Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15294/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14th January 2019	**On 11th February 2019**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ROHAN DUHARRIS BAKER
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Brocklesby-Weller, Senior Home Office Presenting Officer
For the Respondent: Mr R H Rashid instructed by The Legal Guys

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department, I shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of Jamaica born on 4 September 1978. His appeal against deportation was allowed by First-tier Tribunal Judge Anthony on 18 October 2018.

2. The Secretary of State appealed on the grounds that the judge had misdirected herself in law in finding that there was no justifiable ground to support the Respondent's position that the previous sentence of more than four years in 2000

should trigger the application of paragraph 398A. The judge erred in law in failing to have regard to the Secretary of State for the Home Department v Johnson (Sierra Leone) [2016] UKUT 282. Secondly, the judge had failed to attach sufficient weight to the public interest in deportation and in assessing very compelling circumstances. The judge had erred in law in concluding that the Appellant's deportation was disproportionate.

3. Permission to appeal was granted by First-tier Tribunal Judge Shimmin on 20 November 2018 on the grounds that the judge had arguably erred in law in making material misdirections including failing to follow case law, failing to properly apply Section 117 and paragraphs 399 and 399A, and failing to give sufficient weight to the public interest.

The Appellant's immigration history and previous convictions

4. The Appellant came to the UK as a visitor in February 1989. He returned to Jamaica and re-entered the UK on 27 August 1993 when he was almost 15 years old. He had leave to enter as a visitor and on expiry of his leave he remained in the UK and became an overstayer. He was granted indefinite leave to remain on 26 September 1997. He has six convictions for 14 offences. In July 1997, he was convicted of robbery and handling stolen goods for which he was sentenced to two years in a young offenders' institution.

5. On 11 August 2000, the Appellant was convicted of robbery at Guildford Crown Court and was sentenced to 66 months' imprisonment. The Respondent informed the Appellant that he was subject to deportation on 20 September 2002 and the Appellant appealed against the decision on 31 July 2002. The Appellant's appeal was allowed on 7 February 2003 and he was issued with a warning letter on 11 April 2003. On 21 November 2003 the Appellant was convicted of possessing a class A controlled drug, driving without insurance and driving otherwise than in accordance with a licence and was fined £50. On 29 November 2017, the Appellant was convicted of six counts of supplying a class A drug (heroin) and sentenced to three years and eight months' imprisonment.

The judge's findings

6. The Appellant's previous appeal against deportation was allowed in 2003. The judge found that the gap of fourteen years between 2003 and the current sentence did reduce the significance of the Appellant's sentence of more than four years. It was on this basis that she found that the previous sentence did not trigger the application of paragraph 398A.

7. In this case there were no qualifying children but a qualifying partner. The judge found that, although it would be unduly harsh to expect her to relocate as a British

citizen who has spent all her life in the UK, the care she provided for her brother and mother did not present any difficulties to relocation nor did her ability to access treatment for her condition of low mood and anxiety. There were also no linguistic difficulties in relocating to Jamaica.

8. The judge concluded at paragraph 42: "I find that there is a world of difference between expecting a foreign national settled here, to return to his country of origin against expecting a British citizen who had lived in the UK all her life and had an inalienable right of abode in the UK, to live and work and find accommodation in another country or else forfeit her marriage. I find this is effectively the situation facing the appellant's partner who has to choose between forfeiting her marriage or saving her marriage and uprooting her from her home and the only country she has ever lived".

