Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12524/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 March 2017 and 24 May 2017	**On 3 July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

EATON RICHARD VALENTINE O'CONNOR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Saini, Counsel
For the Respondent: Mr A Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal dismissing his appeal against the respondent's decision of 20 November 2015 to make a deportation order under s.5(1) of the Immigration Act 1971.

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Background

2. The appellant is a citizen of Jamaica born on 21 March 1977. He arrived in the UK on 6 May 2008 with entry clearance valid until 5 March 2010 as the spouse of a settled person and on 7 April 2010 he was granted indefinite leave to remain in that capacity. On 11 March 2015, following his conviction of two counts of possession of cannabis with intent to supply, he was sentenced to 136 days' imprisonment. The appellant was notified of the respondent's intention to make a deportation order. He made representations based on human rights grounds but by a decision made on 7 July 2015 the respondent rejected those submissions and refused the claim, certifying her decision with the result that there was no in-country right of appeal. However, following the lodging of a pre-action protocol letter before judicial review proceedings, a new decision was made on 20 November 2015 withdrawing the certification. The appellant was then able to appeal against the decision arguing that the deportation order infringed his rights under article 8 in respect of both private and family life.

3. The appellant is married to a British national born on 6 June 1970. They met in 2000 when the appellant was in the UK with a visa. Their relationship developed and in 2003 when his visa was coming to an end they decided to return together to Jamaica, the appellant's partner taking her son, LA born on 22 July 1992, from a previous relationship with her. The appellant and his partner were married on 24 March 2004 and there are three children, EW, born on 6 June 2004, EV on 4 January 2011 and AM on 9 March 2012.

4. The judge accepted that the appellant's wife and his three children were British citizens and that he and his wife were in a genuine and subsisting relationship which had lasted for many years and certainly since 2003. The appellant's wife, LV and EW returned to the UK in 2005 because of the difficulties they had there and the appellant came to the UK with entry clearance as a spouse in May 2008. LA is now an adult age 23 and no longer lives with the family. The judge accepted that the appellant's relationship with his children was genuine and subsisting and that there was no doubt that their best interests lay with both parents but, alternatively, certainly with their mother. The judge accepted that EV had a continuing health issue as he had swallowed a battery some years ago but there was evidence that, subject to him requiring further treatment, his condition had stabilised to the point when a negligence claim could be settled in August 2016. She accepted that EW was a gifted child, who had won a scholarship to a major public school in England but, nonetheless, found that there was no reason why the children would not adapt to life in Jamaica, it being reasonable to assume that there were private and international schools there which the children including EW could attend.

5. The judge considered the sentencing remarks made by the trial judge when imposing a sentence to enable the appellant's immediate release. The appellant had pleaded guilty on the basis that the cannabis was for

personal use and for family and friends with no financial reward. It was argued that his custodial sentence of 136 days was at the lower end of the sentencing options given that the guidelines ranged from a high-level community order to six months' imprisonment. The judge disagreed, saying that it equated to four months' imprisonment and reflected a guilty plea to two counts of possession of a cannabis with intent to supply, albeit that the intent to supply was not on a commercial basis.

6. The judge set out the relevant legal framework under paras 398, 399 and 399A of HC 395 as amended ("the Rules") and referred to the provisions of part 5A of the Nationality, Immigration and Asylum Act 2002, as amended, and in particular to s.117B and C. She reminded herself that all family members affected by the respondent's decision had to be taken into account and that the best interests of any minor child should be determined by reference to the child alone without reference to the immigration history or status of either parent.

7. The judge was satisfied that para 398(c) of the Rules applied as the appellant had been convicted of an offence meeting the requirement that "in the view of the Secretary of State, their offending has caused serious harm". The judge said that the seriousness of the offence lay in the intent to supply the drug to others, whether for profit or on a commercial scale or not. The appellant had also allowed large quantities of cannabis to be kept in his home where his young children lived and had supplied cannabis to his own wife despite being aware of her mental health issues, she having given evidence that she was a former drug addict addicted to class A drugs before she met the appellant. The judge found that on balance the interference in the appellant's family and private life was necessary in the interests of the prevention of disorder or crime, his deportation was in the public interest and there was nothing before her to suggest that his deportation had been or would be in the future, unduly harsh. The respondent's decision was therefore proportionate to a legitimate aim. Accordingly, the appeal was dismissed.

