Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/20155/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 September 2019	**On 10 October 2019**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

D M C
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Fripp, Counsel, instructed by Peer & Co (Birmingham)
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The FTT made a direction for anonymity. I continue this in order to protect the identity of the Appellant's children.

The background

2. The Appellant is a citizen of Jamaica. His date of birth is 15 February 1977.

3. On 5 April 2017 the Appellant received a custodial sentence of four years and eight months. He pleaded guilty to two offences of conspiring to supply Class A drugs, possessing criminal property (cash to the value of £24,216.08) and careless driving. The offences date back to 14 October 2015. When sentencing the Appellant, the judge said that he had "a considerable awareness of the scale of the operation in which you played a critical part. This was not street dealing so far as your part is concerned". On 26 September 2018, following conviction, the Secretary of State made a deportation order pursuant to Section 5(1) of the 1971 Act. The Appellant is a foreign criminal as defined by Section 32(1) of the UK Borders Act 2007 ("the 2007 Act") and it follows from this pursuant to Section 32(5) the Secretary of State must make a deportation order.

4. The Appellant appealed against deportation on the basis that it would breach his rights under Article 8 of the 1950 European Convention on Human Rights. His appeal was dismissed by the FTT. That decision was set aside by The Honourable Mrs Justice Thornton DBE sitting as a Judge of the Upper Tribunal (UT) and UT Judge McWilliam in their decision of 27 June 2019 ("the error of law decision").

5. The Appellant came to the UK in 2002. He had been granted a visit visa. He made subsequent applications to remain. On 9 November 2009 he was granted discretionary leave to remain until 9 November 2012. On 5 December 2013 he was granted discretionary leave until 5 December 2016.

6. The Appellant has five biological children. DC is his eldest child; his date of birth is 26 July 2002. DC is a Jamaican national with leave to remain here in the UK. He lives with the Appellant's sister JK. DC's mother is ST and the evidence before the First-tier Tribunal was that he does not have contact with her. The Appellant's second child is JC. His date of birth is 31 July 2003. JC lives with his mother, TM, in Harrow. The Appellant's third child is AC. Her date of birth is 17 June 2006 and she lives in Gloucester with her mother, SB. The Appellant's fourth child is NC. She was born on 24 January 2011. The Appellant's fifth and youngest child is MC. His date of birth is 10 November 2009. MC and NC live with their mother, EC, the Appellant's wife. EC has two older children, EB (date of birth 28 June 1999) and RB (date of birth 2 August 2002) who are described as the Appellant's stepchildren.

7. On 17 December 2014 the Appellant acted as a sponsor for DC in an application for DC to join him here in the UK and for him to be granted leave in line with the Appellant. The application was granted. On 2 December 2016 the Appellant made an application for ILR for himself and his son DC. DC's application was refused and the Appellant's was put on hold as a result of his criminality. DC's appeal was successful. He was granted limited leave to remain until 23 November 2020.

The error of law decision

8. The error of law decision reads as follows:-

> "20. We communicated a brief decision orally to the parties at the hearing. We found that the Judge materially erred in this case. He concluded that

because DC is not a qualifying child and that therefore he could not meet Exception 2 that it followed that there could not be very compelling circumstances. We accept that this is an erroneous approach to the statutory regime for the reasons we will go on to explain. We also find that the decision that deportation would be unduly harsh in the context of DC is inadequately reasoned in any event. Furthermore, the assessment of very compelling circumstances was flawed for the reasons identified by the Secretary of State. We are not however persuaded that the Judge's reliance on the decision of First-tier Tribunal Judge Frazer and the weight he attached to it discloses a discrete error of law. We reject in its entirety Mr Fripp's argument as to a jurisdictional error in relation to the grant of permission to cross appeal the Secretary of State. As we understood Mr Fripp's argument the error arises as a consequence of the permission Judge not properly considering the full extent of the delay by the Secretary of State in making his cross appeal. However, as Mr Fripp effectively conceded during oral submissions, paragraph 3 of the judge's reasons consider the point and reach the view that the 'explanation is not entirely satisfactory'. We consider Mr Fripp's argument to be misconceived.

21. We accept Mr Fripp's submission that in order to establish very compelling circumstances it is not a prerequisite that the Appellant satisfies either or both Exceptions 1 and 2. The judge erred because throughout his decision he finds that despite that there being 'very compelling circumstances over and above undue harshness' in respect of DC (see [24]) because the Appellant cannot fall into Exception 2 (see [26]) the public interest requires his deportation. This, in our view, is a misunderstanding of the law. In any event, it does not accord with his findings in respect of NC and MC. However, we reject Mr Fripp's submission that in the light of this error the appeal should have been allowed under s117C (6). We find that the assessment of unduly harsh is flawed (as asserted by the Respondent) as is the judge's application of the test of very compelling circumstances.

