Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05169/2019

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice, London	**Decision & Reasons Promulgated**
On Monday 25 November 2019	**On Thursday 5 December 2019**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

K R
[Anonymity direction made]

Respondent

Representation:
For the Appellants: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Ms A Childs, Counsel instructed by CK solicitors

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. As this appeal involves minor children, it is appropriate to continue that order. Unless and until a tribunal or court directs otherwise, the Appellant (as he was in the First-tier Tribunal) is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION

BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal even though the Secretary of State is strictly the Appellant at this juncture. The Respondent appeals against a decision of First-tier Tribunal Judge Currie promulgated on 8 July 2019 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 2 August 2018 refusing his human rights claim made in the context of a decision maintaining a deportation order against him. The deportation order was made on 11 March 2008. Notwithstanding the deportation order, the Appellant has remained in the UK and has not been deported to Jamaica.

2. The Appellant came to the UK as a visitor on 31 January 2000, then aged nearly twenty years. His leave was extended to 23 August 2002 and on 15 August 2002, the Appellant was granted indefinite leave to remain as the spouse of a British citizen.

3. The Appellant was convicted of possession of a Class A drug on 31 August 2004 and sentenced to five years in prison. A decision was made to deport him on that account. His appeal failed and the deportation order was signed on 11 March 2008.

4. The Appellant is now in a relationship with another British citizen and they have three children – [K1] born in October 2012, [K2] born in June 2015 and [K3] born in September 2018.

5. On 25 April 2018, the Appellant made representations seeking the revocation of the deportation order against him which was refused by the decision under appeal.

6. The Judge concluded that the impact of deportation on the Appellant's partner and three children would be unduly harsh. He accepted that the Appellant could not meet Exception 1 under the Immigration Rules ("the Rules") or Section 117C (4) Nationality, Immigration and Asylum Act 2002 ("Section 117C") because he had not been lawfully resident for more than half his life. However, the Judge found that the Appellant was socially and culturally integrated in the UK. He also said that "it could be argued" that there would be very significant obstacles to the Appellant's integration in Jamaica ([43] of the Decision).

7. The Judge recognised that it was not sufficient that the Appellant meet either or both of the exceptions under the Rules or Section 117C. Due to the length of his sentence, the Judge noted that the Appellant must show that there are "very compelling circumstances over and above" the two exceptions. In that regard, the Judge took into account the period since the deportation order was signed and that the Respondent had not enforced the order, the Appellant's rehabilitation (he had not offended since leaving prison in 2007), that the Appellant was exhibiting

"positive good character" and had health conditions (a kidney condition for which dialysis was required) ([44] of the Decision). The Appellant's family life also went beyond a "bare case" ([45] of the Decision). Balancing those factors against the public interest, the Judge concluded at [45] of the Decision that deportation of the Appellant would be disproportionate.

8. The Respondent's grounds of challenge are, in summary, a submission that the Judge has failed to provide adequate reasons or has misdirected himself when reaching the "unduly harsh" finding or the conclusion that there are very compelling circumstances over and above the exceptions under the Rules and Section 117C and a failure to consider all relevant factors and evidence. The Respondent relies in particular on the Court of Appeal's judgments in Secretary of State for the Home Department v PF (Nigeria) [2019] EWCA Civ 1139 ("PF (Nigeria)") and Secretary of State for the Home Department v PG (Jamaica) [2019] EWCA Civ 1213 ("PG (Jamaica)").

9. Permission to appeal was refused by First-tier Tribunal Judge Neville on 24 September 2019 in the following terms (so far as relevant):

> "... 2. Not all judges hearing this appeal would have reached the same decision. But the Grounds fail to engage with this Judge's impeccable self-direction at [22] – [34] as to the relevant legal principles. Before the Judge can be said to have erred in law the conclusion reached must be perverse or irrational – JG (Jamaica) [2019] EWCA Civ 982 at [39] is directly on point. Such a challenge should be clearly pleaded and it is insufficient to simply rely on 'factual precedents': RA (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 123 at [14].
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> 3. At para 6 the Grounds assert a failure to take into account the appellant having been an absconder since the making of the deportation order. I cannot see that the Judge has made any such finding, nor that this submission was made at the time. It is for the Grounds to set this out. Nor is the other challenge at para 6, asserting that the Judge placed material weight on rehabilitation contrary to RA. At [44(iii)] the Judge found the circumstances to go beyond what the Grounds call 'the expected norm'. No legal error is disclosed by that then being a 'pro' on the balance sheet to be considered cumulatively alongside all relevant factors, and certainly the Judge cannot be seen to treat it as decisive or even as particularly significant.
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> 4. Overall the Grounds fail to clearly and cogently identify an arguable material error of law, and instead simply ask the Upper Tribunal to disagree with the final result."

