Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06119/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 November 2018	**On 6 February 2019**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

T A B
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer
For the Respondent: Ms J Elliott-Kelly, Counsel instructed by Hoole & Co Solicitors

DECISION AND REASONS

1. Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings. Anonymity is granted in order to prevent serious harm arising for TAB's minor child.

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2. For the purposes of this appeal I refer to TAB as the appellant and to the Secretary of State for the Home Department as the respondent, reflecting their positions before the First-tier Tribunal.

3. TAB is a citizen of Jamaica born in 1995. This decision is remaking of TAB's appeal against deportation, brought on Article 8 ECHR grounds. The remaking of the appeal is required following an error of law decision of Upper Tribunal Judge Grubb dated 16 February 2018 which found a material error of law when set aside the decision of the First-tier Tribunal issued on 26th September 2017 which allowed TAB's appeal against deportation.

4. The background to this matter is that TAB came to the UK in 1999 at the age of 4. He has remained here ever since. He was granted indefinite leave to remain on 9 November 2010.

5. The appellant has three criminal convictions. The first conviction was on 12 October 2012 for possessing a knife or blade in a public place for which he was sentenced to a referral order and six months' deprivation. The second conviction was on 28 October 2015 for two counts of possessing a Class A drug (cocaine and heroin) with intent to supply. For that offence the appellant was sentenced to a suspended sentence of 24 months' imprisonment and 200 hours unpaid work requirement. The third conviction was on 24 November 2016 for two counts of possessing a Class A drug (crack cocaine and heroin) for which he was sentenced to three and half years in prison.

6. The legal framework for considering the appellant's Article 8 rights is that set down by Section 117 of the Nationality, Immigration and Asylum Act 2002 and paragraphs 398-399A of the Immigration Rules.

7. A number of matters are no longer in dispute. It is accepted that the appellant has a genuine and subsisting relationship with his daughter, M, who is a "qualifying child" for the purposes of Section 117(5C)(v) and paragraph 399(a). The finding of the First-tier Tribunal that it is in M's best interests to remain in the UK and to "retain contact with both of her biological parents" is also accepted. The respondent also concedes that it would be "unduly harsh" to expect M to live in Jamaica. The critical assessment to be re-made now concerning M is, therefore, that contained in paragraph 399a(ii)(b), whether it will be unduly harsh for her to remain in the UK without the appellant.

8. Further, it is conceded for the appellant that his index offence was "particularly serious", stated to be so by the sentencing judge and reflected in the imposition of a three and a half year sentence notwithstanding his being given full credit for a guilty plea and an acceptance by the sentencing judge that by the time of sentencing he had "begun to turn his life around". There is also no challenge from the respondent to the finding of the First-tier Tribunal that there is a low risk of reoffending and that the custodial sentence had been "a life changing

experience" for the appellant, both issues falling to be set against the public interest in his deportation.

Would the Effect of the Appellant's Deportation be Unduly Harsh for M?

9. The Supreme Court in **KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53** at [27] approved the meaning of "unduly harsh" provided by the Upper Tribunal in the case of **MK (Sierra Leone) v SSHD [2015] UKUT 223 (IAC)**:

> "… 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antipathies of pleasant or comfortable. Furthermore, the addition of the adverb "unduly" raises an already elevated standard still higher."

10. Lord Carnwath also indicate in **KO that**;

> "The expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under Section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further, the word "unduly" implies an element of comparison … one is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with a deportation of a parent."

11. The Supreme Court in **KO** also clarified that the "relative levels of severity of the parents' offence other than is inherent in the distinction drawn by the section itself by reference to the length of sentence" is not something that should be weighed against the child. in the unduly harsh assessment, reflecting the principle from **Zoumbas v SSHD [2013] UKSC 74** "that the child should not be held responsible for the conduct of the parent".

12. The Supreme Court also indicated that the "unduly harsh" test is not to be equated with the requirement to show "very compelling circumstances" which would be a mere replica of the additional test provided in Section 117C(6) for more serious offending. The Supreme Court in **KO** confirmed the "**Zoumbas**" principle "that the child should not be held responsible for the conduct of the parent".