9. The judge made the following relevant findings:

> "51. I have already accepted she suffers from low mood and anxiety. I find her mental health and the stress of relocation would cause her very significant difficulties in adapting and accessing work and finding accommodation. I find to expect her to uproot would cause very serious hardship for the appellant's partner over and above those in EX.2 of Appendix FM.
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> 52. As I have found that it would not be unduly harsh for the appellant's partner to remain in the UK without the appellant, I find the appellant cannot succeed under paragraph 399(b). This is because the use of the word 'and' in paragraph 399(b)(ii) connotes a conjunctive requirement. Similarly, neither can the appellant succeed under Exception 2 in Section 117C".
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> 73. I take into account the fact that when the 2003 Tribunal allowed his appeal, there was one further offending which resulted in a fine and no custodial sentence. I find that there was a fourteen-year period in which the appellant led a blameless life. I accept from the evidence of the witnesses who attended that the appellant has an extremely caring nature and has cared for various members of the family.
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> 74. I find from the sentencing judge's remarks that the appellant's stepmother's [CB] diagnosis of terminal cancer has unhappily led to the appellant's relapse into class A drug use and that the appellant took to dealing in order to fund his habit. There is further independent evidence of CB's illness and disabilities in the documentary evidence before me. I take on board the remarks of the sentencing judge that the appellant only supplied drugs to which he himself was addicted. I find from the Relapse Prevention certificate that the Appellant has since addressed his drug addiction. I take into account his exemplary behaviour in prison and his willingness to undertake voluntary work and to comply with every instruction a prison officer gives.
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> 75. I see the 14 year gap in which the appellant stayed away from drugs and the circumstances which led to his current offending as a paradigm of a

very compelling circumstance sufficient to protect the appellant against expulsion.

76. I find having regard to all factors for and against deportation that the balance is just tipped in his favour and for these reasons it would be disproportionate for him to be removed".

Submissions

10. Ms Brocklesby-Weller submitted that the judge had erred in law in finding that the Appellant was able to benefit from the exceptions. In the case of Johnson, the court held that any four-year sentence was sufficient to put an appellant in the category of the most serious offences and therefore the exceptions were not applicable in this case. The judge erred in law in taking into account the public interest considerations set out in Section 117C (3), (4) and (5) and paragraphs 399 and 399A of the Immigration Rules. However, Ms Brocklesby-Weller accepted that this was not material to the decision because the judge concluded that the Appellant could not benefit from those exceptions in any event and therefore went on to assess whether there were very compelling circumstances. However, the judge's error was relevant to her assessment of the public interest and the weight to be attached to it in considering very compelling circumstances over and above the Immigration Rules.

11. Ms Brocklesby-Weller submitted that it was clear from the judge's findings that the Appellant could not satisfy the exceptions on family life or the exceptions on private life. However, the judge diluted the public interest in carrying out the balancing exercise. She concluded that because of the significant passage of time and the previous successful appeal, it was not in the public interest to deport the Appellant. These two reasons were not open to the judge because the Appellant's further conviction enhanced the public interest; the Appellant had been given an opportunity to reform and had not done so.

12. The judge assessed very compelling circumstances at paragraph 71 onwards. She found that the Appellant had a British partner and was stepfather to her adult son who was 26 years old. There was no OASys Report because the Appellant was considered to be at low risk of reoffending. The judge took into account the previous successful appeal and the one further conviction which resulted in a fine and no custodial sentence.

13. Ms Brocklesby-Weller submitted that the judge had failed to look at very compelling circumstances through the prism of the exceptions set out in the Immigration Rules. The Appellant had to show something over and above the exceptions. The weight to be attached to his family and private life was reduced because he could not satisfy the exceptions in the Immigration Rules and therefore he could not show very compelling circumstances over and above his right to family and private life. The judge found it would not be unduly harsh to separate the Appellant from his partner or adult child. This should not be given enhanced status in the balancing exercise.

The low risk of reoffending, lack of an OASys Report and rehabilitation did not make a significant difference amounting to very compelling circumstances.

