Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00189/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Determination Promulgated**
On 27 November 2013	**On 16 December 2013**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M C P

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Ms Solomon of IAS Limited

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

2. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal (Judge Holder and Mr D R Bremmer JP) which allowed MCP's appeal

against the Secretary of State's decision made on 26 September 2012 that s.32(5) of the UK Borders Act 2007 ("the 2007 Act") applied. On 24 January 2013, the Secretary of State made a deportation order by virtue of the provisions to the 2007 Act.

3. For convenience, I shall refer to the parties as they appeared before the First-tier Tribunal.

The Background

4. The appellant arrived in the United Kingdom on 5 December 1999 with leave to enter as a visitor valid until 31 December 1999. Thereafter, his leave was extended as a student until 30 May 2002. In June 2002 the appellant made an application to remain as the partner of a British citizen ("CW") with whom he has one child ("JP") who was born in 2002. The application was refused in September 2004 and the appellant subsequently withdrew his appeal. That relationship had broken down in 2003 or early 2004. On 11 September 2004 he married a British citizen ("AE") and they have two children, ("DJP" and "DMP") who were born respectively in January 2004 and November 2004. That marriage ended in divorce on 12 October 2006.

5. On 23 July 2007 the appellant was removed to Jamaica. He subsequently applied for entry clearance but that was refused and subsequent appeals dismissed. On 2 January 2008, a contact order was made by the Bristol County Court in favour of the appellant in respect of his son JP. On 22 January 2008, the appellant made an application for entry clearance in order to exercise his contact rights. A visa was issued on 9 April 2008 and, shortly thereafter, the appellant returned to the UK. On 24 February 2009, the appellant applied for indefinite leave to remain as the parent of a child settled in the UK and that leave was granted on 20 October 2010.

6. In about May 2004, the appellant had begun a relationship with a British citizen ("BA"). They have two children together ("MP" and "LP") born respectively in 2005 and 2009. The appellant and BA married on 18 April 2012.

7. In addition to the five children I have already referred to, the appellant has two other children. His eldest child, ("AP") was born in 1995 in Jamaica. He has lived in the UK since 2002. He is a Jamaican citizen. The appellant's other child, ("TAP") was born in 2007. Her mother is a British citizen and the birth resulted from a casual relationship.

8. In total, therefore, the appellant has seven children in the UK. They are, in chronological order, AP who is 18 and a Jamaican citizen; TP who is 11; DJP who is 9 and will shortly be 10; DMP who is 9; MP who is 8 and will shortly be 9; TAP who is 6 and LP who is 4. All apart from AP are British citizens, as are their mothers.

9. On 6 October 2011, the appellant pleaded guilty at the Bristol Crown Court to two counts of possession with intent to supply class A controlled drugs, namely cocaine and heroin. On 23 March 2012, he was sentenced to a total of 21 months' imprisonment in relation to these offences. It was as a result of these convictions that

the Secretary of State made a decision that the provisions of the 2007 Act applied and which is the subject of this appeal.

10. Following the Secretary of State's decision on 26 September 2012, the appellant appealed to the First-tier Tribunal. He relied both upon the Immigration Rules namely paras 397-399, and Art 8 of the ECHR. The First-tier Tribunal dismissed the appellant's appeal under the Immigration Rules and no challenge to that decision has been made. In relation to Art 8, the appellant relied upon his "family life" with his current wife, BA, and his children in the UK. The First-tier Tribunal accepted that he had a genuine and subsisting relationship with five of his children and, as he had no contact with the two children (DJP and DMP) born to his ex-wife AE, the First-tier Tribunal accepted that his family life was only with his five other children and his wife. The First-tier Tribunal concluded that it was in his children's "best interests" that he should remain in the UK to maintain his family life with them and the First-tier Tribunal concluded that the appellant's deportation would be a disproportionate interference with the family life between him and his wife and children. Consequently, the First-tier Tribunal allowed the appellant's appeal under Art 8.

11. The Secretary of State appealed to the Upper Tribunal. On 2 July 2012 the First-tier Tribunal (DJ Appleyard) granted the appellant permission to appeal. The appeal initially came before me on 7 October 2013. In a decision dated 10 October 2013, I concluded that the First-tier Tribunal had erred in law in allowing the appellant's appeal under Art 8 on the basis that it had failed properly to carry out the balancing exercise taking into account the seriousness of the appellant's offending and had failed to give adequate reasons for its finding that the appellant's deportation would be disproportionate. It is not necessary to repeat those reasons here which are fully set out in my earlier decision.

