Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/23649/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 February 2018	**On 14 March 2018**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR NICARDO DWIGHT ROACH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Clarke, Home Office Presenting Officer
For the Respondent: Ms J Heybroek, Counsel, instructed by Thomas Andrew & Daodu Solicitors

DECISION AND REASONS

1. The respondent, (hereafter the claimant), a citizen of Jamaica aged 41 was made the subject of a deportation order served by the appellant (hereafter the SSHD) on 29 September 2016. His appeal came before First-tier Tribunal Judge (FtT) Herbert who in a decision sent on 17 July 2017 allowed his appeal on Article 8 grounds under the Immigration Rules. Following a hearing on 2 October 2017 I set aside the decision of Judge Herbert for material error of law. I found the judge to have erred in his application of Exception 2 of s.117C NIAA 202 and also in his assessment of factors relevant to the public interest when assessing proportionality. I stated, however, that the SSHD's grounds did not

challenge the judge's primary findings of fact as regards the claimant's family circumstances in the UK, although it would be a matter for the Upper Tribunal at the next hearing to determine the strength and quality of the claimant's ties with his children and the likely impact on their best interests of his deportation and to determine the parties' willingness and ability to live in Jamaica.

2. The claimant was tendered for cross-examination. Asked by Mr Clarke whether he accepted his guilt for the offences of rape and sexual assault, the claimant said yes, he did. Asked whether he stood by his statement of May 2017 that there were mitigating circumstances and that he 'honestly believed' the victim gave consent, the claimant said he did not believe that. He had signed it but it was incorrect; he did not understand. Afterwards he realised that what he had done was wrong.

3. Asked whether he had made inquiries about getting employment in Jamaica the claimant said that he had spoken to one or two friends who said there was nothing there. His mum had died and he had no siblings. He did have cousins but they lived separately and did not like family sticking together. He had work experience as a car mechanic for 15 years. He did not think his wife had made any inquiries about employment for herself. She had no family in Jamaica.

4. The claimant said he had not been in touch with his son R for two and a half years. The boy's mother had cut him out. He did what he could.

5. As regards his son J, he sees him regularly, every other day. His mother is Ms L. The boy complains when he does not get to see him. He could not visit the appellant in Jamaica as his mum would never go there or allow it.

6. Asked why she had not come today to give evidence, the claimant said he did not know she was needed as well. He is told just to bring his partner.

7. He was asked about his son, D. He was very close to D. The boy has been told his father may be deported but he does not understand. He gets very unhappy if he does not see and do things with his dad. His partner's mum lives nearby and helps with child-minding but she has some health care issues. He does not know what she does. His partner, JW, suffers from depression and has had to take time off work once or twice. When she can't cope, she shuts down. Her mother helps calm her down.

8. Mr Clarke asked the claimant what he knew about the incident in which his partner was robbed whilst on holiday in Jamaica. He said it was racially motivated because she was white and she received comments about 'not taking our boys away'.

9. I then heard evidence from the claimant's partner, JW. She said she had met the claimant in 2009 and commenced a relationship in 2010. When

she found out she was pregnant they moved in together. The claimant had raised her son. The claimant cared deeply for her son. She did not know at the beginning of their relationship that he had immigration difficulties but he told her in approx. 2012. When she found out she took steps to help him regularise his status.

10. Asked about the claimant's use of the alias 'Sean Scott', she said she had not been aware of him using that name, but he had told her that he had had to use this name previously.

11. Asked if she would consider going to live in Jamaica with the claimant she said they would have nowhere to live and the last time she went she had been verbally and racially abused as well as robbed. She agreed that crime happens everywhere but she had already experienced it and did not want to take that risk again. She had not researched about levels of crime and violence in different parts of Jamaica or whether there were safe areas.

12. Asked about her family ties in the UK, she said she had a mother and brother. Her brother lives in North London. Her mother lives nearby and has a very big family. She is very supportive. Her mother works and has an elderly stepmother. She divides her time between helping JW and other family. She works in a school, for something like 20 hours a week. She is looking for a second job. Her mother would not be able to give up work to look after her son. The claimant did the picking up from school. Ms JW said she worked in a nursery, averaging around 20 hours a week. She had not done any investigation of childcare employment opportunities in Jamaica. She did not have any family members there.