14. Ms Brocklesby-Weller relied on paragraph 17 of Secretary of State for the Home Department v Olarewaju [2018] EWCA Civ 577 which states:

> "The Court of Appeal addressed the significance of rehabilitation in Taylor v Home Secretary [2015] EWCA Civ 845. Moore-Bick LJ, with whom McCombe and Vos LJJ agreed, said (in paragraph 21):
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> > 'I would certainly not wish to diminish the importance of rehabilitation in itself, but the cases in which it can make a significant contribution to establishing the compelling reasons sufficient to outweigh the public interest in deportation are likely to be rare. The fact that rehabilitation has begun but is as yet incomplete has been held in general not to be a relevant factor: see SE (Zimbabwe) v Secretary of State for the Home Department [2014] EWCA Civ 256 and PF (Nigeria) v Secretary of State for the Home Department [2015] EWCA Civ 596. Moreover, as was recognised in SU (Bangladesh) v Secretary of State for the Home Department [2013] EWCA Civ 427, rehabilitation is relevant primarily to the reduction in the risk of re-offending. It is less relevant to the other factors which contribute to the public interest in deportation'".

15. Ms Brocklesby-Weller submitted that the Appellant's rehabilitation in this case was not a weighty factor and could not make the difference in tipping the balance to show that there were very compelling circumstances. The judge had erred in law in minimising the criminality involved and focusing on a period of non-offending rather than focusing on the Appellant's behaviour and the public interest, which required his deportation. She referred me to the sentencing remarks of the judge who found that there was no evidence of the Appellant's vulnerability. There were aggravating features to the latest offence because the Appellant was caught on a number of occasions over a period of eight weeks dealing drugs to an undercover police officer. The Appellant had received a sentence of 44 months' imprisonment for this offence, a substantial period of time, and he had previously committed a very serious offence in 2000 which had led to a sentence of five and a half years. He had been given an opportunity to reform in 2003 and, whilst he had not offended for fourteen years, this in itself was not enough to amount to very compelling circumstances. The judge had not properly balanced the reasons for deportation.

16. The Appellant had committed two very serious offences and the judge appeared to have imported reasons for his latest offence into the offence which were not correct and ignored the earlier very serious offence. Given that little weight could be attached to his family and private life, the judge's assessment of balancing the public interest against the Appellant's circumstances was fundamentally flawed. Ms Brocklesby-Weller relied on Secretary of State for the Home Department v SS (Jamaica) [2018] EWCA Civ 2817 at paragraph 39 which states:

> "In my view, the FtT in this case plainly failed to apply the approach set out in *MF (Nigeria)* later approved in *Hesham Ali (Iraq)*. Although the Judge referred in paragraph 60 of the decision to giving heavy weight to the [the Secretary of

> State's] view that the Respondent's deportation was necessary for the protection of society, she did not in fact do so. There was no reference to a crucial step in the necessary analysis of the position outside the Rules: namely, whether there were circumstances which were sufficiently compelling (and therefore exceptional) to outweigh the public interest in deportation, see *MF (Nigeria)* at [46]. To the contrary, the FtT's findings were that the public interest did not require the deportation of the Respondent (paragraph 62); and the judge's conclusion was that, having balanced the factors that weighed on each side, that deportation is neither appropriate or necessary (see paragraph 78), [emphasis added]. The judge's approach fatally undermined her conclusion".

17. Ms Brocklesby-Weller submitted that the judge paid lip service to the relevant assessment of very compelling circumstances and she failed to identify anything over and above the exceptions in paragraph 399 or 399A. The Appellant did not have an enhanced family life and the judge incorrectly focused on a fourteen-year gap and low risk of reoffending. This was not a very strong claim and did not meet the high threshold test of very compelling circumstances. The judge had erred in law and the decision should be set aside and re-made.

18. Mr Rashid relied on his Rule 24 response. He submitted that ground 1 was not material and conceded that the four-year offence committed in 2000 meant that the Appellant fell into the very serious category. However, since the judge had considered very compelling circumstances over and above the Immigration Rules any error of law in relation to the application of the exceptions was not material. Mr Rashid relied on paragraph 27 of Johnson which showed that the Appellant, a young man, had received four years but had since led a blameless life for 40 or 50 years. The court found that the significance of the previous sentence would have receded to the point of irrelevance and this was capable of amounting to a very compelling circumstance. It was not the case that the fourteen-year gap was a trump card as submitted by the Respondent.

