail. However, I would accept that the FtT had the advantage of hearing evidence and seeing considerably more documentation than was available to the Secretary of State or this court.

The FtT decision

24. FtT Judge Foudy began by setting out her analysis of the legal position:

> 56. There is a presumption in favour of the [respondent's] deportation as he is a foreign criminal who was sentenced to 3 years and 4 months imprisonment for a very serious drug offence. In order to resist deportation, the [respondent] must either:
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> a) bring himself within one of the statutory exceptions set out in paragraphs 397 to 400 of the Immigration Rules; or
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> b) persuade me that his deportation is disproportionate.

25. At §§58-60, she set out the seriousness of the offence in supplying heroin:

> 60. I find that in committing the crime the he did [the respondent] capitalised on the misery of others for his own gain … I find that it is right for me to give heavy weight to the [Secretary of State's] view that the [respondent's] deportation is necessary for the protection of society and I do so.

26. At §61, she set out some of the factors that went 'to define the public interest'. I have added enumeration for ease of reference.

> However, there is no fixed definition of what the public interest encompasses, and the type of crime and length of sentence are

> just some of the factors that go to define the public interest. This was reflected upon by the Court of Appeal in *N (Kenya)* [2014] EWCA Civ 1094 and in *OH (Serbia).* I find that in the present appeal the main public interest factors are as follows:
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> (1) - the need to protect the public from crime;
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> (2) - the need to appropriately punish the offender;
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> (3) - the need to reflect public revulsion at drug dealing;
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> (4) - the need to protect the health and social fabric of UK society;
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> (5) - the need to protect the UK economy from the effects of drug abuse;
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> (6) - deterring the [respondent] and others from drug dealing;
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> (7) - maintaining public confidence in the control of foreign nationals admitted to the UK;
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> (8) - assessing the risk that the [respondent] poses or re-offending;
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> (9) - the need to protect children;
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> (10) - the promotion of family life where children are concerned;
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> (11) - the avoidance of unnecessary intervention in the care of children;
>
> (12) - encouraging healthy relationships between children and their parents and other family members;
>
> (13) - providing decent role models for children and young people.

27. Some of these factors reflect the public interest in the deportation of such offenders, (1)-(7); some may amount to countervailing factors, (10)-(12); and some point in different direction depending on the circumstances, (8), (9) and (13). However, the danger of drawing up a list of factors in this way, by reference to cases that preceded *MF (Nigeria)* and without reference to the analysis in that case, was that insufficient attention was paid to 'the great weight that should generally be given to the public interest in the deportation of such offenders, which can only be outweighed by very compelling circumstances: in other words, by a very strong claim indeed', to slightly adapt the words of Lord Reed in *Hesham Ali (Iraq)* (above).

28. The Judge concluded at §62, that the public interest did 'not require the deportation of [the Respondent] for the reasons' that followed.

29. At §63, she expressed the view that the offence was 'one event of criminality in an otherwise law-abiding life', that the Respondent had proved a model prisoner, had expressed shame at his crime and that he therefore 'presented a minimal risk of further offending'. At §63, the Judge considered that the Respondent 'at least has the opportunity to become a good role model to his children', in the light of his conviction and punishment.

30. The Judge then went on to consider the effect of his deportation on his children and nephew.

31. So far as M and J were concerned, she recognised that they were 18 years old and that 'their best interests alone' could not displace the public interest in the Respondent's deportation, adding, at §67:

> However, I also find that [J and M] are part of a wider sibling group. It has long been recognised in childcare practice that where parents separate the relationships take on greater significance.

32. At §70 she added this:

> I therefore conclude that if the [Respondent] were deported all meaningful contact between the older and younger siblings would quickly cease. I find that this cannot be in the best interests of any of the siblings as they currently enjoy each other's company at least twice a month and are strongly intertwined.

33. At §72, the Judge found that the 'greatest concerns' regarding the children centred around K and S, who lived with their mother, Stacey. She then considered some of the material lodged in support of the Respondent's application for contact with these two children, following refusal of such contact by their mother. Among this material was the report of a CAFCASS officer which 'unequivocally advised that losing day-to-day contact with the [Respondent] would be detrimental to the best interests of [K and S]'.

> She also advised that [K and S] would probably lose contact with their half siblings if the [Respondent] were deported and that this too was not in their best interests.'

34. Finally, on the issue of the effect of the Respondent's deportation on K and S, the Judge said this:

> I therefore conclude that the deportation of the [Respondent] is certainly not in the best interests of [K and S], who would risk losing more than just a father in their everyday lives but also siblings. Moreover, I find that the public interest in reinforcing family life and avoiding the need for state intervention in childcare would not be met by the [Respondent's] deportation.

35. The Judge then considered the position of JJ and concluded at §77:

> The general public interest in removing foreign criminals is not outweighed by JJ's interest alone.

36. The final conclusion of the FtT was expressed at §78:

> Having balanced all the public interest factors in the appeal and all the subjective factors raised by the [Respondent], I find that deportation is neither appropriate nor necessary.