13. She said that D did not understand that the claimant faces deportation, but he would be devastated if he did know. It would break his heart. They have a close bond. Without the claimant, the boy would have no male figure to look up to and be guided by and to keep him from taking the wrong path. She suffers from depression. The uncertainty about the claimant's situation made it worse; there was only so much she could take. Without the claimant, she was afraid she would break down.

Submissions

14. Mr Clarke said there was no dispute that the claimant was a foreign criminal and could only succeed under the Immigration Rules or s.117C of the NIAA 2002 if able to show very compelling circumstances over and above those relating to whether it would be unduly harsh to require him to leave the UK. The assessment of whether it would be unduly harsh for him to be deported had to take into account his criminality as well as his poor immigration history. He had not had lawful leave to remain since 2002 when his visit visa expired. In cross examination, the claimant gave a different version of whether he had shown remorse than he did in his witness statement signed in May 2017. He had also convictions for lesser crimes, including possession of crack and a driving disqualification. On the authority of **Danso** [2015] EWCA Civ

596 his rehabilitation could not in any event contribute greatly to the balancing exercise. Regardless of the positive steps he had taken to undertake relevant courses any contrition he had for his criminality could carry little weight. Mr Clarke said he did not consider that the delay of some 10 years between his last conviction and the decision to make a deportation order assisted the claimant's case and whilst **EB (Kosovo**) [2008] UKHL 41 remained relevant, Parliament had decided to apply more stringent legal requirements for foreign criminals and the Upper Tribunal was bound to follow higher court authority interpreting that.

15. In assessing undue hardship Mr Clarke said he accepted that the claimant's partner's circumstances were relevant but she had been suffering from depression prior to meeting the claimant, even if it had got worse recently. It was speculation on the part of the claimant and his partner as to how badly the claimant's deportation would affect D but he could be expected to get over it. There were no welfare reports from his schools or social workers.

16. As regards the claimant's partner's fear that if she moved to Jamaica she would suffer another racist attack, Jamaica was a large place and there were relatively safe areas. Her not going was a matter of choice; she had not shown she had an objective fear of further attacks. It was clear the claimant could set himself in employment in Jamaica given his experience as a car mechanic and a painter and decorator.

17. The Upper Tribunal should attach little weight, submitted Mr Clarke, to the claimant's ties with the second eldest child, J, and there was no evidence from the boy's mother to support the claimant's importance to her child's welfare. He had not seen his oldest child for 2 and half years. Accordingly, his deportation would not be unduly harsh and there would not be very significant obstacles to his integration into Jamaican society and there were no compelling circumstances. The claimant was not financially independent.

18. Miss Haybroek emphasised that the error of law decision had stated that there was no need to revisit the primary findings of fact made by the First-tier judge. She accepted that the claimant had to show very compelling circumstances, but submitted he could do that, especially taking into account the guidance given by the Supreme Court in **Hesham Ali** [2016] 60. The adverse effect on the partner and child would be very considerable. The evidence of his rehabilitation was relevant. As regards delay the claimant was entitled to pray in aid **EB (Kosovo)** since his case fell squarely within the third category of a 'dysfunctional immigration system'. What could be more dysfunctional than the Secretary of State delaying 10 years since his conviction and taking no steps to deport him when he came out of prison and formed family life ties with his partner and had a child with her.

19. As regards Mr Clarke's submissions that the claimant had failed to show full remorse the claimant had explained why he had said what he did in

his May 2017 witness statement about honestly believing his victim consented; he had said the same thing to the FtT judge. He had come to realise, despite his belief at the time, that it was not reasonable. It was not incorrect of him to say that he 'now' understood this.

20. Miss Heybroek submitted that the fact that Miss JW had experienced assault and abuse in Jamaica on a visit there was relevant especially as she was someone who suffered from depression. If she was a more robust character, it would perhaps be different. She did not want her son to be involved in the same milieu she had experienced. The effect of deportation on the claimant's family would be to split it. Skype would be the sum total of their relationships. Miss JW would not be able to afford to go to Jamaica for visits. It was significant that Mr Clarke had said that the effect of the claimant's deportation on the child D would be akin to 'bereavement' as that underlined how severe the effect would in fact be. It would inevitably have an adverse effect on the child's future.