22. The Appellant could never meet exception 2 in respect of DC because he is not a qualifying child. However, whether DC's circumstances are capable of reaching the elevated threshold was a material consideration when assessing very compelling circumstances. The judge's decision that the effect of deportation would be unduly harsh on DC is inadequately reasoned. It is not clear how he reached the conclusion with reference to the application of the correct test (set out in KO with reference to MK). In addition, the test applied by the judge in respect of s. 117C(6) is flawed because he did not take into account the public interest. He also did not make a holistic assessment but considered very compelling circumstances in respect of each child. We acknowledge that the Judge went on to consider proportionality outside of the Rules and in so doing took account of public interest considerations. However, this reveals another serious misunderstanding of the application of the statutory regime in deportation cases. In NA at para 35 the court of appeal said:

> "The Court of Appeal said in *MF (Nigeria)* that paras. 398 to 399A of the 2012 rules constituted a complete code. The same is true of the sections 117A to 117D of the 2002 Act, read in conjunction with paras. 398 to 399A of the 2014 rules. The scheme of the Act and the rules

> together provide the following structure for deciding whether a foreign criminal can resist deportation on Article 8 grounds."
>
> The Judge made serious errors when assessing Article 8 under the statutory regime. They are not merely structural errors. They are errors of substance. For the above reasons the decision of the First-tier Tribunal is so seriously flawed that it cannot be maintained. We set the decision to dismiss the Appellant's appeal aside.

Remaking

23. We canvassed with the parties how the matter should proceed. We decided in accordance with the Practice Statement of the Senior President of Tribunals of 25 September 2012, that the matter should be remade by the Upper Tribunal.

24. There are findings within the decision that have not been challenged by either party. The judge found at [21] that the effect of deportation would be unduly harsh in relation to NC and MC. This has not been challenged by the Secretary of State and, in our view, there is no reason to go behind these findings. The weight to attach to the decision of Judge Frazer will be a matter for the UT when considering the impact of deportation on the DC (sic).

25. There is a finding in respect of s. 117C(4) at [23] of the judge's decision against which there is no challenge. Mr Fripp conceded that the Appellant cannot meet the private life requirements at Section 117C (4). We understand this concession to mean that he cannot meet Section 117C(4)(a), (b) and (c).

26. We find that the conclusions reached by the judge at [22] in relation to the Appellant's wife, EC, can be maintained. There is no reason advanced before us to interfere with those. However, we do not accept Mr Fripp's submission that the finding is effectively a finding under s. 117C (5). If this is what the judge intended, then it is inadequately reasoned.

27. There was no further evidence produced by the Appellant for the purposes of the hearing before us despite directions having been issued to the parties. Nevertheless, we were unable to proceed to remake the case because the Appellant was not produced and, in any event, there was a lack of court time.

28. The issue for the UT will be whether s. 117C (6) applies. In making that assessment the Tribunal will make findings in respect of the impact of deportation on DC, notwithstanding that he is not a qualifying child and consider any other matters relied on by the Appellant."

The Law

9. The Immigration Rules set out how the Secretary of State and her officials will exercise the powers conferred by the 2007 Act:-

> "398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported".

10. On 28 July 2014 the Immigration Act 2014 ("the 2014 Act") came into force. It provided that a new Part 5 should be inserted into the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). That part provides, so far as material:

"PART 5A

ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard –

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), 'the public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases:

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

117D Interpretation of this Part

(1) In this Part— 'Article 8' means Article 8 of the European Convention on Human Rights; "qualifying child" means a person who is under the age of 18 and who—

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more; "qualifying partner" means a partner who—

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

(2) In this Part, 'foreign criminal' means a person—

(a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who—

(i) has been sentenced to a period of imprisonment of at least 12 months,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender.

(3) For the purposes of subsection (2)(b), a person subject to an order under—

(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),

(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or

(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc), has not been convicted of an offence.

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—

(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);

(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;

(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and (d) include a person who is

sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it".