13. The First-tier Tribunal found that it would be unduly harsh for M if the appellant were to be deported. The Upper Tribunal found that this assessment was an error of law given the high threshold for a finding of undue harshness and the limitations of the evidence before the First-tier Tribunal of the consequences for M were the appellant to be deported. The material before the First-tier Tribunal was found to be incapable of showing the requisite level of severity or bleakness to reach a finding of undue harshness.

14. I had additional evidence on this issue, however, in the form of further witness statements from the appellant, his partner, CW, the mother of M and a psychology report from Dr Abdelnoor dated 11 November 2018.

15. As above, there is no dispute that TAB has a loving and positive relationship with M. The evidence of CW, and TAB showed that their close, relationship has resumed since he was released from detention.

16. In her first statement provided for the First-tier Tribunal hearing CW confirmed that the appellant had a strong relationship with M and that when he went to prison M became "really upset". She went on to state in paragraph 11 of that statement "I don't think my daughter would cope with the separation being permanent, and I firmly believe that she would be emotionally devastated by that experience".

    In her second statement dated 12 November 2018 CW stated that since the appellant had been released from prison M had been "happier in herself". The appellant had resumed a strong position as her father, helping with the running of the household and care of M. CW commented that:

    > "the emotional impact of her father being taken away would be too much for me and her to bear. The physical impact would be horrendous as she has grown dependent on him. She prefers her father to help her with her homework and to read her story before bed".

17. In her oral evidence CW confirmed that there had been some support from the appellant's family and her own family but did not feel that this would be sufficient to ameliorate M's difficulties in the event of the appellant being deported.

18. The appellant also confirmed in his witness statement dated 12 November 2018 that his daughter is an extremely important focus in his life. He has taken up a full role as father since being released from prison, providing for her when he can, given his own limited financial resources, attending meetings at school, assisting her with her homework and so-on. He considered that M was a "more stable, confident, and stronger child" since his release from detention in return to her home.

19. At paragraph 10 of his most recent witness statement the appellant refers to M being less well behaved whilst he was in prison and both he and CW stated in their oral evidence that this was the case. It was not my conclusion that the behaviour that they had noted could have been particularly serious, however, where it was not mentioned in any of the school documents concerning M or in the psychology report.

20. The high point of Dr Abdelnoor's psychology report is set out in paragraph 10 which states

    > "(i) I am convinced that the impact of deportation will be immensely damaging for M,
    >
    > (ii) M will be permanently changed by this course of events and may have difficulties with attachment and relationships in the future."

That conclusion and his other observations appeared to me to be consistent with the evidence of the appellant and CW.

21. As above, it is not disputed that it is clearly in M's best interests for TAB to remain with her in the UK. There is no doubt from the evidence set out above that if the appellant is deported this will bring a great deal of distress and unhappiness to the appellant, CW and M. The consistent evidence is that the damage it will do to their family relationships and to M's future will be "severe, or bleak".

22. The difficulty here, however, is that these harsh consequences are the expected outcome of deportation. Following the learning of the Supreme Court, "one is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with a deportation of a parent." I have thought very carefully about whether that "considerably more elevated threshold" is met here and I am, regretfully, not able to conclude that the evidence shows that to be so. The difficulties M will experience are at the level of harshness to be expected in the context of deportation. The unduly harsh test set out in Section 117C(5) and paragraph 399(a)(ii)(b) is not met here.

Very Compelling Circumstances Over and Above Paragraphs 399 and 399A

23. Where the exceptions in s.117C and paragraphs 399 and 399A are not made out, a further assessment is required of whether there would be "very compelling circumstances" over and above those exceptions if the appellant were to be deported and outweighing the public interest; **Hesham Ali v SSHD [2016] UKSC 60** applied. The test is not merely for there to be "compelling circumstances" but imposes a still more stringent threshold for the situation to be "very compelling" to a level over and above the factors in the exceptions in s.117C and paragraphs 399 and 399A.