<u>The Grounds and Submissions</u>

8. The grounds raise five issues. Ground 1 argues that the judge's assessment of undue harshness under paras 399 and 399A failed to take proper account of relevant evidence: the independent social worker's report ("ISW report") dated 15 February 2016 (A/B1-37), the medical evidence from the appellant's wife's GP dated 24 March 2015 (A/D4) and the letter from the head teacher at the children's school (A/C7-9). Ground 2 argues that the judge failed to take proper account of the length of sentence and the basis of the plea when considering the public interest as the judge had imposed a custodial sentence on the basis that it would not be fair to give the appellant a community order when he had already spent time in custody.

9. Ground 3 argues that the judge failed to consider the evidence of the appellant's rehabilitation and Ground 4 that she erred in finding that the appellant's offence came within the provisions of para 398(c), having failed to make a proper or lawful assessment of whether his offending had caused serious harm. Ground 5 argues that the judge failed to take into account the appellant's right to derivative residence pursuant to the judgment in Zambrano CJEU C-34/09. Finally, in ground 6, it is argued that Supreme Court judgment in Hesham Ali v Secretary of State [2016] UKSC 16 meant that the Tribunal decision in KMO (Section 117 – unduly harsh) Nigeria [2015] UKUT 543 was wrongly decided and could not stand given that it was premised on the Rules being a complete code in deportation appeals.

10. Permission to appeal was granted by the First-tier Tribunal on the basis that it was arguable that the judge had failed to consider the evidence in the ISW report, the medical evidence from the appellant's wife's GP and the letter from the children's head teacher and she could have taken a less serious view of the appellant's offending as there was evidence that the sentencing judge would have made a community order if the appellant had not already spent substantial time in custody prior to sentencing. The remaining grounds, however, merely showed a disagreement with the judge's findings.

11. When this appeal was listed for hearing before the Upper Tribunal (Supperstone J and DUTJ Latter) on 17 January 2017, Mr Saini indicated that he wished to rely on all the grounds of appeal and not simply the two grounds identified by the First-tier Tribunal as arguable. The panel was satisfied that, had the judge meant to refuse permission on the other grounds, he would have made that clear with the consequence that the appellant would have had the right to renew his application to the Upper Tribunal on the refused grounds. Accordingly, the panel was satisfied that it was open to the appellant to argue all the grounds. The hearing was adjourned to give the respondent an opportunity of filing a Rule 24 reply. This had not been done as, through an administrative oversight, a copy of the grounds of appeal and other documents had not been properly served. A full Rule 24 response has now been filed by the respondent and there is a skeleton argument setting out the appellant's submissions. Although Mr Saini relied on all his grounds, he indicated that he relied primarily on grounds 1, 2 and 4.

Assessment of whether there is an error of law

12. Ground 1 argues that the judge failed to deal adequately with the evidence in the ISW report, the medical report and the letter from the head teacher. It is submitted that, although the judge referred to the social worker's report at [30] of the decision, this was only to the extent of noting that the report confirmed that the behaviour of the children greatly improved when the appellant was around but the report goes much further, so it is argued, as it expresses an opinion that it was not in the

best interests of the children for the appellant to be removed in the light of the impact that separation would have on the children which might give rise to problems in their development. The report also confirmed that if the appellant were removed it would impact upon the care given by his wife to the children and that a family breakdown would have significant consequences, especially for the children. The report also set out the wishes and feelings of the children but it is argued that these were not taken into account by the judge.

13. Mr Saini submitted that this indicated a failure to give proper consideration to the best interests of the children in accordance with the Supreme Court judgments of ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC and Makhlouf v Secretary of State for the Home Department (Northern Ireland) [2016] UKSC 59. In consequence, the Tribunal did not give sufficient consideration to the children's best interests. So far as the GP's report was concerned, Mr Saini argued that the judge had not carried out a satisfactory appraisal of that evidence and its implications on the children's well-being if the appellant was removed. Finally, he argued that the head teacher's letter had been completely overlooked.