Interpretation of the Legislation

11. In NA (Pakistan) [2016] EWCA Civ 662 the Court of Appeal said as follows:-

> "28. The next question which arises concerns the meaning of 'very compelling circumstances, over and above those described in Exceptions 1 and 2'. The newpara.398 uses the same language as section 117C(6). It refers to 'very compelling circumstances, over and above those described in paragraphs 399 and 399A.' Paragraphs 399 and 399A of the 2014 rules refer to the same subject matter as Exceptions 1 and 2 in section 117C, but they do so in greater detail.
>
> 29. In our view, the reasoning of the Court of Appeal in JZ (Zambia)applies to those provisions. The phrase used in section 117C(6), in para. 398 of the 2014 rules and which we have held is to be read into section 117C(3) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that "there are very compelling circumstances, over and above those described in Exceptions 1 and 2". As we have indicated above, a foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paras. 399 or 399Aof the 2014 rules), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.
>
> 30. In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an Article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute 'very compelling circumstances, over and above those described in Exceptions 1 and 2', whether taken by themselves or in conjunction with other factors relevant to application of Article 8.
>
> 31. An interpretation of the relevant phrase to exclude this possibility would lead to violation of Article 8 in some cases, which plainly was not Parliament's intention. In terms of relevance and weight for a proportionality analysis under Article 8, the factors singled out for description in Exceptions 1 and 2willapply with greater or lesser force

> depending on the specific facts of a particular case. To take a simple example in relation to the requirement in section 117C(4)(a) for Exception 1, the offender in question may be someone aged 37 who came to the UK aged 18 and hence satisfies that requirement; but his claim under Article 8 is likely to be very much weaker than the claim of an offender now aged 80 who came to the UK aged 6 months, who by dint of those facts satisfies that requirement. The circumstances in the latter case might well be highly relevant to whether it would be disproportionate and a breach of Article 8 to deport the offender, having regard to the guidance given by the ECtHR in *Maslov v Austria*[2009] INLR 47, and hence highly relevant to whether there are "very compelling circumstances, over and above those described in Exceptions 1 and 2.
>
> …
>
> 34. The best interests of children certainly carry great weight, as identified by Lord Kerr in HH v Deputy Prosecutor of the Italian Republic[2012] UKSC 25; [2013] 1 AC 338 at [145].Nevertheless, it is a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals. As Rafferty LJ observed in Secretary of State for the Home Department v CT (Vietnam)[2016] EWCA Civ 488 at [38]:
>
> > "Neither the British nationality of the Respondent's children nor their likely separation from their father for a long time are exceptional circumstances which outweigh the public interest in his deportation."
>
> …
>
> 37. In relation to a serious offender, it will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are 'very compelling circumstances, over and above those described in Exceptions 1 and 2' as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6)."

12. The Upper Tribunal considered Section 117C(6) in RA (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 123 (IAC) and said as follows at paragraph 22:-

> "It is important to keep in mind that the test in section 117C(6) is extremely demanding. The fact that, at this point, a tribunal is required to engage in a wide-ranging proportionality exercise, balancing the weight that appropriately falls to be given to factors on the proposed deportee's side of the balance against the weight of the public interest, does not in any sense permit the tribunal to

> engage in the sort of exercise that would be appropriate in the case of someone who is not within the ambit of section 117C. Not only must regard be had to the factors set out in section 117B, such as giving little weight to a relationship formed with a qualifying partner that is established when the proposed deportee was in the United Kingdom unlawfully, the public interest in the deportation of a foreign criminal is high; and even higher for a person sentenced to imprisonment of at least four years".

13. The Tribunal said that the way in which a court or Tribunal should approach Section 117C remains as set out in the judgment of Jackson LJ in NA (Pakistan) & Anor v Secretary of State [2016] EWCA Civ 662. It said as follows:-

> "33. Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient."

14. The Upper Tribunal further considered very compelling circumstances in MS (s. 117C(6): "very compelling circumstances") Philippines [2019] UKUT 122 (IAC) and concluded that when determining Section 117C(6) of the 2002 Act 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 four years. Nothing in KO (Nigeria) v The Secretary of State for the Home Department demands a contrary conclusion. It also concluded that there was nothing in Hesham Ali v The Secretary of State for the Home Department [2016] UKSC 60 that requires a court or Tribunal to assume the principle of public deterrence as an element of the public interest in determining a deportation appeal by reference to Section 117C(6).

15. In Forrester v The Secretary of State [2018] EWCA Civ 2653 the court considered s.117C (6) and said as follows:-

> "20. The real gravamen of this ground of appeal is that the judge assumed that once something over and above an exception was established, this would amount to compelling circumstances. But I do not think that this is a sustainable reading of the judgment as a whole and in particular, in the light of para.38, reproduced at para. 13 above. In that paragraph the judge unambiguously recognised that the question was not simply whether there were circumstances over and above one of the exceptions; the issue was still whether these constituted very compelling circumstances, sufficiently compelling to outweigh the very strong presumption in favour of deporting someone with a four year sentence. The judge fully appreciated that it was not enough to identify factors over and above the exceptions. It was still necessary to ask whether they amounted to very compelling circumstances.
>
> 21. Mr. Harland, counsel for the Secretary of State, accepted that if paragraphs 38 and 39 were read together, there was nothing wrong with the judge's