10. Permission to appeal was granted by Upper Tribunal Judge Gill on 16 October 2019 in the following terms:

> "It is arguable that the Judge of the First-tier Tribunal Currie was not reasonably entitled to find:

1. that it would be unduly harsh for the appellant's partner to remain in the United Kingdom without him;

2. that it would be unduly harsh for his children to remain in the United Kingdom without him; and

3. that there were very compelling circumstances over and above those described in paras 399 and 399A

Findings 1 and 2 above appear to be counter to the Court of Appeal authority, such as, for example, SSHD v PF (Nigeria) [219] EWCA Civ 1139.

Finding 3 appears to ignore the guidance in several Court of Appeal cases to the effect that rehabilitation is not a significant factor, such as, for example, Danso [2015] EWCA Civ 596 and Binbuga [2019] EWCA Civ 551.

All the grounds may be argued."

11. The appeal comes before me to determine whether the Decision contains errors of law and if so whether the Decision should be set aside.

DISCUSSION

12. Mr Lindsay began by explaining the way in which the Respondent puts her case. This is not, as the Appellant suggests in the Rule 24 statement, intended to be a perversity or rationality challenge. Mr Lindsay accepted that the pleaded case is not clear but pinned his colours firmly to the mast of a material misdirection. The pleaded case is perhaps more indicative of a challenge to the adequacy of reasons, but Ms Childs did not object to the way in which the case was argued. In her submission, the Judge had not misdirected himself and had provided reasons for reaching what were rational findings on the evidence.

13. Mr Lindsay sought to persuade me that the Judge when reaching his findings had ignored binding case-law both of the Court of Appeal and of the Upper Tribunal.

14. The Respondent's pleaded case refers to PG (Jamaica) as authority for the principle set out at [38] to [39] and [43] to [46] of the judgment. Insofar as Ms Childs sought to argue that the Respondent relies on case-law as a factual precedent, I reject that submission. The principles which can be gleaned from the relevant parts of the judgment in PG (Jamaica) are as follows:

(a) The Judge must reach findings on undue harshness which are based on evidence;

(b) The degree of harshness must go "beyond what would necessarily be involved for any partner or child of a foreign criminal facing deportation"; the impacts must be more than "commonplace";

(c) Distress of a child separated from his or her parent is to be expected but that is not the test – the issue is whether the impact is unduly harsh.

15. The Respondent's reliance placed on PF (Nigeria) is perhaps closer to a reliance on the facts as the case was quite similar in terms of the additional factors said to be at play. There the Court of Appeal found that the impact on children having to face the potential death of their father abroad was neither unduly harsh nor a compelling circumstance. However, I accept as Ms Childs submitted that each case turns on its own facts and assessment.

16. Mr Lindsay also drew my attention to the Upper Tribunal's decision in MS (s.117C(6): "very compelling circumstances") Philippines [2019] UKUT 122 (IAC) and in particular headnote (1) as follows:

> "In determining pursuant to section 117C (6) of the Nationality, Immigration and Asylum Act 2002 whether there are very compelling circumstances over and above those described in Exceptions 1 and 2 in subsections (4) and (5), such as to outweigh the public interest in the deportation of a foreign criminal, a court or tribunal must take into account, together with any other relevant public interest considerations, the seriousness of the particular offence of which the foreign criminal was convicted; not merely whether the foreign criminal was or was not sentenced to imprisonment of more than 4 years. Nothing in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 demands a contrary conclusion."

17. Finally, Mr Lindsay referred to the Tribunal's decision in RA (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 123 (IAC) and to the guidance at [4] of the headnote that "[r]ehabilitation will not ordinarily bear material weight in favour of a foreign criminal".