14. Mr Melvin submitted that the judge had considered the ISW report as part of the evidence as a whole. There was no reason to believe in respect of the GP's evidence and the headmaster's letter that the judge was not aware of the mental health issues of the appellant's wife and, whilst there was no express finding on the head teacher's letter, that was not fatal to the decision. The judge could not reasonably be expected to refer at length to those reports.

15. I am satisfied that ground 1 is made out and that the judge failed to take into account the social worker's conclusions set out at [76] or to explain what weight she gave to them, if any. I am also satisfied that the judge failed to consider the points raised in the GP's letter which, in the absence of any reasoned finding why the GP's evidence that the appellant's wife was depressed was not accepted, indicates that a relevant matter, the consequences of separation on her ability to look after the children if the appellant is removed, was left out of account.

16. So far as ground 2 is concerned Mr Saini argued that the judge failed to take proper account of the circumstances leading to the appellant's sentence of 136 days. There was evidence of the basis on which the appellant pleaded guilty in a letter from the higher advocate who represented him at the Crown Court referring to the sentencing guidelines that the starting point was a community order but as the appellant had served a lengthy period on remand, the judge had concluded that it was not fair to give him a community order when he had already spent time in custody. Further, so it is argued, the sentencing remarks indicated that the judge had not taken a particularly serious view of the offence. Mr Melvin submitted that it was not incumbent on the judge to go behind the sentence. The appellant had been convicted of drugs offences, supplying

drugs to family and friends. The First-tier Tribunal had been fully entitled to proceed on the basis that this was a serious offence.

17. I am satisfied that the judge erred by failing to take into account the circumstances in which the Crown Court imposed a sentence of 136 days. The basis of the sentence appears to be clear and there is no obvious reason not to accept the contents of the letter from the appellant's advocate about why he was sentenced to imprisonment rather than a community order. In consequence, the judge failed to take all relevant matters into account when considering the public interest.

18. I am satisfied that these errors are such that the decision should be set aside as relevant factors were not taken into account in relation to the consequences for the family if the appellant is to be deported and when assessing the nature and seriousness of the offence when considering the public interest.

19. In these circumstances, I can deal briefly with grounds 3-6. I am not satisfied there is any substance in ground 3. There is no reason to believe that the judge failed to consider the evidence of the appellant's rehabilitation. Ground 4 argues that the judge made an unlawful assessment of the precedent fact necessary to engage para 398(c), that in the view of the Secretary of State his offending had caused serious harm. Mr Saini argues that the judge failed properly to consider the instructions set out in chapter 13 of the Immigration Directorate Instructions on criminality and article 8 ECHR cases and particularly paras 2.1.2 to 2.1.5, dealing with serious harm but I am not satisfied that there is any substance in this ground.

20. The provisions of paras 2.1.2 – 2.1.5 are perfectly clear. At para 2.1.5 it says that where a person has been convicted of one or more violent, drugs or sex offences he will usually be considered to have been convicted of an offence that has caused serious harm. I agree with Mr Melvin's submission that the judge was entitled to find that the appellant fell within this category. He had been convicted of possessing cannabis with intent to supply and this is an offence which falls within the provisions of 2.1.3 of contributing to a widespread problem causing serious harm to a community or to society in general. The judge's findings on this issue were properly open to her for the reasons she gave.

21. Ground 5 seeks to rely on the appellant's derivative rights pursuant to the judgment in Zambrano but there is no substance in this argument. The appellant's removal would not inhibit the exercise by his wife or his children of their treaty rights as they can remain in the UK with their mother: see Secretary of State v AQ (Nigeria) and Ors [2015] EWCA Civ 250.

22. Ground 6 seeks to argue that KMO (Nigeria) is inconsistent with the judgment of the Supreme Court in Hesham Ali. I do not need to decide

this issue in the light of my previous findings. If it becomes relevant when the decision is re-made, the issue can be addressed at that stage but in any event in so far as KMO (Nigeria) is inconsistent with Hesham Ali, it has been overruled by the later superior authority.

23. For the reasons I have given I am satisfied that the judge erred in law and that the decision should be set aside. On the information before me I am satisfied that this is an appeal which should be retained in the Upper Tribunal for the decision to be re-made.