approach and no material misdirection. That was a realistic and fair concession. Indeed in a sufficiently strong case there may be factors relating to a particular exception which can amount to something over and above the exception constituting compelling circumstances within the meaning of the statute. This point was made by Jackson LJ in *NA (Pakistan) v Secretary of State for the Home Department*[2016] EWCA Civ 662 where he explained that circumstances over and above the exceptions do not necessarily mean that the test can only be satisfied where there are circumstances or considerations which are independent of the exceptions. There may be cases where the circumstances are compelling because the exception is not merely satisfied but is engaged in a particularly robust way so as to provide a very strong article 8 claim capable on its own of amounting to compelling circumstances. Mr Harland's submission was that FTT Judge Gibb's decision had already been tainted by the error identified by the UT Judge and could not safely be relied upon thereafter."

16. In PF (Nigeria) [2019] EWCA Civ 1139 Lord Justice Hickinbottom said the following about the statutory provision and the Immigration Rules concerning deportation:-

> "36. The statutory provisions in sections 117A-117D are, unlike the Immigration Rules (see Ali at [17]), law rather than mere policy. However, both section 117C and the relevant Immigration Rules set out policy, in the sense that they provide a general assessment of the proportionality exercise that has to be performed under article 8(2) where there is a public interest in deporting a foreign criminal but countervailing article 8 factors. The force of the assessment in section 117C is, of course, the greater because it directly reflects the will of Parliament. The statutory provisions thus provide a 'particularly strong statement of public policy' (NA (Pakistan) at [22]), such that 'great weight' should generally be given to it and cases in which that public interest will be outweighed, other than those specified in the statutory provisions and Rules themselves, 'are likely to be a very small minority (particular in non-settled cases)' (Ali at [38]), i.e. will be rare (NA (Pakistan) at [33]).
>
> 37. But the required, heavily structured analysis does not eradicate all judgment on the part of the decision-maker and, in its turn, the court or tribunal on any challenge to that decision-maker's decision. It is self-evident that relative human rights (such as the right to respect for family and private life under article 8) can only ultimately be considered on the facts of the particular case. The structured approach towards the article 8(2) proportionality balancing exercise required by the 2002 Act and the Immigration Rules does not in itself determine the outcome of the assessment required to be made in an individual case.
>
> 38. Therefore, whether an exception in paragraph 399 or 399A applies is dependent upon questions that require case-specific evaluation, such as whether in all of the circumstances it would not be reasonable for a child to leave the United Kingdom or whether in all of the circumstances there are insurmountable obstacles to family life outside the United Kingdom.
>
> 39. More importantly for the purposes of this appeal, where an offender has been sentenced to at least four years' imprisonment, or otherwise falls outside the paragraph 399 and 399A exceptions, by section 117C(6) and

> paragraph 398 of the Rules, the decision-maker, court or tribunal entrusted with the task must still consider and make an assessment of whether there are 'very compelling circumstances' that justify a departure from the general rule that such offenders should be deported in the public interest. That requires the decision-maker to take into account, not only that general assessment (and give it the weight appropriate to such an assessment made by Parliament), but also the facts and circumstances of the particular case which are not – indeed, cannot – be taken into account in any general assessment."

17. In respect of unduly harsh and the test to be applied the Supreme Court in KO said as follows:-

> "23. On the other hand 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. It assumes that there is a 'due' level of 'harshness', that is a level which may be acceptable or justifiable in the relevant context. 'Unduly' implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department*[2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) can it be equated with a requirement to show 'very compelling reasons'. That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more."

In KO at paragraph 22 Lord Carnwath (with whom the other Justices agreed) said that on the face of it, Exception 2 in section 117C of the 2002 Act raises a factual issue seen from the point of view of the partner or child and he said the above at paragraph 23. It is now clear that a Tribunal or court considering section 117C(5) of the 2002 Act must focus not on the comparative seriousness of the offence or offences committed by the foreign criminal who faces deportation but rather on whether the effects of deportation on a child or partner would go beyond the degree of harshness which would necessarily be involved for any child or partner of a foreign criminal faced with deportation. The Tribunal must consider whether it would be unduly harsh for the child and/or partner to live in the country to where the foreign criminal is to be deported and whether it would be unduly harsh for the child and/or partner to remain in the UK without him.

The resumed hearing

18. The matter was adjourned for a resumed hearing. Directions were issued to the Appellant in relation to further evidence, however these directions were not

complied with. Mr Fripp at the hearing before me indicated that the Appellant relied on the bundle that was before the FTT and submitted an additional statement from the DC. Mr Tufan did not object to the admission of this witness statement of 24 September 2019 which had not been served in compliance with the directions of the Tribunal. No further evidence was submitted. The Appellant and his sister, JK, gave oral evidence.