19. The judge found that the Appellant's partner could not relocate but that separation was not unduly harsh, so in considering Article 8 the judge looked at the family life of other family members. The Appellant's partner had lived in the UK all her life and the Appellant had been in the UK for over twenty years. She was a credible witness, had a history of mental illness and no family in Jamaica.

20. Mr Rashid submitted that, looking at the decision as a whole, the judge had adopted the correct approach because the judge was balancing negatives against positives in considering very compelling circumstances and in dealing with the inability to satisfy the exceptions. The judge clearly stated that the Appellant had been convicted of a serious offence. There was no OASys Report because this would only be prepared if the Appellant was a risk to the public, which he was not. This again was only one of the factors that the judge considered in assessing very compelling circumstances. The judge made a significant number of findings on family and private life before assessing very compelling circumstances and then the judge

brought together all those findings and had regard to all relevant factors in concluding that the balance tipped just in the Appellant's favour.

21. Mr Rashid submitted that the judge did not dilute the seriousness of the offence in carrying out the proportionality exercise. The Appellant's previous offence was more serious than his last offence and it took place when he was just forming his family life with his partner. The judge in that appeal obviously found that the interference with his family life was disproportionate because the appeal was allowed. The judge was not speculating as to what happened in the decision, but it was apparent that the Appellant succeeded on appeal when he was convicted of a much more serious offence and when his Article 8 claim was somewhat weaker.

22. The judge recognised that deportation lies not only in the prevention of further offences but in deterring others and expressing society's revulsion. She applied Devaseelan and found that the Appellant's family and private life had increased since the previous appeal. The judge took into account the seriousness of both offences, the Appellant's rehabilitation and the risk of reoffending. The fourteen-year gap without offending was a relevant factor and the judge considered what weight should be attached to it. Again, it was only one factor of a number of factors.

23. Looking at the decision as a whole the judge had considered all the circumstances and carried out a proper assessment of proportionality and very compelling circumstances. Her conclusions were open to her on the evidence before her and there was no material error of law. The Respondent had not shown that the judge attached limited weight to the public interest because the judge was fully aware of the circumstances of both offences. It was unfair to say that the judge did not understand the weight to be attached to the public interest when all aspects of the public interest were reasoned. The challenge amounted to a difference of opinion, not an error of law.

24. Ms Brocklesby-Weller submitted that the Immigration Rules and legislation in relation to deportation had changed since the previous appeal and it was not possible to apply Devaseelan in the abstract without the decision being before the judge. It was necessary to look at the substance of this decision. It was not sufficient for the judge to merely recite case law. The Appellant could not succeed on three out of four of the findings in relation to family life. The Appellant did not have a very compelling case. The factors identified by the judge, the passage of time and rehabilitation, were not sufficient to outweigh the public interest. If the Appellant's family life was not sufficient to make out his Article 8 case, then what factors were there to show a very compelling case over and above the Immigration Rules? The judge had failed to realise the interplay between the Rules and a freestanding Article 8 claim.

25. Ms Brocklesby-Weller submitted that the Appellant's serious offending was not reconciled with the judge's findings at 73 and 74 where she had diluted the public interest. The scales tipped against the Appellant in failing to satisfy the Article 8

exceptions and by virtue of his criminality, which meant that he could not benefit from those exceptions. The judge had failed to identify what factor made the balance tip in the Appellant's favour. The fourteen-year gap and the circumstances which led to his current offending were not sufficient.

Discussion and Conclusion

26. It is not in dispute that, following Johnson, the Appellant was sentenced to a period of imprisonment of more than four years in August 2000 and therefore he could not benefit from the exceptions in section 117C of the 2002 Act or paragraph 399 or 399A of the Immigration Rules. He had to demonstrate that there were very compelling circumstances, over and above the exceptions, such that his deportation would be disproportionate.