24. In accordance with directions issued at the end of the error of law hearing further evidence was filed on behalf of the appellant including both witness statements and further reports. The appellant's documentary evidence is set out in the original bundle A indexed and paginated A1 – I10 and a supplementary bundle SA indexed and paginated A1-F8. The respondent's documents are annexed to the appeal papers in Annexes A-H. Both Mr Saini and Mr Melvin have filed written submissions both dated 24 May 2017.

Further Oral Evidence

(i) The Appellant

25. The appellant adopted his two witness statements and a letter written for this hearing which are at SA/ A1-20. In the letter the appellant says that contrary to the comment by the First-tier Tribunal Judge at [42] of her decision that the appellant introduced his wife to cannabis, that was not the case. His wife had been taking both class A drugs and cannabis and he supported her to get off class A drugs. He also says that in the two years since being released from prison he has religiously adhered to his reporting conditions and there have been no further incidents of misconduct and there will be no more.

26. In his oral evidence he explained that the current situation has had a great impact on his wife's health causing her considerable mental stress. He explained that he was initially arrested in 2011 and because of the quantity of cannabis found in his possession he feared that he would be facing four to six years' imprisonment. He and his wife decided to divert the consequences of his actions, as he described it, and the family went to live in Zambia but his wife did not find it easy to integrate and she and the children returned in December 2013. He remained in Zambia until October 2014 when he returned to the UK. There was then a period of three weeks when he returned to Jamaica to arrange for the burial of his grandmother. On his return, he was arrested and remanded in custody pending his trial. He explained that he had been a long-term cannabis user and had been in the habit of buying cannabis for personal use and when he had an opportunity of buying a large amount (seven pounds), he thought it would be a good idea to have a stockpile. He had not intended to supply it for profit but to keep it for his and his wife's personal use. He explained that

he no longer took cannabis and again expressed his regret for what had happened. He had previously owned his own transport business and now worked as a transport manager.

(ii) The Appellant's Wife

27. The appellant's wife adopted her witness statements at SA/ A21-41, where she sets out fuller details of her background than were before the First-tier Tribunal. In very brief outline she says that her mother was a heavy drug user and an alcoholic and that when she was about 5 she and her brother were taken into care by Social Services. She went back home when she was 12, by which time her mother had married and was expecting a baby. Later, her mother ran off with another man leaving her and her brother with her husband. After she left school at 16 she took a job in Madrid as a nanny. She came back at 18 and managed to get a council flat and a YTS job. She describes being abused by a relative. She drifted into what she describes as a wild lifestyle, starting to take drugs which led up to class A drugs. She had a child and described herself as a bad mother following in the footsteps of her own mother. In her statement, she says that she hated and loathed herself.

28. However, things began to change when she met the appellant. Initially, he was unaware that she used class A drugs. She was subject to extreme outbursts of temper and could be violent and aggressive but the appellant stuck with her and encouraged her to obtain help. With his support and the help of her GP and the counselling service, she was able to stop using class A drugs and smoking skunk weed. She weaned herself down by using natural weed to come off the other drugs. She had got free of class A drugs and skunk weed before 2008 and since 2012 has stopped using weed and does not smoke cigarettes anymore. She has spent her whole life feeling anxious and unable to cope and that the appellant was the only stable person she had. She was very frightened of what would happen without him.

(iii) Witness Statement of EW

29. There is witness statement dated May 2017 from the EW, the appellant's eldest son (SA/A42-7) in which he updates his statement of March 2016 A/B66-68. In his statements, he explains why he would not be happy living in either Jamaica or Zambia. He also says that his mother could not cope as a single mother and he fears what would happen if his father were deported to Jamaica. Neither representative wished to ask EW any further questions about his statement.

Submissions

30. Mr Melvin relied on his written submissions. He confirmed that the respondent accepted that there was a genuine and subsisting parental relationship between the appellant and his children and that his removal

would have an impact on the stability of the family unit but not such that they would suffer the psychological problems set out in the ISW report. He submitted that any medical observations made in that report should be treated with caution. There was no evidence that the appellant's wife had had any problems managing the children when her husband was on remand or when he remained in Zambia following the rest of the family returning to the UK. There was little medical evidence that she had had problems with class A drugs in the past. Whilst it may be the case that she was suffering from depression and taking medication, that did not without more mean that she would be unable to cope with the children should the appellant be deported. The fact remained that the appellant had been convicted of two counts of supplying class B drugs to family and friends and that by buying drugs in large volume, he had added to the drugs problem and kept drug dealers in business.