The Evidence

The Appellant's evidence

19. The Appellant's evidence is contained in his undated witness statement (pages 4 to 10 of the Appellant's bundle). He gave evidence at the hearing and adopted his statement. . He was cross-examined. His evidence can be summarised.

20. Whilst the Appellant was in custody his children, save JC and AC, visited him every two to three months. DC visited him in total on six or seven occasions. He had regular telephone contact with all the children. The Appellant was released from prison on 3 September 2019. He is on licence and Home Office bail. Since his release he has been living with his mother and stepfather. He has not returned to the family home in Bristol because he wanted to be out of the area to disassociate himself with criminals. He regularly sees DC and he has seen all the other children at various times.

21. The Appellant's youngest children stayed with him last weekend from Friday to Monday. DC lives with the Appellant's sister, JK. Family members had been very much affected by his imprisonment. Before his conviction he was a hands-on father who provided for and looked after his children. He took MC to play football. MC was picked by a football club but was unable to take up the offer because of the Appellant's incarceration. MC as having some behavioural problems as a result of his incarceration. NC used to read to the Appellant at bed time but since the Appellant's release she has not done this. NC sometimes cries at school and her mother has to go into school to comfort her. AC sent the Appellant a letter saying that she wanted to live with him. DC finds it very difficult to motivate himself. He spends most of his time in his bedroom and has to be physically taken out of his room in order to go to work or to attend school. Before the Appellant's incarceration the Appellant would take DC to play football or they would watch football together. DC used to have friends and was sociable, but all that has stopped as a result of the Appellant's incarceration and the prospect of the Appellant's deportation.

22. The thrust of the Appellant's evidence was that he feels guilty and upset at the impact that his behaviour has had on his children. He wants to be there for them, particularly DC, to help him think for himself, and to help him get out of the house. He wants to spend the time that he has left with his children to make up for the disappointment they feel as a result of his criminality. He accepts that it was difficult because during the time he was in prison the connection with them was lost and it needs to be made again. He would not be able to do this if he was in Jamaica. It would be very difficult to maintain relationships with his children should he be

deported. They would not be able to afford to visit him. He would not be able to return for a period of ten years.

23. The Appellant is a hard worker. He has an interview on 1 October 2019 with the probation service relating to future employment.

24. The Appellant fears return to Jamaica. His father was murdered there in October 2017 and he fears being targeted by gangs. The Appellant is not a threat to society. He is at low risk of reoffending. He is a changed man and describes himself as having been rehabilitated. His behaviour in prison was described as excellent and he has fully co-operated with the probation services.

25. It would be unduly harsh for his children to relocate to Jamaica. There are so many uncertainties there. Crime is high and employment is scarce.

JK's evidence

26. The Appellant's sister, JK, gave evidence. She adopted her witness statement dated 17 January 2019 (pages 25 to 27 of the Appellant's bundle) as her evidence-in-chief. Her evidence can be summarised.

27. She visited the Appellant whilst he was in prison. DC lives with her. Since the Appellant's release DC has seen his father almost daily. DC was very much affected by his father's incarceration. He became very quiet and withdrawn. He has lived with JK since August/September 2018. He was living with the Appellant and the Appellant's family before this. After the Appellant's incarceration it was difficult for EC to cope with another child. DC's GCSEs suffered as a result of his father's incarceration. DC has never had a mother. He lived with godparents in Jamaica. He came here to be with the Appellant in 2002. The Appellant had not met him prior to this. He found love here with his father. It was good for him. They did things together like a normal father and son. Since the Appellant's release on 3 September 2019 there has been a change in DC's behaviour and attitude. He seems much happier and more positive. He now comes out of his room and socialises. DC needs a father. He is like a child still and must be told when to shower, to eat or clean his bedroom. If the Appellant is deported DC would go back into his shell. He would be unlikely to do anything. JK gave evidence about positive changes she has seen in all the Appellant's children since his release.

DC's evidence

28. There is a letter from DC (at page 126 of the Appellant's bundle). He expressed his desire for his father to be allowed to remain in the UK and described how hard it has been for him not having him here. He described what they used to do together, namely that the Appellant would take him to football games and they watched each other play football. His father was always supportive and they had a great relationship. DC's more recent statement of 24 September 2019, says that he is now at college and he is working and he has been focusing on his future. His dad has been a very important part of his life. He has taught him an important life lesson and

helped him choose his own career path. Since the Appellant has been in custody he (DC) has not been doing some of the things he used to enjoy, such as playing football. Since his father's release they have spent more time together as a family. They all missed him when he was in prison. He needs his father's guidance.