27. The judge's failure to apply Johnson was not material to the decision because the judge went on to conclude that the Appellant could not benefit from either Exception 1 or Exception 2. She considered very compelling circumstances in any event.

28. The judge took into account the circumstances identified at paragraph 71 onwards, namely:

    (i) The Appellant had a partner who is a British citizen and it was not reasonable for her to return with the Appellant to Jamaica;

    (ii) He also had a stepson aged 26 who lived in the family home and the Appellant's deportation would affect his stepsister as well;

    (iii) There was no OASys Report and the Appellant was considered to be at low risk of reoffending.

    (iv) The Appellant's previous appeal against deportation was allowed and there had been no period of offending for fourteen years.

    (v) The judge's sentencing remarks took into account the Appellant's relapse into class A drug use and the Appellant only supplied drugs to which he himself was addicted.

    (vi) His behaviour in prison was exemplary and he had undertaken voluntary work.

29. At paragraph 75, she found that the fourteen-year gap in which the Appellant had stayed away from drugs and the circumstances which led to his current offending were very compelling circumstances sufficient to protect the Appellant from expulsion.

30. I find that the judge has erred in law in assessing very compelling circumstances. The fourteen-year gap and the circumstances which led to the Appellant's current offending are not sufficient to outweigh the public interest in deportation. I find that the matters relied on by the judge at paragraph 71 onwards are not sufficient to amount to very compelling circumstances on the particular facts of this case.

31. Given that the Appellant cannot satisfy Exceptions 1 and 2, the weight to be attached to his family and private life was limited. The fact that he was at low risk of reoffending was only one aspect of the public interest in relation to protecting the public. It did not go towards deterring others from committing offences or to express society's revulsion. Although the judge acknowledges these aspects of the public interest at paragraph 70, she goes on to state that "the appellant's scale of offending even taking into account the 2000 conviction is not as serious as the offence of the appellant in N (Kenya) v SSHD [2004] EWCA Civ 1094 and the appellant in AO (Nigeria) v SSHD [2015] EWCA Civ 250. I find that she has failed to attach significant weight to the public interest in this case.

32. Given the serious nature of both offences committed by the Appellant and the lengthy periods of imprisonment to which he has been sentenced (66 and 44 months), it could not be said that the fourteen-year gap in which the Appellant did not offend was sufficient to render the first conviction irrelevant. The Appellant committed a very serious crime and was given the opportunity to reform and failed to do so.

33. The circumstances which were before the First-tier Tribunal did not amount to very compelling circumstances over and above the exceptions in section 117C or the Immigration Rules. The matters relied upon by the judge were not sufficient to satisfy this high threshold test and it is clear that, although the judge has set out all relevant factors and relevant case law, she has not attached sufficient weight to the public interest in accordance with section 117C. It is apparent from looking at the decision as a whole that, even adopting a structured balance sheet approach, the judge failed to attach significant weight to the public interest in concluding that the balance just tipped in the Appellant's favour.

34. Accordingly, I find that the judge erred in law and I set aside the decision to allow the appeal and re-make it. There was no dispute on the facts and there has been no strengthening of the Appellant's family or private life such that it would affect the judge's findings that it would not be unduly harsh for the Appellant to be separated from his partner and there were no very significant obstacles to integration. There was no change in circumstances since the decision in October 2018.

35. I find that the Appellant has failed to show very significant circumstances over and above the exceptions in section 117C and the Immigration Rules. The weight to be attached to the public interest is significant in this case and the factors in favour of the Appellant do not outweigh it. Accordingly, I dismiss the Appellant's appeal on human rights grounds.

Notice of Decision

The Respondent's appeal to the Upper Tribunal is allowed.

The decision of 18 October 2018 is set aside and re-made.

I dismiss the Appellant's appeal against deportation on human rights grounds.

No anonymity direction is made.

J Frances

Signed Date: 8 February 2019
Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed Date: 8 February 2019
Upper Tribunal Judge Frances