18. Turning then to the errors which Mr Lindsay submitted that the Judge had made, he pointed first to [36] of the Decision where the Judge said that the Appellant "had to first satisfy the requirements of either Exception 1 or 2". This is a case where the Appellant's sentence was over four years and he has therefore to show that there are very compelling circumstances over and above those exceptions (as the Judge rightly noted also at [36]). Ms Childs accepted that the Judge was wrong to say that the Appellant had to satisfy either of the exceptions before any assessment was made of the very compelling circumstances but said it was not material. Mr Lindsay accepted that this was so. Whilst it goes too far to say that an appellant must satisfy either of the exceptions in an over four years' sentence case, it is undoubtedly a good discipline to start with consideration whether those exceptions are met before moving on to look at the very compelling circumstances.

19. Next, Mr Lindsay argued that the Judge had misunderstood the nature of the offence at [2(iii)] and [4(ii)] of the Decision. He had considered that the offence was one only of possession of class A drugs whereas it was

an offence of possession with intent to supply. Whilst I accept that the Judge may have mischaracterised the offence, I do not consider this to be a material error not least because the Judge understood that this was a serious offence due to the length of the sentence, that it was one involving a kilo of heroin and that "the offence committed had many victims and was associated with many other criminal activities; it resulted in significant harm to society" ([4(ii)]). That is an indication that the Judge did not misunderstand the nature of the offence. Mr Lindsay also raised this point, though, as a reason why the Judge had erred when he came on to balance the public interest against the impact on the Appellant and his family. I deal with that point below.

20. Turning then to the Judge's reasoning in relation to Exception 1 based on the Appellant's private life, that appears at [43] of the Decision as follows:

> "The issue of the deportation order invalidated the Appellant's indefinite leave to remain therefore he could not be said to fall into Exception 1. However, I found that at the date of the hearing he had been in the UK, admittedly some of that time in prison, for 19 years and 5 months of his 39 years, he was also socially and culturally integrated in the UK as established by his letters of support. Additionally, it could be argued that there would be very significant obstacles to his integration into Jamaica, practically all his adult life had been spent in the UK, he had no remaining family in Jamaica, his significant health problems would make finding work difficult and although renal dialysis was available in Jamaica, this was generally of a type not recommended for the Appellant and there were serious questions as to whether he could pay for such treatment in any event. I did note that the Appellant had visited his mother in Jamaica in 2004, some 15 years ago".

21. Mr Lindsay pointed out that the Judge had not made a finding whether the factors relied upon did amount to very significant obstacles to the Appellant's integration in Jamaica. I accept that is so but of course it could not avail the Appellant had the Judge done so because the Appellant failed to meet the exception for other reasons and, in any event, it would not be enough for him to meet that exception; he has to show something over and above the exception.

22. Mr Lindsay also submitted that there was an error in this regard because it was not clear whether and to what extent the Judge had taken into account these matters when reaching his conclusions as to very compelling circumstances. The Judge's findings as regards very compelling circumstances are at [44] and [45] of the Decision as follows:

> "44. In addition to the above I found the following to be relevant to the question of whether the Appellant could demonstrate that there were 'very compelling circumstances' in his case:
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> i. The deportation order had been made over 10 years ago in 2008 and no positive steps had been taken by the Home Office

to action it; it was the Appellant who had sought to revoke it in order to regularise his immigration status,

ii. The Appellant had demonstrated that he was rehabilitated, although not mitigating his previous offending behaviour he had not committed any further offences since his release from prison in March 2007, a period in excess of 12 years, he had only committed the one offence,

iii. Not only had the Appellant not been convicted of any further offences he was now demonstrating positive good character; as evidenced by the testimony of Ms Plummer and Ms Pryce and letters of support, he as an admirable role model as a father to his friends and provided them with practical and emotional support. He was also actively involved in his son's nursery supporting staff in group activities.

iv. Although his health conditions, to some extent, had been mentioned above, this was a significant and serious concern to the Appellant and his family, it was imperative that he received the right kind of treatment, without it he would not survive. At the moment he was receiving this treatment in the UK but there were substantial questions as to whether this treatment would be available in Jamaica. The peritoneal dialysis he needed was not generally available and although haemodialysis dialysis was available this was not recommended by his consultant and the outcomes for patients were not always positive. It was also unlikely that the Appellant would be able to pay for this treatment in any event.