12. The appeal was adjourned for a resumed hearing which was listed before me on 27 November 2013.

The Hearing

13. Ms Solomon, who represented the appellant, indicated that she did not propose to call any oral evidence. Without objection from Mr Richards, I admitted under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) updating statements from the appellant and his wife BP dated 27 November 2013. Mr Richards indicated that he did not wish to cross-examine the appellant. In addition, Ms Solomon put before me an email and a letter dated 24 October 2013 from Ms Adie, a Probation Service Officer. The e-mail indicated that the appellant's licence would end on 22 December 2013 and that he was not expected to attend for any further supervision appointments following his final supervision appointment on 26 November 2013. The letter points out, inter alia, that the appellant is assessed as having a "low risk of re-offending" and, given the length of time since his conviction, his "his risk of serious harm is currently assessed as low".

14. I heard oral submissions from both Ms Solomon and Mr Richards and Ms Solomon also relied on her skeleton argument.

15. It was common ground before me that the First-tier Tribunal's factual findings stood. The central issue for me, on the basis of those findings, was to determine whether the appellant's deportation was proportionate for the purposes of Art 8.2 of the ECHR.

16. Put succinctly, the parties' submissions amounted to this. Ms Solomon submitted that the interference with the family life established between the appellant and his wife and children (which would inevitably be disrupted by his deportation as they could not reasonably be expected to live with him in Jamaica) and given that it was in his children's best interests that he should remain in the UK with them as a family unit, were not outweighed by the legitimate aim of preventing disorder or crime, even taking into account the seriousness of the appellant's offence but having regard to the fact that he had no history of offences of this nature and he only posed a low risk of re-offending and had, indeed, not committed any offences since his release on 15 February 2013.

17. Mr Richards submitted that despite the favourable findings by the First-tier Tribunal in respect of the appellant's family life with his wife and children and their best interests, this was an extremely serious offence involving the supply of cocaine and heroin with a street value of £14,000 and the legitimate aim of preventing disorder and crime outweighed any interference with the family life of the appellant, his wife and children.

Discussion and Findings

18. At the outset, I set out a number of factual matters accepted by the First-tier Tribunal and not now challenged:

    (i) The appellant is a citizen of Jamaica who first came to the UK in 1999. Apart from a period between July 2007 and April 2008 (when he had been removed to Jamaica) the appellant has resided in the UK;

    (ii) The appellant had valid leave until 30 May 2002 but thereafter remained in the UK without leave until he was removed on 23 July 2007. Between April 2008 and October 2010 the appellant had leave to remain in the UK and on 20 October 2010 was granted indefinite leave to remain in the UK;

    (iii) The appellant married BP in April 2011 although they had known one another since May 2004. Their relationship broke down in early 2004 but was later re-kindled and they started living together in April 2011. They now live together and have a genuine and subsisting relationship as husband and wife;

    (iv) The appellant has seven children living in the UK. All except the eldest (AP) are British citizens. AP is 18 and his other children are aged between 11 and 4. AP has lived with his "aunt" since 2002 and is studying to be a hairdresser.

    (v) The appellant lives with his two younger children (their mother is his wife), namely MP and LP who are 8 and 4 years old respectively;

(vi) The appellant has a genuine parental relationship with five of his seven children in the UK, namely AP, JP (in respect of whom a contact order is in force), MP, TAP and LP;

(vii) The relationship between the appellant and his wife and between the appellant and his five children amounts to family life for the purposes of Art 8 of the ECHR;

(viii) It would not be reasonable to expect the appellant's wife, BP or any of his children to live in Jamaica if he is deported;

(ix) None of the appellant's children (including AP) have any meaningful ties with Jamaica;

(x) The appellant's ties to Jamaica are "limited" where the prospects are not good for him to obtain work and accommodation and he has no family who can provide any significant help;

(xi) The best interests of the appellant's five children can only satisfactorily be met by the appellant remaining in the UK with his children and wife in order that family life can continue.