24. The appellant accepts that statute provides, as he is a foreign criminal, that his deportation is in the public interest. Further, the public interest weighs more heavily against him as his offence was particularly serious.

25. I can deal briefly with the comments of Dr Abdelnoor, for example at paragraph 11 of his report, that he did not consider the appellant's deportation to be in the public interest. I did not find the comments to be of assistance. The role of the public interest here is fixed by statute and not susceptible to the approach he takes. Any additional weight attracting to the public interest and the factors capable of weighing against it are matters for judicial consideration with reference to the correct legal matrix and case law. It is also expedient to indicate here that Dr Abdelnoor's comments on how the appellant will cope in Jamaica were also without force where he was not instructed to comment on that issue and he concedes in paragraph 19 (viii) that he is "not an expert on Jamaica".

26. There are a number of factors that I must take into account on the appellant's side of the balance. The appellant has conducted himself positively since he was arrested for the index offence. He entered a guilty plea at the earliest opportunity. A police officer, a support worker from a charity working with young people and his employer spoke positively about him at his sentencing hearing. The police officer considered the appellant was not an entrenched drug dealer but had made bad decisions for which he was remorseful and was trying to make amends. The sentencing judge commented on the "exceptionally positive" comments and found that they showed:

> "… somebody who really wants to turn their life around, and in each element of your life you have started to engage positively."

27. The appellant's conduct since release from prison has justified those positive reports. Nothing suggests other than that his risk of reoffending is low. He has moved away from the area where he was involved in drug dealing. He has formed a stable relationship with M's mother and been a good father to M. His immediate family have continued to support him and have offered employment if he permitted to work.

28. These are clearly matters weighing in the appellant's favour but I would sound a somewhat cautious note as to how highly they can weigh where, firstly, some of their force has already been reflected by the sentencing judge in what remains a very serious sentence and good conduct after criminal offending is what can be expected from an offender. That is the base-line, not re-offending with credit being given for being law abiding.

29. The harshness for CW and M, considered above, also weigh on his side of the balance as does the distress for his immediate family in the UK if he is deported. CW has stated that she will not take M to visit the appellant in Jamaica as she had a difficult time when she went there on holiday in the past. I did not find that could be a significant factor where the situation would be different now as she would be visiting the appellant and if she still felt unable to travel, the appellant's immediate family, his father, uncle or siblings, all originally from Jamaica could consider taking M to see her father.

30. I also weigh in the appellant's favour that he has been resident in the UK since the age of 4 year's old. He was granted indefinite leave to remain in 2010 and had that status until 2017. All of his education has been in the UK. There is also no dispute as to his no longer having ties to Jamaica and not having returned there since coming to the UK in 1999. If he goes to Jamaica he will face the emotional difficulties of being separated from his child, his partner and his immediate family. I accept that there will be hardship and uncertainties on return to Jamaica. That is ameliorated, however, by there being charities and NGOs able to assist with accommodation, free medical care and skills and vocational training, as identified by the respondent before the First-Tier Tribunal, and the appellant is a young, healthy person who has shown determination in taking positive steps in his life.

31. Are these factors capable of amounting to very compelling circumstances such that the public interest is outweighed? In reaching a conclusion on that assessment, I also referred to the comments in **Maslov v Austria [2009] INLR**_ at [75], where the ECtHR said:

> "In short, the court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country, very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the measure as a juvenile."

32. I did not find it easy to make this assessment. I recognise the steps the appellant has made to turn his life and his daughter's future around. It is impossible not be concerned about the consequences for her if he is deported. It is still my conclusion, however, that in this case that there are very serious reasons requiring the appellant's deportation which are not outweighed by the factors considered above, even taking them cumulatively and at their highest. The "very compelling circumstances" test is a stringent one, additionally so here where the public interest is so high in light of the seriousness of the offences. I am not able to conclude that the evidence shows that the test is met here.

33. For these reasons, I remake the appeal as refused.

Notice of Decision

The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be remade.

I remake the appeal as refused under Article 8 ECHR.

Signed:  Date: 17 December 2018
Upper Tribunal Judge Pitt