45. I am satisfied that the circumstances of his family are such that the Appellant presented much more than a 'bare case' in respect of Exception 2, **NA (Pakistan)**. Taking the above into account collectively, which I am entitled to do, **NA (Pakistan)**, I am also satisfied that there are very compelling circumstances sufficient to outweigh the strong public interest in deporting those foreign criminals convicted of serious offences attracting a sentence of 4 years or more. In coming to this conclusion, I note the need for the deterrent effect of the immigration policy. I am conscious that I must be clear why I am satisfied that the high threshold required by section 117C (6) has been crossed and it is for the cumulative effect of the reasons stated at [37] – [44] above."

23. As the Judge's reasoning incorporates also paragraphs [37] to [42] of the Decision dealing with Exception 2 based on the Appellant's family life, before turning to look at the Judge's assessment of very compelling circumstances, I set out those paragraphs also:

"37. In respect of exception 2; it had been conceded by Mr Cordon that the Appellant had a genuine and subsisting relationship with a qualifying partner and with a qualifying child, his partner and three children were British citizens. It was not accepted that it would be unduly harsh if either the Appellant's partner or children had to leave the UK to reside with the Appellant in Jamaica or remain in the UK without him.

38. I found that this was a tight knit family, where the parents relied on each other for emotional and practical support, the children, as expected given their age, were dependent on both parents for their emotional and practical needs. The Appellant played a significant role in their daily care and, to all intents and purposes, was their primary carer. The children had not known any other life than in the UK with their immediate family and maternal extended family. The two older children were doing well at school and nursery respectively and were integrating into their local community through dance school. Other than through their father the children had no cultural ties with Jamaica, they had no paternal extended family residing there and they had never visited the country.

39. The two eldest children were aware that their father was ill, indeed the eldest had asked whether he was going to die. Their mother, who from her work and continuing education, had some knowledge of child welfare described them as being anxious about their father's illness. She has serious concerns about their emotional, behavioural and physical well-being because of feelings of anger, abandonment and worry should their father be deported.

40. The Appellant had been particularly supportive of his partner's continuing professional development and I was satisfied that without his support, coupled with the need to become solely responsible for the emotional and daily care of her children, that she would not be in a position to commence her degree.

41. When assessing the best interests of the children, I was directed by the guidance of Clarke LJ given in **EV (Philippines) v SSHD [2014] EWCA Civ 874** and Lord Carnwath in **KO (Nigeria)** and I was satisfied, for the reasons stated above, that it was in the best interests of the children to remain with both parents and that that should be in the UK. I was also satisfied that it would be unduly harsh for the children to have to leave the UK and reside in Jamaica with their father or to remain in the UK without him. The reality of the situation was that if the Appellant was deported, the children would remain in the UK with their mother. Whilst much of what they would experience would be the normal consequences of the deportation of a parent, there were particular features of their family life and the health condition of their father that would make their situation excessively harsh. The children were particularly close to their father, he was responsible primarily for their daily care, and they were worried, to the extent that they showed signs of being anxious, about their father's health. I found that it would be unbearable for them and detrimental to their health not to have regular face to face contact with their father so that they could see that he was still alive and that they could be reassured personally by him that he was 'doing ok'.

42. In respect of the Appellant's partner I also found that it would be unduly harsh for her to remain in the UK without her partner or for her to have to leave the UK and reside in Jamaica. The reality of the situation was that if the Appellant was deported, she would remain in the UK and have the sole responsibility for the children day to day. She did have close family relatives nearby but, because

> of their own work commitments, they were not in a position to provide the support when she needed it. Whilst she might be able to change her working hours so that she could remain in employment, her family responsibilities were such that it would be extremely difficult or impossible to look after a family of three young children, anxious about their father's health, and study for a degree including completing the necessary placements. She had already undertaken considerable study and sacrifice to get herself in a position where she could commence her degree and not to be able to do so I found would be excessively harsh. In reaching this conclusion I did take into account that a number of 'single' mothers successfully undertake such courses of study, but I found the Appellant's likely situation to be extremely challenging and unsurmountable. Also noted that it would not be necessarily harsh that the effect of her partner's deportation would require her to relinquish her work and become reliant on state benefits, this was the situation for many single mothers, however being in this position would seriously curtail her ambitions of becoming a qualified social worker."