31. Mr Saini repeated his submission that the appellant did not fall within para 398(c) as the respondent had unlawfully assessed the precedent fact necessary to engage that paragraph as the respondent had failed to show there was a proper basis for taking the view that the appellant's offending had caused serious harm. The offence had not contributed to a widespread problem causing serious harm to a community or to society in general, so he submitted, given that it was for the appellant's personal use and any supply was to his wife or friends and was non-commercial. He further submitted that deporting the appellant would be unduly harsh in the particular circumstances of his family. He relied on the ISW report and its addendum, the medical evidence from his wife's GP, and the evidence from EW's school.

32. He submitted that when the evidence was taken as a whole, the fact remained that if the appellant's wife and children remained in the UK, his wife would be unable to cope with the situation. It would be unreasonable in the light of their past experiences in Jamaica and Zambia to expect the family to go to Jamaica. He further argued that the removal of the appellant would interfere with the children's rights as Union citizens within the principles set out in Zambrano, as recently considered by the Grand Chamber in Chavez-Vilchez ECtHR 10 May 2017, C113-15.

33. Mr Saini argued that when considering the public interest and the factors set out in s.117C, proper account must be taken of the fact that the appellant's sentence was 136 days' imprisonment. There was evidence from the higher advocate representing him at the Crown Court that the starting point in the sentencing guidelines was a community order but as the appellant had served a lengthy period on remand, the judge had concluded that it would not be fair to give him a community order when he had already spent time in custody and for this reason the judge sentenced him to the length of imprisonment calculated to effect his immediate release.

Assessment of the Issues

34. I have already set out the factual background in [2] – [7]. The appellant's offences arise from the fact that on 7 May 2012 officers conducted a search of his home and a large quantity of cannabis was found. Fearing the consequences, the appellant and his family left the UK in November 2012 to live in Zambia but his family returned to the UK in December 2013 and he followed in October 2014. Following a brief visit to Jamaica to arrange for his grandmother's funeral, he returned to the UK and was arrested. He was remanded in custody until his conviction and sentencing on 11 March 2015 at Warwick Crown Court. Previously, on 6 October 2014 the appellant was convicted at a Magistrates' Court of failing to surrender to custody and was sentenced to one day's detention.

35. I must first consider whether the appellant falls within the provisions of para 398 which identifies foreign criminals liable to deportation whose claims under article 8 must be assessed by considering whether paras 399 and 399A apply. The appellant does not fall within the provisions of paras 398 (a) or (b) but the respondent argues that he falls within para 398 (c) which provides:

> "the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm ...".

36. For the reasons I have already set out at [19] – [20] above I was not satisfied that the First-tier Tribunal Judge erred in law in finding that the requirements of para 398(c) were met. Mr Saini has made further submissions on this issue arguing that the respondent's view that the appellant's offending had caused serious harm was not properly open to her in the light of the sentence passed by the Crown Court Judge, the offending could not rationally be deemed to be serious harm given the guidance at 2.1.3 of the relevant IDI, and the appellant did not fall within para 2.1.5 which required that a person be convicted of one or more offences when there was no mention of several counts arising from one offence. He submitted that there was a stark difference between two counts and two offences and, in consequence, the seriousness of harm has not been properly assessed.

37. I do not accept this submission. The statute makes it clear that it is for the Secretary of State to take a view as to whether an offence has caused serious harm. I am satisfied that she was entitled to take such a view in the circumstances of this particular case. The fact that there may be, and clearly are in the present case, mitigating factors which led the judge to pass a lenient sentence does not without more mean that the Secretary of State was not entitled to regard it as a serious offence. I agree with Mr Melvin that the seriousness lies in buying and storing prohibited drugs in a large quantity, so keeping drugs dealers in business and supporting the current drugs problem. The arguments based on the IDI are ill-founded for the reasons I have already set out in [20] above. I am therefore satisfied

that the appellant falls within the provisions of para 398(c) as the respondent was entitled to regard the offending as causing serious harm.

