Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00938/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 2nd November 2015	**On 5th November 2015**

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

TREVOR WASHINGTON HOWELL

Respondent

Representation:

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Ms V Easty, counsel, instructed by Duncan Lewis & Co solicitors

DETERMINATION AND REASONS

1. On 6th May 2014 Mr Howell (hereafter the claimant) was served with a decision that S32(5) UK Borders Act 2007 applies. A deportation order was signed on 23rd April 2014. On 1st June 2015 the appellant (hereafter the SSHD) was given permission to appeal.

2. The grounds upon which the SSHD relies are, in essence, as follows:

   (a) That the judge had materially misdirected himself in his assessment of what constitutes "unduly harsh" in the context of the separation of the child and the claimant
   (b) The judge had applied the test of whether it was 'reasonable' or wholly unreasonable for the claimant's former partner to relocate to Jamaica, rather than whether it was unduly harsh to expect her to do so;

(c) That the judge erred in taking account of the lack of offending since release because the lack of offending does not diminish the public interest.

3. Permission to appeal was granted on all grounds. In his Rule 24 response, Mr Howells submitted that the grounds were no more than a disagreement with the FtT judge's finding that it would be unduly harsh on the his son if he were deported and that the judge had given adequate reasons for his findings and had applied the correct test. He further submitted that the reference to the lack of medical evidence as to the degree of disability of the child was not in issue before the FtT; that there was no error of law in the chronology of care and contact referred to by the judge; that it was not submitted that the judge failed to take into account a relevant consideration or took into account irrelevant considerations or erred in his assessment of what was exceptional. Further it was submitted that although the SSHD argued that the judge misapplied the test of unduly harsh by stating it was not reasonable or wholly unreasonable for the partner to relocate to Jamaica, that amounts to 'unduly harsh'. In any event it was submitted that the appeal was allowed under s117D of the Nationality Immigration and Asylum Act 2002 where there is no requirement to assess whether it would be unduly harsh.

Background

4. Mr Howell, a Jamaican citizen date of birth 22nd February 1988, arrived in the UK as a visitor with leave to enter for 6 months on 11 December 1999. An application for leave to remain as a dependant of his mother was refused on 8 September 2000. He has a partner in the UK, Ms Hibberd, who is a British Citizen and they have a son R, born on 13th August 2005 who has cerebral palsy. The FtT judge appears to accept that the claimant and Ms Hibberd have been in a relationship for some 10 years or more although during that time there have been periods when they have not lived together for reasons that include domestic violence. It appears that the FtT judge, at the date of the hearing accepted that the couple were living together and intended to marry.

5. Mr Howell has a committed a number of offences:
(a) 11th October 2006 sentenced to 6 months suspended for 18 months, unpaid work of 100 hours and a curfew with electronic tagging for 12 months for two counts of robbery;
(b) 25th October 2006 fined £75 for possession of Class C controlled drug;
(c) 18th May 2007 fined £50 for failing to surrender to custody at an appointed time
(d) 31st March 2008 sentenced to 3 months and 1 month to run consecutively for breach of a suspended sentence, common assault and destroying or damaging property;
(e) 16th December 2008 fined £50 for destroying or damaging property;
(f) 10th February 2009 6 months suspended for 18 months, supervision order, 18 months curfew and 3 months tagging for theft from a person;
(g) 20th May 2009 continue community order with 20 hours unpaid work for breaching a suspended sentence (10th February 2009);

(h) 26th October 2010 30 months sentence for possession of class A and possession of Class A with intent to supply and 3 months imprisonment unserved from original sentence of 10th February 2009, to run concurrently.

6. Mr Howell had not committed any offences since he was released on licence on 24th October 2011.

7. The child R has been diagnosed with cerebral palsy resulting in weakness on the left side known as hemi paresis. He has achieved all his motor development milestones within the normal age range and has walked independently from the age of 13 months. The report from Mr Ricketts (social worker from the Social Services Care division) dated 13th July 2013 refers to Mr Howell having

> 'good attachments with R…understands the impact [domestic violence] could have on his son….R is a happy, confident and active boy, he loves his father and enjoys activities they do together. Mr Howell and R were observed to have a positive attachment and Mr Howell is able to positively interact with his son. He is a good and caring father and is emotionally attached to R…no safeguarding concerns have been identified…..It is my opinion that the separation in this family would be devastating the welfare of R as the psychological effect could induce difficulties in relation to his education, health behaviour and self esteem…the deportation of his father would result in a resource of emotional and practical support being taken away from him and this would be to the detriment of this young boy's development.'

8. The relevant Rules and legislation:

> 398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
> (a) ….;
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
> (c) ….
> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A
> .
> 399. This paragraph applies where paragraph 398 (b) or (c) applies if
> –
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
> (i) the child is a British Citizen; or
> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
> (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or
> (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and
> (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
> (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and
> (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –
(a) the person has been lawfully resident in the UK for most of his life; and
(b) he is socially and culturally integrated in the UK; and
(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

PART 5A Nationality Immigration and Asylum Act 2002
Article 8 of the ECHR: public interest considerations

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).

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.

(4)Little weight should be given to—

(a)a private life, or
(b)a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5)Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6)In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a)the person has a genuine and subsisting parental relationship with a qualifying child, and

(b)it would not be reasonable to expect the child to leave the United Kingdom.

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)…..
(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.

Error of Law

9. The FtT judge correctly identifies that the starting point in this case is that the deportation of Mr Howell is conducive to the public good. The decision of the FtT Judge is confusing: he refers to paragraphs in the Rules that are not relevant and, even if it is accepted that these references are no more than typographical errors, he refers to factors in those paragraphs which do not exist.