24. If one reads the paragraphs dealing with the Appellant's family and private life together with those dealing with the very compelling circumstances assessment, it becomes evident that, in summary form, the factors on which the Judge relied in his analysis as meeting the test were the following:

(a) The closeness and interdependency of the family unit ([38]);

(b) The reliance which the Appellant's partner placed on him not simply to provide childcare whilst she worked but in order that she could pursue her ambition and training as a social worker ([40], [42]);

(c) The Appellant's illnesses and in particular the diagnosis of "end stage" renal failure which required a particular type of dialysis and, in due course, if the Appellant's medical conditions improved, a kidney transplant: the Appellant's medical condition was relevant both to his ability to integrate on return to Jamaica but also to the impact on the children who would worry for his safety and well-being ([39], [41], [43], [44]);

(d) The Appellant's lack of familiarity with and therefore difficulty with integration in Jamaica ([43]);

(e) By contrast, the level of the Appellant's integration in the UK ([43]);

(f) The positive developments in the Appellant's behaviour and community contribution since release in March 2007 ([44]);

(g) The passage of time since the deportation order was made (in 2008), that the Appellant had not been deported in that period and had not committed any further offences in a period of twelve years ([44]).

25. It may go a little too far to suggest that the failure to deport is a positive factor in the Appellant's favour. As Mr Lindsay pointed out, a person facing deportation is expected to leave the UK. However, the passage of time is relevant both as to risk of reoffending and rehabilitation. The Judge did not in any event place any great weight on this issue. The positive change in behaviour relates only to two of the seven reasons given.

26. The Judge was clearly entitled to place weight on the Appellant's medical conditions in the way he did. Although the Judge did not find it necessary to consider those conditions under Article 3 ECHR (and I express some reservations whether such a claim could in any event have succeeded on the evidence as presented), it was clearly a relevant factor both as to what would happen to the Appellant on return and as to the impact on his family in the UK if they were to remain here whilst he returned to Jamaica. In that regard, although the Respondent did not accept that it would be unduly harsh for the Appellant's family to accompany him, for the reasons the Judge gave at [38], that was a finding which the Judge was entitled to make.

27. There was no independent social worker's report about the impact on the children. However, the Judge did have a lengthy statement from the children's mother, the Appellant's partner who, as I have already noted, is training to be a social worker and has qualifications in child psychology. As such, and although she has an interest in the outcome of the proceedings, the Judge was entitled to place weight on her evidence. It is worthy of note that there had been no opportunity in this case to observe the impact of any previous absence of the Appellant from the children's lives – his offending and period of imprisonment pre-date the birth of all three children.

28. Equally, although the impact on the Appellant's partner and children of separation might be described as "commonplace" (except for that impact occasioned by the Appellant's medical conditions), the Judge recognised at [42] of the Decision that this might be the case but provided reasons why, in this particular case, he did not consider this to be so.

29. The Judge also acknowledged at [45] of the Decision the seriousness of the offending. I have already concluded that the Judge did not misunderstand the nature of the offences committed and recognised the significance of those offences at [4] of the Decision. The Judge also noted the "deterrent effect of immigration policy" which, although not explicitly referring to deterrence of criminal offending, is capable of incorporating that consideration, particularly in light of the Judge's correct self-directions earlier in the Decision as to the public interest.

30. Ultimately, the Judge's main reason for allowing the appeal appears at [45] of the Decision where he concludes that this is more than a "bare case" in terms of impact on family life and that this, coupled with the

"very compelling circumstances" which he had identified in the preceding paragraphs, outweighed the strong public interest.

31. As Judge Neville observed when refusing permission to appeal, "[n]ot all judges hearing this appeal would have reached the same decision". However, that is not the issue. The question for me is whether the Respondent has demonstrated that the Decision contains legal errors, whether those be ones of material misdirection or of a failure to provide adequate reasons. Based on a combination of the factors which I have set out at [24] above and the Judge's reasoning leading to those findings and based on the Decision read as a whole, I conclude that the Respondent has failed to show that the Decision contains errors of law. For those reasons, I uphold the Decision.

CONCLUSION

32. For the above reasons, I conclude that the decision of First-tier Tribunal Judge Currie promulgated on 8 July 2019 does not contain any errors of law. I therefore uphold the Decision.

DECISION

The decision of First-tier Tribunal Judge Currie promulgated on 8 July 2019 does not contain errors of law. I therefore uphold that decision with the effect that the appeal of [KR] remains allowed.

Signed Dated: 4 December 2019
Upper Tribunal Judge Smith