38. It follows that I must consider whether para 399 or 399A applies because if 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 those paragraphs. It is accepted that the appellant has a genuine and subsisting parental relationship with his children who are under the age of 18, are in the UK and are British citizens. The issues to be considered are whether it would be unduly harsh for the children to live in the country to which the appellant is to be deported and whether it would be unduly harsh for them to remain in the UK without the appellant: (para 399(a)(ii)(a) and (b)).

39. The issue of undue harshness has been considered by the Court of Appeal in MM (Uganda) v Secretary of State [2016] EWCA Civ 617. Laws LJ said as follows:

> "22. I turn to the interpretation of the phrase 'unduly harsh'. Plainly it means the same as in s.117C(5) as in rule 399. 'Unduly harsh' is an ordinary English expression. As so often, its meaning is coloured by its context. Authority is hardly needed for such a proposition but is anyway provided, for example, by VIA Rail Canada [2000] 193 DLR (4th) 357 at paras 35 to 37.
>
> 23. The context in these cases invites emphasis on two factors, (1) the public interest in the removal of foreign criminals and (2) the need for a proportionate assessment of any interference with article 8 rights. In my judgment, with respect, the approach of the Upper Tribunal in MAB ignores this combination of factors. The first of them the public interest in the removal of foreign criminals, is expressly vouched by parliament in s. 117C(1). S.117C(2) then provides (I repeat the provision for convenience):
>
> > 'The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal'.
>
> 24. This steers the Tribunals and the Court towards a proportionate assessment of the criminal's deportation in any given case. Accordingly the more pressing the public interest in his removal, the harder it will be to show that the effect on his child or partner will be unduly harsh. Any other approach in my judgment dislocates the 'unduly harsh' provisions from their context. It would mean that the question of undue hardship would be decided wholly without regard to the force of the public interest in deportation in the particular case. But in that case the term 'unduly' is mistaken for 'excessive' which imports a different idea. What is due or undue depends on all the circumstances, not merely the impact on the child or partner in the given case. In the present context relevant circumstances certainly include the criminal's immigration and criminal history".

40. Therefore, the assessment of undue harshness in this context requires regard to be had to all the circumstances with proper regard to the public interest, the impact on family members and the appellant's immigration and criminal history and of course I must take into account as a primary consideration the best interests of the children. The correct approach has been set out by the Supreme Court in ZH (Tanzania) [2011] UKSC 4 and Zoumbas v Secretary of State [2013] UKSC 74. The children's best interests are a primary consideration. They are not determinative but should be considered in advance of other matters and no other single consideration should be regarded as more important.

41. When assessing the best interests of the children of the family, I take into account the ISW report at A/B 1-37 and the addendum at SA/F1-8. In his first report the social worker sets out his conclusion that deporting the appellant would not be in the best interests of the children. He set the wishes of the children and says at [86] that any decision that compels the breakup of this family unit is contrary to the children's best interests so much that the risk of further separation due to deportation is of irreversible harm to them by that break up. He further expresses the view that removing the appellant from the family unit is likely to have a negative impact on his wife's ability to meet her children's needs and that if he is separated from the family unit that could have an impact on the quality of care that is given by her to the children.

42. In his supplementary report of 11 May 2017 he makes the point that EW has chosen his GCSE subjects and it is a critical time in his education. AW has now started in reception and EW is in year 1 and is described as an active class member. In his conclusions the social worker says that it is his considered view that the children are currently settled in the care of their parents who are supporting each other to enable them to meet their developmental needs and the current structure, routine and stability is of paramount importance in the three children's lives and that removing the appellant from the family unit would not be in the best interests of the children and would not be consistent with safeguarding and promoting their welfare. The supplementary bundle also includes a long research report on the impact of family breakdown on children's wellbeing prepared for the Institute of Education, University of London 2009. I have also taken into account the reports and letters from the children's schools and in particular the recent reports at SA/B1-9.

43. I accept that in the present case that the wishes and best interests of the children are for them to remain in the family home with both their mother and father and to remain at their present schools. However, I must keep in mind, as the Court of Appeal said in EJA v Secretary of State [2017] EWCA Civ 10, that 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. Whilst the best interests of the children

are a primary consideration, they can be outweighed by the public interest considerations particularly in cases of serious criminality.