10. In so far as it is possible to extract relevant findings from paragraphs 106 to 136 he makes the following findings:
(i) The child R is a British Citizen and he has a genuine and subsisting relationship with the child
(ii) it would be unreasonable to expect the child R, who was born on 13th August 2005, to leave the UK
(iii) the primary consideration is whether there is another family member able to care for the child in the UK and there is – the child's mother Ms Hibberd.
(iv) It would be wholly unreasonable for Ms Hibberd to remove herself to Jamaica – she has no family ties there whatsoever, no accommodation, maintenance or employment to turn to.
(v) Ms Hibberd is a British Citizen and Mr Howell and Ms Hibberd have a genuine and subsisting relationship
(vi) Mr Howell has been lawfully present in the UK from 11 December 1999 until 8 September 2000 and then from 10th January 2005 until 23rd April 2014
(vii) he does not satisfy paragraph 399A of the Immigration Rules (although in the determination this is said to be paragraph 339A, Ms Easty submitted and Mr Whitwell accepted that the judge meant 399A); his immigration status was not precarious when he established his relationship as he had been granted indefinite leave to remain in 2005; Exception 1 (s117C(4) Nationality

Immigration and Asylum Act 2002) is not met although he meets 117C(a) and (b) there are not very significant obstacles to his integration into Jamaica.
(viii) based upon the expert evidence of Ms Rickets and my (the judge's) assessment of the needs and welfare of this child set out in the written and oral evidence it would be unduly harsh for him to be separated from his partner and child.
(ix) He has committed one extremely serious criminal offence in 2010 but 'all' the indications are that he has shown significant remorse and corrected his offending behaviour
(x) his removal would be unduly harsh bearing in mind the significant detriment that would place on his partner but particularly his nine year old son.
(xi) he falls within Exception 117C(4) [it seems that this should read s117C(5)].
(xii) the balance 'falls in favour' of Mr Howell 'given the significant detriment his partner and his child will suffer 'on the back of his removal to Jamaica'.

11. Although the judge identified what he took into account in reaching his conclusions, he does not address on what basis or why separation of the child from his father would be unduly harsh. The separation of the child from his father may, in these particular circumstances be harsh, but those circumstances do not approach, on the findings of the FtT judge, 'unduly harsh'. The social worker does not identify anything other than the detriment that would be suffered by any child being separated from a father with whom he has a close relationship. The social worker states future development '*could*' be affected, not that it will or how it will. That a child will suffer is axiomatic but nothing has been identified which could lead to a conclusion that it is unduly harsh. 'Unduly harsh' is an elevated threshold – see *MAB (para 399; "unduly harsh") USA* [2015] UKUT 00435 (IAC). The FtT judge has not even come close to identifying what, in the circumstances of this child and the relationship with his father, would be unduly harsh – and that is without considering the seriousness of the offence committed by Mr Howell – see *KMO (section 117 – unduly harsh) Nigeria* [2015] UKUT 00543(IAC). This is not a mere disagreement but a fundamental failure on the part of the judge to identify and make findings why such separation would be unduly harsh.

12. Furthermore although the judge found that it would be unduly harsh for Mr Howell to be separated from his son that is not the test. The test is whether it would be unduly harsh for the child. The judge has also failed to address and identify whether and how it would be unduly harsh for the child, if the parents so choose, to travel to and live in Jamaica.

13. In so far as the judge finds that it would be 'wholly unreasonable' for Ms Hibberd to relocate to Jamaica this appears to be based on a lack of family, maintenance and accommodation. She would of course be relocating with her family if she chose to do so – her partner and her son. Again the judge has failed to identify what would be unduly harsh rather than uncomfortable or challenging. He has not made a finding as to whether it would be unduly harsh for Ms Hibberd to remain in the UK without Mr Howell. Wholly unreasonable cannot be equated with 'unduly harsh' and the judge has failed to make any proper finding on that required element.

14. The Rule 24 response states that the judge in any event allowed the appeal under s117D where there is no 'unduly harsh' test. S117D does not set out any test but is a 'definition' section. S117C(5) requires consideration whether the effect of the deportation of an individual is unduly harsh on the partner or child. It is therefore difficult to understand on what basis the Rule 24 response is submitting that the appeal was allowed "in any event". It was not.

15. I find that the FtT judge erred in law in his consideration of 'unduly harsh'. I set aside the decision to be remade.

16. None of the findings stand – the judge had failed to make findings on the evidence before him in the context of unduly harsh and many of his findings do not stand up to scrutiny. In particular it is difficult to see how it can be said that his relationship with Ms Hibberd was formed when his immigration status was not precarious hen the child must have been conceived prior to him being granted indefinite leave to remain. There were no findings as to the periods of time the couple were actually living together – it appears that throughout the 10 year long relationship there may well have been extended periods of time when they were not together. The extent to which Mr Howell had contact other than on a superficial basis during those periods of time has not been evaluated. There does not appear to have been any consideration of the availability of educational facilities in Jamaica or the extent to which the child would be disadvantaged if he and his mother chose to travel to Jamaica to be with Mr Howell.

17. Where I have set aside a decision of the first tier tribunal, s.12(2) of the TCEA 2007 requires me to remit the case to the First tier with directions or remake it for myself. The nature and extent of fact finding necessary is such that, having regard to the overriding objective, it is appropriate to remit the case to the First-tier Tribunal to be heard. None of the findings of fact, such as they are, stand.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

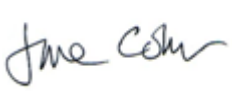
I set aside the decision

I remit the appeal to the First-tier Tribunal for hearing.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and no request for an order was made. I do not make an order.

Date 3rd November 2015



Upper Tribunal Judge Coker