21. As regards delay, Miss Heybroek said she stood by her contention that the decision-making in the claimant's case was dysfunctional. Even if the reason why the Secretary of State had delayed making a deportation order was because of the claimant's use of an alias, she had not sought to deport Sean Scott.

My assessment

22. I am tasked with re-making the decision on the claimant's appeal against the deportation order made against him on 29 September 2006. In doing so I must take into account the entirety of the evidence which includes the oral testimony I heard from the claimant and Miss JW. The claimant is now aged 42. It is not in dispute that he is a foreign criminal and that he is only entitled to succeed in his appeal if able to show that he falls within one of the exceptions in s 33(2)(a) of the UK Border Act by being able to establish that his deportation would breach his Article 8 rights. The Immigration Rules set out the practice the Secretary of State follows when considering an Article 8 claim from a person liable to deportation on the basis of criminal convictions. By virtue of the fact that the claimant was sentenced to five years imprisonment, in order to meet the requirements of the Rules he must show, pursuant to para 398, very compelling circumstances over and above those described in paras 399 and 399A. He is also entitled to succeed in his appeal if able to show, pursuant to s117C(6) of the NIAA 2002, that there are very compelling circumstances, over and above those described in Exception 2 as set out in s117C(5) (the latter which applies where a claimant has a genuine and subsisting relationship with a qualifying partner and child and the effect of his deportation on the partner and child would be unduly harsh). Despite having at least one British citizen child the claimant cannot benefit from the SSHD's policy on parents of British citizen children because of his history of serious criminality.

23. On 27 February2002 the claimant was convicted of possession of a class A controlled drug (Crack Cocaine), using a vehicle whilst uninsured and driving otherwise than in accordance with a licence. On 10 March 2006 at Oxford Crown Court in the name of Sean Scott the claimant was convicted of sexual assault and rape of a female aged 16 or over and he was sentenced to 5 years imprisonment and a requirement to register on the sex offenders register for life. On 18 December 2009 he was convicted of driving otherwise than in accordance with a licence, using a vehicle whilst uninsured and failing to give name and address. He has not committed any further offences since 2009. On 2 February 2016 a request was sent to the claimant in relation to his claimed entry to the UK and his family life. A subsequent biometric revealed a match to the alias name of Sean Scott. As already noted, when the claimant was convicted in 2006 it was in the name of Sean Scott. Since he committed his 2006 offences he has gained a number of certificates of NVQ training and has successfully completed courses in Basic Lift Truck Operating, tyre fitting, decorating finishing and industrial painting among others. He is blind or has diminished sight in one eye.

24. The claimant's family circumstances are not in dispute. He has three children by different partners - R aged 12, J aged 7 and D aged 6. He currently lives with D and D's mother, Miss JW. The child, D, is a British citizen, as is his mother Miss JW. The claimant has little or no contact any more with R, limited contact with J and close contact with D. The claimant has been in a committed relationship with Miss JW since 2010.

25. B y s.117C(6) of the 2002 Act, one of the elements the claimant must establish is that the effect of the claimant's deportation on the partner or child would be unduly harsh. In assessing undue hardship, I must take into account public interest considerations as well as factors in the claimant's favour.

26. One possible way in which the effect of the claimant's deportation might be mitigated for Miss JW and the child D would be if the latter returned to Jamaica to live with the claimant there. I concur with Mr Clarke that the fact that Miss JW had one bad experience when visiting Jamaica does not mean that the couple could not find somewhere to live in Jamaica where they were safe and where she was not likely to suffer a repetition of such an incident. It is not suggested by Miss Heybroek that the country information regarding Jamaica demonstrates a consistent pattern of racist behaviour towards white women. I agree with Miss Heybroek that Miss JW's psychological situation makes it more difficult for her to take an objective view of what would happen if she went to live in Jamaica and that gin her psychological problems she is likely to be more fearful than an ordinary person; at the same time, I agree with Mr Clarke that it cannot be said that she is objectively at risk of a repetition of this type of incident. I also consider it likely that the claimant will be able to utilise his work experience and qualifications achieved in the UK to find gainful employment in Jamaica. It is also possible Miss JW might be able to find employment looking after

children. That said, the evidence also indicates that Miss JW relies quite heavily on support from her mother and that she would lack such support if the couple went to Jamaica. Whilst D is likely to be able to adapt to life in Jamaica fairly quickly, he is a British citizen and it is not reasonable to expect him to have to depart the UK. Hence, I consider that the issue of the effect on Miss JW and the child D is properly confined in the circumstances of this case to whether the family can be separated.