EC's evidence

29. There is a statement from EC of 16 January 2019. EC is the Appellant's wife. Her evidence can be summarised.

30. She is struggling with the children emotionally and financially since her husband has been in prison. Her life has been hell. She cannot manage to financially support the children. She and the children visit the Appellant in prison and that this has taken an emotional toll on them. The children are finding it difficult to cope and their grades at school have suffered. DC has become quiet and withdrawn. He has gone to live with his aunt in Watford. The Appellant is a good father and takes his responsibilities seriously. He has been a hands-on father and the centre of their family life. The children miss him and find it hard to cope without him. The thought of him not being in the UK is something that she would rather not think about because it would be devastating on the children. The Appellant's involvement in the children's life is vital. She would not be able to afford to take them to Jamaica and they would not see him again. The family would be destroyed. He is a changed man since he has been in prison and now realises the errors and the devastating effect that they have had on the family.

31. The Appellant does not have anywhere to go in Jamaica. All his family are in the UK. He has nothing to return to there. He may have a couple of siblings but he cannot rely on them because they have their own problems and their own lives.

Other evidence

32. In the Appellant's bundle there is a letter from another of the Appellant's children at page 124. It is not clear to me which child wrote the letter. There is a letter from HM Prison Service to the Appellant of 29 August 2007 from the Offender Management Unit at HMP Huntercombe. The letter indicates that the Appellant at that time did not require a full OASys assessment due to the nature of his offending. The letter goes on to say that he has been assessed as posing a low risk of harm to all sections of the community and that in these circumstances he does not need a sentence plan and therefore will have no objectives to complete. The Appellant gave evidence of a more recent OASys assessment and that he still continues to present a low risk of reoffending. There was no copy of an assessment in evidence.

33. There are a number of letters from the Custodial Manager, Safer Custody and Equalities at HMP Huntercombe to the Appellant thanking him for his hard work in his role as a listener and equality rep. There is a letter from the library manager at the prison attaching a small reward to the Appellant for his contribution to the library service.

34. There are 140 pages in total in the Appellant's bundle which contains, in addition to witness statements; prison visit logs, evidence of the Appellant's activities whilst in prison and evidence of his good behaviour there.

Submissions

35. Mr Fripp relied on an eleven- page skeleton argument which was passed to me moments before the hearing. In addition, both representatives made oral submissions. Mr Tufan submitted that there was no independent evidence about DC's behaviour and whether there was a link with the Appellant's incarceration. It may be that he was displaying normal teenage behaviour. He indicated that the Secretary of State was prepared to accept that there was subsisting family life, but he referred to the high threshold of unduly harsh with reference to MK and the even higher threshold required under Section 117C(6). He asked me to consider Judge Frazer's determination in the context of that appeal which was against a decision to refuse to grant DC leave on Article 8 grounds.

36. Mr Fripp addressed me in the context of his skeleton argument. In oral submissions he said that 117C(4)(a) could not be met, however'

37. he did not make any further concessions in relation to 117C(4)(b) and (c) but stated that whether or not the Appellant could meet those limbs was a moot point and that there would be no point in challenging any finding under this provision because he cannot meet the provision in its entirety.

38. The Appellant's case is that there are very compelling circumstances. The Appellant is at low risk of reoffending and if able to remain lawfully in the UK he will have an enhanced opportunity to obtain employment and support his family. He relies on the preserved findings of the UT. The Appellant relies on his relationship with DC and the findings of FTT Judge Frazer which represent a "starting point" on relevant issues per Devaseelan v SSHD [2002] UKIAT 702. He referred me to the evidence about DC and the Tribunal's duty under Section 55 of the Borders, Citizenship and Immigration Act 2009. He asked me to consider the cumulative effect of deportation in the context of the numerous relationships that the Appellant has and that this can amount to very compelling circumstances. He brought my attention to the Appellant not having the finances in order to obtain extensive evidence, for example that from social workers or other experts in relation to the children and the effect of deportation. However, he asked me to accept that the adverse impact of imprisonment and deportation on children.

Findings and reasons

Exception 2

39. I accept that it would be unduly harsh to expect any of the Appellant's biological British citizen children to live in Jamaica. Similarly, I accept that it would be unduly harsh to expect his wife EC to live there. The British citizen children live here with their respective mothers. They range in age from 10 to 16. Moreover, it is in all of the

children's best interests to remain in the UK with their father, the Appellant. There is a preserved finding that deportation would be unduly harsh in the context of NC and MC in the context of both scenarios. In addition, there are preserved findings in respect of EC. I accept that, based on the evidence in EC's statement, the effect of deportation in the context of the Appellant leaving EC in the UK would be unduly harsh. Thus, in respect of EC, NC and MC the Appellant meets Exception 2.