19. In addition, the First-tier Tribunal made a number of findings in relation to the appellant's offence and offending which are not disputed as follows:

(i) The risk of the appellant re-offending is "low";

(ii) The appellant is genuinely remorseful;

(iii) The appellant has not re-offended since his release in February 2013 and has been a "well-behaved and law-abiding" citizen since his release;

(iv) The appellant has not previously been convicted of any drugs related offending although he has committed offences under the Road Traffic Act 1988.

20. In addition to those findings, the additional evidence put before me at the hearing establishes the following:

(i) The appellant's tag and curfew were withdrawn in July 2013;

(ii) The close relationship between the appellant and his children and with his wife continues;

(iii) In the most recent assessment by the Probation Service (in its letter dated 24 October 2013) the appellant poses a "low" risk to the public provided that he does not associate with those involved in the supply of illegal drugs.

(iv) The appellant's wife, BP was not aware of the appellant's offence until he was arrested.

21. In applying Art 8, I adopt the well-known five-stage approach as set out by the House of Lords in Razgar [2004] UKHL 27 at [17] by Lord Bingham of Cornhill:

    (a) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

    The answer to that question is 'yes'. The appellant has established family life with his wife with whom he is in a genuine relationship and with his five children, two of whom live with him and his wife (their mother).

    (b) If so, will such interference have consequences of such gravity as potentially to engage the operation of Art 8?

    The answer is again 'yes'. The effect of deportation will be to split the appellant's family such that the appellant's wife and children, who cannot reasonably be expected to accompany him to Jamaica, will live in the UK whilst he lives in Jamaica. Normally, a deportation order in the circumstances of this appellant would prevent his exclusion for ten years (see para 391 of the Immigration Rules). The First-tier Tribunal found that the appellant's family life could not continue "in any meaningful way" if he was deported (see para [69] of the determination).

    (c) If so, is such interference in accordance with the law?

    The answer is again 'yes'. The deportation would, subject to Art 8, be in accordance with the Immigration Rules and the 2007 Act.

    (d) Is any such interference for a legitimate aim as set out in Art 8.2?

    The answer is again 'yes'. The appellant's deportation is "for the prevention of crime or disorder".

    (e) Is any such interference proportionate to the legitimate aim sought to be achieved?

    As I pointed out above, it was common ground at the hearing that this was the crucial issue in the appeal.

22. In Razgar at [20] Lord Bingham identified that the issue of "proportionality":

> "involves the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention."

23. Carrying out that balancing exercise, the "best interests" of any children is a primary consideration although it is not a paramount consideration. In ZH (Tanzania) v SSHD [2011] UKSC 4, Lady Hale stated at [33]:

> "In making the proportionality assessment under Art 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations."

24. It follows that the "best interests" of a child may be outweighed by the cumulative effect of other considerations, including the public interest, but that "no other consideration can be treated as inherently more significant" (see Zoumbas v SSHD [2013] UKSC 74 at [10(3)] *per* Lord Hodge).

25. In this appeal, the focus of the public interest is the appellant's offending. In OH (Serbia) v SSHD [2008] EWCA Civ 694, Wilson LJ (as he then was) summarised the three facets of the public interest which had to be considered in deportation cases as follows (at [13]):

    (a) The risk of re-offending by the person concerned;

    (b) The need to deter foreign nationals from committing serious offences by leading them to understand that, whatever the other circumstances, one certain consequence of that may well be deportation; and

    (c) The role of deportation as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious offences.

26. Those three facets are equally applicable in an automatic deportation case such as the present (see RU (Bangladesh) v SSHD [2011] EWCA Civ 6 and AM v SSHD [2012] EWCA Civ 1634). In SS (Nigeria v SSHD [2013] EWCA Civ 550, the Court of Appeal emphasised that in automatic deportation appeals, the 2007 Act set a legislative policy that the deportation of a "foreign criminal" such as the appellant was in the 'public interest'. Laws LJ at [54] concluded:

> "The pressing nature of the public interest here is vividly informed by the fact that by parliament's express declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgment only be justified by a very strong claim indeed."