44. I must also consider the position of the appellant's wife, and particularly the impact on the welfare of the children if she were left to cope by herself without his presence. I accept that she has had a very difficult background and upbringing, as set out in her evidence and witness statements. I also accept that, having resorted to class A and B drugs in the past, she has now freed herself from them. However, she is still receiving medical treatment and support, as set out in the medical evidence. The letter from her GP of 24 March 2015 (A/D4) refers to the distress and impact to the whole family of the appellant's pending deportation as being enormous. She refers to the appellant's wife as struggling with the severe exacerbation of stress-related depression and having suicidal thoughts. The letter from the medical practice of 5 May 2017 (SA/C1-2) refers to her being supported "with her worsening mental-health issues" and expresses concern about her mental-health. Looking at her background as set out in her evidence, the medical evidence and the statements of her brother-in-law at A/B61, her son, LA, at A/B63-4 and her aunt and uncle at A/B69, I find that there is a very real risk that she would have very considerable difficulty in coping by herself with her three children. I accept that she has no-one else to turn to who could provide the support that the appellant provides: see the further statements from her sister, uncle and aunt at AS/A48-9. I also accept that she was unable to settle in Jamaica for the reasons given in her statement of March 2016 at [5]-[8] and [52]-[54] (AS/A33, 40-41).

45. I must also take into account the public interest in deportation and the fact that the respondent was entitled to regard this as a serious offence so bringing the appellant within para 398(c). The appellant made his position by leaving with his family for Zambia but, on the other hand, when it became clear that his wife could not cope with living there and returned with the children for the UK, he also returned to join them and to face the consequences of the offences for which he had been arrested. The fact that the appellant had in his possession a large quantity of cannabis gives rise to concern about the basis of the plea accepted by the prosecution. However, in his sentencing remarks the judge addressed that issue and commented that a judge could only see what was on the papers of a drug case and that those who prosecuted and investigated it would have more information. He noted that the police had been satisfied that the money found in the premises were not the proceeds of crime and that, having given the matter careful thought and discussions having taken place between Counsel, the officers in the case and the reviewing lawyer, the prosecution had decided to accept the plea on the basis set forward.

46. The basis of the plea is set out at A/E1-2. The appellant said that he pleaded guilty to supplying cannabis on the following basis. In his culture cannabis was a way of life and when he came to the UK, he continued to smoke it. He accepted that he had supplied cannabis to others but not on

a commercial basis and that he would simply supply friends and family with the smoke but it would not be financially rewarded. At A/E3-4 there is a letter from the higher advocate who represented the appellant at the Crown Court confirming that the judge sentenced the appellant on that basis and adds:

> "The judge found that the sentencing guidelines starting point was a community order but as [OC] had served a lengthy period on remand the judge concluded that it would not be fair to give him a community order when he had already spent time in custody. Consequently, the judge sentenced him to 136 days on counts 2 and 3 to run concurrently, the sentence was calculated to facilitate his immediate release."

I accept what the higher advocate says about the reasons for the length of the sentence with the clear inference that, but for being remanded in custody or if reports had been obtained, the likelihood is that the appellant would have been sentenced to a community order.

47. When assessing whether it would be unduly harsh for the children to return with the appellant to Jamaica, I take into account the fact that the family did live in Jamaica from 2003 to 2005 but I accept the evidence that the appellant's wife found this very difficult and I am satisfied that she and the children would face considerable hardship in living in Jamaica and that the interruption to their current education, in particular EW's, would have a serious impact on the children. I also accept that it would be very harsh for the appellant's children to remain in the UK without him not least in the light of the continuing concerns about their mother's mental health and her ability to cope as a lone parent.