27. In conducting the balancing of factors relevant to the issue of undue hardship – as so confined- there are weighty considerations pointing to the effect on Miss JW and the child being considered as unduly harsh. Miss JW suffers from depression and it was accepted by the First Tier Tribunal judge that the claimant gave her considerable positive support in her daily life which helped her to perform her own parental role and be able to work part-time. Whilst I do not consider that the child R's life will be affected either way by the claimant's deportation, and whilst I consider there would be a quite limited effect on the child J (whom the claimant sees twice a month), it is clear that the claimant's deportation would have a serious impact on the child D with whom he lives and in whose upbringing he takes a very active role. As Mr Clarke himself described it, the effect on D would be "devastating". There is a lack of welfare reports on D's situation but that does not detract from the surrounding evidence indicating how important the claimant has become to D's life. I also take into account that the claimant, albeit not financially independent, has demonstrated that he can support himself through gainful employment. Manifestly he speaks excellent English.

28. On the other side of the scale there are very significant public interest considerations in play in the claimant's case. The 2006 offences were of a serious nature as reflected in the 5 years sentence. Whilst I accept that the claimant has not re-offended since 2009 and has taken significant rehabilitative steps through undertaking training and vocational courses and has proved himself a good father, it cannot be said that he has demonstrated full remorse. I do not consider that his statement in May 2017 that he believed the victim consented can be understood to be referring only to his belief at the time. At para 7 he still considered that there "were however mitigating circumstances as the alleged victim was a friend of mine whom I honestly believed engaged in consensual sexual acts with me". Further, there is not only his criminal history. He has remained in the UK without lawful leave since 2002. All his private life ties and indeed his ties with Miss JW have been developed at a time when he knew his immigration status was precarious. Making matters worse, he used an alias in order to enable him to work but maintained it when he was arrested for the 2006 rape. His use of an alias also undermines Miss Heybroek's argument that he was entitled to benefit from the third category of delay identified in **EB(Kosovo**) as counting in favour of a claimant, by virtue of a 'dysfunctional immigration system'. The chronology makes clear that it was only in March 2016 that the SSHD became aware that the client

was someone who had committed a criminal offence using the alias of Sean Scott. Had the claimant not used that alias the SSHD would have been in a position much more quickly to take steps to deport the claimant. Miss Heybroek sought to argue that this should make no difference because the SSHD did not move to deport Sean Scott, but we have no certain particulars regarding Sean Scott's basic particulars, including his immigration status, where he was born etc. Her submissions on this issue are purely speculative.

29. Having considered the evidence as a whole, I conclude that when assessing the issue of whether the effect of the claimant's deportation on his partner and child would be unduly harsh the very significant public interest considerations applicable in the claimant's case outweigh those considerations pointing in favour of a different conclusion, notwithstanding that the latter considerations are weighty.

30. However, even if I had concluded that the claimant had established he could benefit from Exception 2, it is entirely clear in my judgment that the claimant cannot establish, as he must under s117C(6), very compelling circumstances over and above those described in Exception 2. At the very best, the competing considerations applicable to the issue of undue hardship would have resulted in a decision in favour of the claimant by a very fine margin.

31. In reaching my decision I have had regard to established principles set out in decided authorities. Whilst the Court of Appeal in JZ (Zambia) [2016] EWCA Civ 116 at [29]-[30] and in SSHD v KE (Nigeria) at [24] have highlighted that paras 399 and 399A of the Rules and Exception 2 of the 2002 AC provide some indication of the sort of matters which the Secretary of State might regard as very compelling in this context, they make equally clear that the requirement to show very compelling circumstances "over and above" those set in these provisions means that the threshold is raised.

32. For the above reasons:

The decision of the FtT judge has already been set aside for material error of law.

The decision I re-make is to dismiss the claimant's appeal.

No anonymity direction is made.

H H Storey

Signed Date: 13 March 2018

Dr H H Storey
Judge of the Upper Tribunal