27. With those matters well in mind, I set out the factors recognised in the settled jurisprudence of the Strasbourg Court to be taken into account in assessing the proportionality of an individual deportation. The "Boultif criteria" (as they are known) are conveniently set out in the Grand Chamber's decision in Üner v Netherlands (Application no. 46410/99) [2007] Imm AR 303 at [57] and [58] as follows:

> "(a) The nature and seriousness of the offence committed by the appellant;
>
> (b) The length of the appellant's stay in the United Kingdom;
>
> (c) The time elapse since the offence was committed and the appellant's conduct during that period;

(d) The nationalities of the various persons concerned;

(e) The appellant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;

(f) Whether the spouse knew about the offence at the time when he or she entered into a family relationship;

(g) Whether there are children of the family, and if so, their age;

(h) The seriousness of the difficulties which the spouse is likely to encounter in Jamaica (the country to which the appellant is to be expelled);

(i) The best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the appellant are likely to encounter in Jamaica, the country to which the appellant is to be expelled; and

(j) The solidarity of social, cultural and family ties with the host country and with the country of destination."

28. I deal first with the factors concerning the appellant and his family's circumstances. First, the appellant has been in the United Kingdom since December 1999 with the exception of a period between July 2007 when he was removed to Jamaica and April 2008 when he returned with entry clearance to exercise contact rights with his son JP. He has, therefore, been in the UK initially for seven and a half years and latterly for five and a half years making a total of 13 years. He was 17 when he first came to the UK and is now a few weeks short of his 41st birthday.

29. Secondly, although the appellant is Jamaican, his wife and four of his five children with whom he has family life are British citizens. His children with his wife (with whom he lives) are 4 and 8 years old respectively. He also has family life with a daughter (TAP) aged 6, a son (TP) aged 11 and his (now adult) son (AP) aged 18.

30. Thirdly, the depth and richness of the family life that the appellant has with his wife and children is described by the First-tier Tribunal as being a "close and genuine bond". The evidence amply demonstrates that the appellant is fully involved with his children and, in particular, plays a full part in raising the two children of his current marriage with whom he lives. At para 4 of his most recent statement, the appellant says:

> "My bond with my children is greater than ever, they are extremely happy to have me home and see my face in the audience at school shows. Being home I was able to take my son [JP] to his first day at secondary school and my youngest daughter [LP] to her first day at pre-school. I continue to attend all of their appointments, meetings and school activities."

31. The evidence of BP, the appellant's wife, is to like effect. The First-tier Tribunal referred to a letter from the head teacher of the school where two of the appellant's children study (at para [23]) as describing the appellant "as a caring parent showing concern for his children and engaging with the school". The head teacher is quoted

as saying: "I know his children adore him and he really cares for them emotionally and physically".

32. As I have already stated, the First-tier Tribunal made the clear and unequivocal finding that the "best interests" of the appellant's five children could: "only be satisfactorily met by him remaining in the United Kingdom with his children and wife in order that family life continues." (at [69] of the determination).

33. Fourthly, the First-tier Tribunal found that it would not be reasonable to expect the appellant's wife or any of his children to return to live with him in Jamaica. That finding was, frankly, inevitable given the fact that (apart from AP) they are all British citizens who have lived their entire lives in the UK. Leaving aside AP, the children (and as a consequence their respective mothers) could not be expected to uproot themselves and live outside the EU (in particular the UK) (Sanade and Others (British children – Zambrano – Dereci) [2012] UKUT 00048 (IAC)).

34. Fifthly, as the First-tier Tribunal found, the appellant's wife and children only had ties in the UK and his eldest son (though Jamaican), who has lived in the UK since 2002 and is currently studying and training to be a hairdresser, had "no meaningful ties" to Jamaica. The appellant's ties to Jamaica were found by the First-tier Tribunal to be "limited" and the prospects of him obtaining work and accommodation were "not good" and further he did not have any family in Jamaica who could provide any significant help (see para [49] of the determination).

35. Sixthly, in my view the lives not only of the appellant's wife and his children are solidly rigid in the UK but so also is the life of the appellant himself. The appellant left Jamaica when he was 17 and, on his evidence, he was abandoned by his parents at the age of 10 to grow up on the streets. He has had ILR since October 2010.

36. Turning now to the nature and seriousness of the appellant's offence, there is no doubt that the appellant was convicted of a most serious offence, namely possession with intent to supply a significant quantity of class A drugs, namely cocaine and heroin with a street value of £14,000. The seriousness of that offence is not mitigated by the fact that he was not directly dealing with the public. He acted as a custodian for another but was, nevertheless, an essential link in the chain of distribution of class A drugs. He was sentenced to imprisonment for 21 months having been given the maximum credit (a third) for his guilty plea. In her sentencing remarks, the Crown Court judge recognised that the nature of the appellant's offence was such that an immediate term of imprisonment was inevitable. The judge recognised that the appellant was "effectively" of good character and that he was, on the references she had read, "a very caring and committed individual".