40. I accept that since the Appellant's recent release from custody he has made efforts to see his children. He does not live with any of them. He does not live with his wife, EC and their children. JC and AC did not visit the Appellant in custody; however, he has seen them on release. I accept that the other children visited him. Despite the Appellant not living in the family home, there was no up-to-date evidence from EC. Despite this gap in the evidence, Mr Tufan did not ask me to revisit the preserved findings about the position at the date of the hearing before me. Whilst I accept that there may be good reasons why he has moved himself away from the family home to avoid connections with criminals, I would have expected up to date evidence from the Appellant's wife. She did not attend the hearing to give evidence.

41. The evidence relating to the Appellant's biological children is scant. I find that the evidence does not establish that the effect of deportation, in the context of the Appellant leaving JC, AC and NC meets the elevated test for unduly harsh. Their father has been absent from their lives during his extensive prison sentence. He did not live with them prior to incarceration. There is no evidence from the children's mothers. I accept that the option of instructing an independent expert may not have been open to the Appellant, but it is not unreasonable for him to have obtained evidence from the children's mothers, their school or other relatives about the impact on them of their father's deportation. The evidence that is reasonably expected in order to establish the elevated test is met is wholly absent.

42. There is no up to date evidence about EC's older two children. I accept that the Appellant lived with them prior to his incarnation. The Appellant did not give evidence of contact with them since his release. I accept that he has had a relationship with them, but the evidence is insufficient to enable me to assess the quality or nature of this. I find that he has not established a genuine and subsisting parental relationship with RB and EB at the date of the hearing before me. EB is now an adult.

Exception 1

43. The Appellant cannot meet any of the limbs of para 399A. As conceded by Mr Fripp, whilst he has been here lawfully for periods of time, he has not been here lawfully most of his life. Whilst Mr Fripp indicated that he did not concede that there would not be very significant obstacles to integration into Jamaica, this ignores that the FTT made an unchallenged finding that there were no very significant obstacles. This was preserved. It is not open to the Appellant to now challenge this. There is no good reason to go behind the preserved finding of the FTT. There is no finding by the FTT about the Appellant's social and cultural integration. This omission was not the subject of challenge of the decision of the FTT. This explains the UT's understanding

of the case as at [24] of the error of law decision. The Appellant's case was not and is not properly advanced on the basis that he can meet any of the requirements of 399A including (b). It is not open to Mr Fripp to introduce further challenges to the decision of the FTT. In respect of social and cultural integration, Mr Fripp did not advance any argument in support of the Appellant. The Appellant has family life here. He came here as an adult in 2002 aged 25. There is no evidence before me of lawful employment. Whilst there is a degree of social and cultural integration arising from his family life here, the serious crime that he has committed indicates very strongly an alienation from important values of our society which has some bearing on social and integration. In any event, the Appellant cannot meet Exception 2 even if he is socially and culturally integrated.

S.117C(6)

44. I now must consider DC. He is not a qualifying child and therefore the Appellant cannot meet Exception 2 based on his relationship with DC. Nevertheless, in order to consider the impact of deportation on DC, a factor that I will consider amongst others is whether it would be unduly harsh within the meaning of Exception 2. DC is a citizen of Jamaica. He has limited leave here until 23 November 2020. He lives with his aunt, JK. He is aged 17. On 17 December 2014 he applied for leave to remain as a dependent on his father. He was granted leave on this basis until 5 December 2016. At the time the Appellant had discretionary leave. A later application was refused because of the Appellant's status and because he was by that time in prison. DC's mother in Jamaica was not able to care for him because of mental health issues. DC appealed. At this time, he was living with EC and his younger siblings. The evidence from EC was that MC and NC would be devastated if DC was deported, having already been separated from their father. DC was at the time at school about to sit GCSEs. He had lived with his godparents in Jamaica before coming to the UK. The judge heard evidence that DC wanted to stay with EC and his siblings in Bristol and that he wanted to continue at school. The judge found that to return DC to Jamaica " at this pivotal stage of his academic and social life would not be in his best interests in circumstances where there is some uncertainty about his future care, the capacity of his godparents to look after him and the prospect of whether he will be able to continue his education." Judge Frazer said that there were "serious sand compelling circumstances in this case which warrant the preservation of the status quo for this young man" and that removal would not be proportionate. Judge Frazer allowed DC's appeal under Article 8 in a decision promulgated on 25 April 2019. The argument by the Appellant in respect of *Devaseelan* is misconceived. There is no reason to interfere with Judge Frazer's findings; however, he was determining DC's appeal against removal. I am considering his father's against deportation.