48. Looking at the evidence as a whole, I find that it would be unduly harsh for the children either to have to leave for Jamaica with the appellant or remain in this country without him. A combination of factors and their cumulative effect satisfy me that this would be the case: firstly, it is in the best interests of the children for them to remain within their current family home with both parents and for their education not to be disturbed; secondly, I am satisfied that there are very real concerns as to whether the appellant's wife would be able to manage and hold the family together without the help she receives from the appellant; thirdly, in the light of the basis on which the plea was accepted, this offence, whilst serious, was less serious that originally appeared to be the case; fourthly, this was the appellant's first offence save for the breach of bail condition, which arises from his arrest for these offences and fifthly, I accept that the appellant genuinely regrets his actions both in purchasing such a large quantity of cannabis and in seeking to evade the consequences by taking his family to Zambia. Applying the approach set out in MM (Uganda), I find that in the circumstances of the appellant and his family that his deportation would be unduly harsh for the children and that the requirements of para 399(a)(ii)(a) and (b) are met.

49. In the light of this finding, I need not consider whether there are very compelling circumstances over and above those described in paras 399 and 399A such as to outweigh the public interest in deportation nor need I deal with the submissions based on the principle set out in Zambrano. I should add that after I made the error of law decision, the judgment of the CJEU (Grand Chamber) in Chavez-Vilchez ECtHR 10 May 2017 C113/15 has been issued and indicates that a more fact-sensitive and individualised approach should be taken in assessing this issue. However, in the light of my findings on the appeal under the Rules there is no need for me to re-open this issue.

50. The judgment of the Supreme Court in Hesham Ali has made it clear that the Rules do not provide an exclusive code for the assessment of article 8 and that the obligation remains on the Tribunal to make an assessment of proportionality when considering whether a decision made under the Immigration Acts breaches a person's right to respect for a private and family life under article 8. I will briefly consider the appeal in the alternative outside the Rules. Here again, the best interests of the children are taken into account as a primary consideration and the public interest in the deportation of foreign criminals must be given proper weight in the light of the provisions of the Rules and, more significantly, the provisions of s.117B and C of the 2002 Act as amended.

51. Dealing with the provisions of s.117B in so far as they apply to the appellant, he is able to speak English and is financially independent. In the past he has run his own haulage business which not only supported himself and his family but also generated employment. His presence in the UK has been in accordance with the Rules. When his leave expired he returned to Jamaica with his wife. When the family returned to the UK, the appellant obtained entry clearance and was subsequently granted indefinite leave to remain. S.117C provides that the deportation of foreign criminals is in the public interest and the more serious the offence, the greater is that public interest. Where a foreign criminal has not been sentenced to a period of imprisonment of four years or more the public interest does not require deportation where the applicant 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 deportation on the partner or child would be unduly harsh. This provision raises factors virtually identical to those considered under para 399(a)(ii).

52. I must also take into account the relevant Strasbourg jurisprudence, and in particular the Maslov [2008] ECHR 46 criteria. These require consideration of the nature and seriousness of the appellant's offences. The offence of possession of cannabis with intent to supply is a serious offence but the Crown Court accepted that the appellant had bought the cannabis for his own use and for supply to family and acquaintances with no financial gain so leading the judge to pass a more lenient sentence than otherwise would have been the case. The appellant has no previous convictions save for the related breach of bail offence and has not committed any further

offences since his conviction. On balance, I accept that his expressions of regret relate not to just to the fact that he was caught but also to his involvement in criminal activity. I accept his evidence that he has now ceased using cannabis and is all too well aware of the effects his behaviour has had on his family. I take into account the children's ages and the fact they are UK citizens and have already referred to their best interests and to the reasons why I find that it would be unduly harsh to expect them to go to Jamaica or to remain in this country without the appellant. I also take into account the effect the appellant's removal would have on his wife and the consequential impact on the life of the family in this country.

53. Clearly deportation would be an interference with the appellant's right to respect for his family life and that of his family. It is in accordance with the law and is for the legitimate aim of preventing disorder and crime within article 8(2). The critical issue, adopting the words of Lord Reed at [50] of Hesham Ali, is whether giving due weight to the strength of the public interest in the appellant's deportation, the article 8 claim is sufficiently strong to outweigh it and that in general only a claim which is very strong or very compelling will succeed. For the reasons I have given, I find that this is such a case and that deportation would be disproportionate to the legitimate aim.

Decision

54. The decision of the First-tier Tribunal was in error of law and has been set aside. I re-make the decision by allowing the appeal against the deportation order on both immigration and human rights grounds.

Signed Dated: 28 June 2017

Deputy Upper Tribunal Judge Latter