37. As I have said, the appellant's offence was of a most serious kind involving him (as part of the distribution chain) in the supply of class A drugs to the public. This offence engages all three facets of the public interest, namely the need to deter other foreign nationals from committing similar offences; and the importance of expressing society's revulsion at such a serious crime which, in its end result, does, as Mr

Richards put it in his submissions, have a "catastrophic effect" on society. As regards re-offending, the finding of the First-tier Tribunal is that there is a "low" risk of the appellant re-offending. That is further borne out in the letter from the Probation Service dated 24 October 2013. The First-tier Tribunal also found that the appellant was now genuinely remorseful that he had committed the offence. He has not committed any further offence since he was released from custody in February 2011 and, perhaps more importantly for this point, has been without a tag or not subject to a curfew since July. The appellant has not been "tempted" to commit further offences despite the fact that, as he cannot currently work given his immigration status, he and his wife have had to go into debt in order to meet their needs, including paying legal fees. The appellant's continued good behaviour bodes well for the future.

38. In carrying out the balancing exercise, this is a case where if the appellant is deported, inevitably the substance of the appellant's family life with his wife and children will for the foreseeable future (probably for at least ten years) come to an end. That, as the First-tier Tribunal found, is not in the "best interests" of his children. They will be deprived of the support and continued care and attention of the appellant who is, all the evidence shows, a loving father. The appellant's wife gives an illustration of the impact of separation from the appellant when she states in para 7 of her statement dated 27 November 2013 that as a result of the appellant being in prison, at night her children wet the bed and talked about him in their sleep.

39. In this appeal, to paraphrase the words of Lord Bingham in SSHD v Huang [2007] UKHL 11 at [20], the ultimate question that I have to address in the circumstances of this appeal where the family life of the appellant's family cannot reasonably be expected to be enjoyed elsewhere is whether "taking full account of all considerations weighing in favour of the refusal" the appellant's deportation "prejudices the family life of [the appellant] in a manner sufficiently serious to amount to a breach of the fundamental rights protected by Article 8."

40. I bear in mind that the children's "best interests" – which are that the appellant should remain in the UK with them – are a "primary consideration". I bear in mind that those "best interests" will be entirely thwarted by the appellant's deportation. Likewise the appellant's married life will, in substance, cease. The impact of the appellant's deportation will be felt by five children, four of whom are between the ages of 4 and 11 and will, therefore, lose the support of their father as a parent for a significant period of their childhood and development towards adulthood. Against that, I take fully into account that the appellant has been convicted of a most serious offence of dealing in class A drugs. It was his first and only such offence. To all intents and purposes, he was previously a man of good character. The genuineness of his remorse for his offending was recognised by the First-tier Tribunal, which heard the oral evidence, in its findings. The lives of all the relevant parties are rooted in the UK. The appellant has lived in the UK for some twelve years in total. Subject to his deportation, the appellant has indefinite leave to remain in the UK which was granted in October 2010. The evidence posits that the appellant is a "low" risk of re-offending and since his release in February 2013, even in the face of financial

difficulties, the appellant has not re-offended. It seems likely that the appellant has seen the error of his ways and the importance of his family life given that his offending has put that family life at risk.

41. I remind myself of what the Supreme Court said in Zoumbas that:

> "Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant" (at [10(3)]).

42. The strength of the appellant's family life both with his wife and five children and the effect upon it if he is deported, to use the words of Laws LJ in SS (Nigeria) at [54], amounts to a "very strong claim". The strength of that claim drives me to conclude that, having regard to all the circumstances and taking the "best interests" of the appellant's children as a primary consideration, despite the weight that the public interest rightly deserves when a "foreign criminal" commits a crime of this nature, the interference with the family life of the appellant, his wife and children outweighs the public interest such that the appellant's deportation has not been demonstrated to be proportionate. In my judgment, the appellant's deportation would breach Art 8 of the ECHR.

Decision

43. For the reasons given in my decision dated 10 October 2013, the First-tier Tribunal's decision to allow the appellant's appeal under Art 8 involved the making of an error of law and it is set aside.

44. I remake the decision allowing the appellant's appeal under Art 8.

Signed

A Grubb
Judge of the Upper Tribunal