45. I have no doubt whatsoever that DC has been adversely affected by the incarceration of the Appellant. The evidence before me in contrast to that before Judge Frazer is that DC moved out of the Appellant's family home and now lives with his aunt, JK. He is now at college, having completed his GCSEs. I accept that the evidence about DC establishes that out of all the Appellant's children, he has been the worst affected by the Appellant's incarnation. He does not have a mother who is able to care for

him. However, the situation has moved on from the time of Judge Frazer's decision because DC has now completed GCSEs, he is aged 17, and he does not live in the Appellant's family home. The case was not advanced based on DC's relationship with his aunt or his relationship with his siblings; however, there is no reason for me not to accept that his aunt is looking after him and that she genuinely cares for him. I accept that DC has siblings here, and that in 2018 he was living with his younger siblings and that he enjoyed a close relationship with them. Whilst I take into account his recent witness statement and accept that he has been with his siblings as a family on occasions since his father's release, his father has been released relatively recently. There was no up to date evidence before me about the impact of separation of DC from his younger siblings. I accept that DC has had problems as described by the Appellant and JK and an improvement has been seen since his father's release. DC is not a qualifying child; however, I accept that because of his vulnerabilities it would be unduly harsh, applying the elevated test for his father to be deported leaving him here without a parent. However, I do not accept that it would be unduly harsh for him to go to Jamaica with his father. They are both citizens of Jamaica. They have both lived there. I accept that it would not be in DC's best interests and that such a move would be disruptive and unsettling, but he would not be without a parent. He would be able to live with his father. There was no cogent evidence that the Appellant would not be able to make a life for himself and his son in Jamaica despite obvious difficulties. I take into account the evidence before the FTT that the Appellant visited Jamaica in 2015. DC visited Jamaica in 2018. JK's evidence before the FTT was that during his visit DC stayed in her house in Jamaica. Whilst DC's godparents no longer live in Jamaica (the evidence is that they moved to the United States) and other family members are deceased, it can be reasonably inferred from the evidence before the FTT that the family has connections there. From this I infer the Appellant would have help getting on his feet.

46. The facts are not the same as those before Judge Frazer. I accept that at that time removal of DC was not proportionate for the reasons identified by the judge. However, the facts and evidence before me are different. DC would be leaving the UK to return to Jamaica in order to live with his father which is the very reason why he came to the UK in the first place.

47. I remind myself that the test under s.117C (6) is very demanding. I remind myself of s.117B and the material factors therein. This is a precarious family life case. The evidence does not establish that the Appellant is financially independent, whatever his intentions. In addition, I attach weight to the principle of public deterrence.

48. The best interests of the children carry great weight; nevertheless, it is a consequence of criminal conduct that offenders may be separated from their children contrary to their best interests. I accept the evidence is that the Appellant was a model prisoner and that he is at low risk of re-offending. This is not the same as presenting no risk of re-offending or harm. However, I attach some weight to the Appellant's rehabilitation. The fact remains that he has been convicted of a very serious offence. He has been released a matter of weeks prior to the hearing before me and he is on licence. I accept that the Appellant is genuinely remorseful. He is sorry for the impact

of his behaviour on his family and understandably he wishes to stay here and be gainfully employed so that he can support them. I accept that he has a reasonable likelihood of finding work, which may allow him to contribute to the maintenance of his five biological children. I also accept that the Appellant's deportation adversely impacts on several children's lives. I accept that the Appellant meets Exception 2 in relation to his wife EC and their younger children. I accept that DC who is not a qualifying child will be most affected by the Appellant leaving him here, but he does have the option of returning to Jamaica with his father. I appreciate that the Appellant fears crime in Jamaica; however, the evidence before me does not establish that to expect DC to return to Jamaica where he lived until 2014 with his father would be unduly harsh. It would be upsetting and disruptive, but it would not be unduly harsh. Notwithstanding, DC's vulnerabilities and difficulties arising at least in part from the Appellant's incarceration and prospects of deportation, I am not satisfied that his circumstances along with all other factors, in the Appellant's favour, amount to very compelling circumstances. Whether or not the Appellant is socially and culturally integrated does not make any difference to the outcome in this case because there are no properly identified circumstances that considered cumulatively are capable of amounting to very compelling circumstances.

49. All the factors relied on by the Appellant do not amount to circumstances sufficiently compelling to outweigh the very strong presumption in favour of deporting someone who has been sentenced to four years and eight months for drug offences; notwithstanding, that the consequences of deportation are likely to lead to the Appellant being separation from his British citizen children and maybe DC (should he decide to stay) for a long time.

Notice of Decision

The appeal is dismissed under Article 8

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 his 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.

Signed *Joanna McWilliam* Date 2 October 2019

Upper Tribunal Judge McWilliam