Discussion

37. The broad submission of Ms Rowlands for the Secretary of State was that the FtT had failed to adopt the approach indicated in *MF (Nigeria)* later approved in *Hesham Ali (Iraq)*; and that if the Judge had done so, she could not have concluded that the circumstances were very compelling or amounted to a strong claim which outweighed the public interest in the deportation of the Respondent. The circumstances were far from amounting to 'a very strong claim indeed', to adopt the words of Laws LJ in *SS (Nigeria) v. Secretary of State for the Home Department* [2013] EWCA Civ 550. Exceptional circumstances are, by definition, an exception to the normal rule and should be rare and hard to establish. There was nothing unusual about any of the familial or sibling relationships. Nor were the circumstances compelling. They did not give rise to a sense of undue harshness that is required to establish exceptional circumstances.

38. Ms Mair's response was that the FtT had plainly accepted that the Respondent could not succeed under the Immigration Rules, and that it was therefore necessary to consider whether exceptional circumstances existed outside the Rules. In doing so, the Judge had adopted the approach endorsed by the Supreme Court in *Hesham Ali (Iraq)* of according respect to the Secretary of State's assessment of the strength of the general public interest in the deportation of foreign offenders, and had considered all the factors that were relevant to the specific case before her. In short, the Judge made a finding that was open to her on what was a careful review of the particular facts. The Secretary of State's challenge amounted to no more than a disagreement with the outcome of a balancing exercise, which had been carefully and properly conducted by the FtT; and had been rightly upheld by the Upper Tribunal. The Judge had referred to the presumption for deportation and demonstrated why, in the very specific circumstances of the case, that presumption was displaced.

39. In my view the FtT in this case plainly failed to apply the approach set out in *MF (Nigeria)* later approved in *Hesham Ali (Iraq)*. Although the Judge referred in §60 of the decision to giving 'heavy weight to the [the Secretary of State's] view that the [Respondent's] deportation was necessary for the protection of society', she did not in fact do so. There was no reference to a crucial step in the necessary analysis of the position outside the Rules: namely, whether there were circumstances which were sufficiently compelling (and therefore exceptional) to outweigh the public interest in deportation, see *MF (Nigeria)* at [46]. To the contrary, the FtT's findings were that 'the public interest did not <u>require</u> the deportation of the [Respondent]' (§62); and the Judge's conclusion was that, having balanced the factors that weighed on each side, that 'deportation is <u>neither appropriate or necessary</u>' (see §78), [emphasis added]. The Judge's approach fatally undermined her conclusion.

40. Nor is this a case in which this Court can properly conclude that, if the FtT had adopted the right approach, it would have come to the same conclusion.

41. In *Assad* (above) at [30] Burnett LJ made clear:

> The conclusion that routine non-residential contact with two small children by their father, with whom they had never lived, could amount to exceptional circumstances to avoid the automatic deportation dictated by the 2007 Act would neuter completely both the statutory provisions and the Rules. It comes close to suggesting that removing a parent of children with whom he is in contact, and who will remain in the United Kingdom, is in itself an exceptional circumstance which is sufficient to resist deportation on account of its negative impact on family relationships. There must be relatively few cases in which there is a meaningful relationship between a parent and children where deportation of the parent, with consequent physical separation, will not have an adverse impact on the children. The argument accepted by the FtT would have been even stronger had EA remained in a relationship with the children's mother and intended to live with them on his release from custody. Yet the 2007 Act, the Rules and the test now approved in *Heshem Ali* all contemplate the deportation of foreign criminals with families in the United Kingdom with whom they are living and to whom they provide emotional and financial support.

42. The starting point was that there were other family members who could care for the children. I would, of course, accept the findings of the importance of the Respondent's role in the various elements of his family and his presence as a means by which the siblings maintained contact with each other; and, perhaps particularly, the importance of his role in the private life of K and S. However, in my view, none of these circumstances, whether taken individually or in combination, were such as to justify treating them as very compelling, and therefore exceptional.

43. Accordingly, I would allow the Secretary of State's appeal.

Lord Justice Coulson

44. I agree.

Lord Justice Underhill (Vice-President of the Court of Appeal, Civil Division)

45. I agree that this appeal should be allowed for the reasons given by Simon LJ. I would only add that one reason why the Judge fell into the error that she did may have been that, although her judgment is in other respects full and careful, she at no point summarises the law which she has to apply. There is a section of her Reasons headed 'Legal Principles', but it is mostly concerned with an asylum issue with which we are not concerned, and the only paragraph dealing with deportation refers only, and generally, to sections 32-33 of the 2007 Act; there is no reference either to paragraphs 398-399A of the Immigration Rules or to *MF (Nigeria)*, which was then the most

recent authority. She was aware of both, because she refers compendiously to 'paragraphs 397 to 400' in the passage quoted by Simon LJ at paragraph 24 of his judgment, and in an earlier paragraph recording the documents supplied she lists a copy of *MF (Nigeria).* But it is always a healthy discipline to set out the key provisions governing the issue that falls for decision and quote or summarise key passages from the case-law identifying the correct approach or the applicable principles. If in this case the Judge had set out the terms of paragraph 398 and the explanation of it at paragraph 43 of the judgment in *MF (Nigeria)* it might have focused her attention on the need for very compelling (and therefore exceptional) circumstances to be established if the public interest in deportation was to be outweighed. I emphasise that I am not to be taken as encouraging the formulaic recitation of lists of cases; short extracts or summaries are enough.