Upper Tribunal

(Immigration and Asylum Chamber) **Appeal number: DA/00193/2013 (P)**

THE IMMIGRATION ACTS

Heard Remotely at Bradford	**Decision & Reasons Promulgated**
On 25 September 2020	**On 29 September 2020**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SS

(ANONYMITY ORDER MADE)

Respondent

For the appellant: Mr M Diwnycz, Senior Presenting Officer

For the Respondent: Ms L Mair of counsel, instructed by GM Immigration Aid Unit

DECISION AND REASONS (P)

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This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. At the conclusion of the hearing I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. For the purposes of this decision, in order to avoid confusion, I will refer below to the appellant and the respondent as they were designated before the First-tier Tribunal.

2. The appellant is a Jamaican national with date of birth given as 20.6.75. He has appealed against a decision to deport him from the UK, made on 15.1.13. The case was remitted by the Court of Appeal to the First-tier Tribunal to be heard afresh, on the basis that the First-tier Tribunal had failed to apply the guidance in existing case law and failed to properly approach the issue of whether or not there were exceptional circumstances outweighing the public interest in removal of a foreign criminal.

3. The appeal was heard in Manchester on 26.7.19 before Designated First-tier Tribunal Judge McClure and reference should be made to the detailed decision promulgated on 22.11.19 for the full facts of the case there comprehensively set out.

4. It was common ground in the First-tier Tribunal that the appellant is a foreign criminal, having been sentenced in January 2010 to a term of immediate imprisonment of 40 months for two Class A drug-dealing offences, possession with intent to supply both crack cocaine and heroin in December 2018. This conviction gave rise to the deportation decision, made under s32 of the UK Borders Act 2007. Condition 1 of s32(1) & (2) is satisfied, so that the appellant has to rely on one of the exceptions under s33, asserting that deportation would breach his, his partner's and his children's rights under article 8 ECHR.

5. The central issue in the First-tier Tribunal appeal hearing was the appellant's relationship with his children and whether, pursuant to the considerations under paragraphs 398 and 399 of the Immigration Rules and s117C of the 2002 Act, it would be unduly harsh for qualifying children to remain in the UK if the appellant were to be deported, or otherwise whether there were exceptional circumstances outweighing the public interest in deportation.

6. At [103] the judge noted that there was no suggestion by the respondent that any of the qualifying children should accompany the appellant to Jamaica, "*The test therefore being whether or not it would be unduly harsh for the children to remain in the United Kingdom without the appellant*."

7. The appellant's immigration history and family relationships are complicated but carefully set out in Judge McClure's decision. He has six children from different relationships, two of whom are British citizens (K and SS). At [94] of the decision, the judge accepted that he has a family life with his children K

and SS, whose mother is Stacey, the appellant's former partner, and with his present partner, ID, and their children, including JJ and a further child, J.

8. At [111] of the decision, the judge concluded that whilst there are in total three 'qualifying' children, the appellant's removal would not be unduly harsh for the two children K and SS. However, Judge McClure allowed the appeal on article 8 ECHR human rights grounds, finding at [113] of the decision that in respect of the qualifying child JJ only, with whom the judge found the appellant had a very close bond and relationship, the appellant's removal would have such a serious impact on the child that, when combined with the family's financial circumstances, this would result in undue hardship.

9. In the alternative, between [114] and [118] of the decision, Judge McClure found that there were such exceptional circumstances as to outweigh the strong public interest in removal and justifying allowing the appeal on article 8 ECHR grounds.

10. The Secretary of State has now appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal allowing the appellant's appeal against deportation.

11. In summary, the four grounds assert as follows:

    a. The judge made a material misdirection in law in finding it would be unduly harsh for JJ to be separated from the appellant. It is submitted that the judge failed to apply the unduly harsh test. Reliance is made on the circumstances of the appellant in SSHD v PG (Jamaica) [2019] EWCA Civ 1213, suggesting that this appellant's circumstances fall squarely within those considered in PG, including alleged financial difficulties the partner would experience by not being able to pursue her education and career.

    b. The judge made a material misdirection in law when finding there were exceptional circumstances. Reliance is made on SS (Nigeria) v SSHD [2013] EWCA Civ 550, as to the greater weight to be accorded to the public interest in the case of a foreign criminal. It is submitted that the judge gave merely lip service to the seriousness of the appellant's offending and failed to give any proper consideration of the public interest in deporting him in the light of the seriousness of the offence.

    c. The judge materially misdirected himself in law in having regard to the fact that the appellant had not committed further offences and giving weight to the time elapsed since his last conviction. Reliance is made on RA (s117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 00123 (IAC), which held that the fact than an individual has not committed further offences since release from prison is highly unlikely to have a material bearing. Rehabilitation will not normally do more than show that the individual has returned to the place where society expect him to be. "*There is, in other words, no material weight which ordinarily falls to be given to rehabilitation in the proportionality balance*." It is submitted that this error infects the article 8 proportionality balancing exercise.

d. The judge failed to provide adequate reasons on a material matter by failing to have regard to significant negative factors when considering the public interest. Reliance is made on ZS (Jamaica) & Anor v SSHD [2012] EWCA Civ 1639, to the effect that breach of immigration law was a serious matter which should be "*accorded commensurate seriousness as a countervailing factor in the balancing exercise in the assessment of the proportionality of the proposed removal*."

12. There has been no cross-appeal by the appellant against any of the judge's findings.

13. Permission to appeal to the Upper Tribunal was refused by the First-tier Tribunal on 9.12.19. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Coker granted permission on 27.1.20, considering it arguable that the evidence and reasons could not result in a finding that it would be unduly harsh for the child JJ to be separated from the appellant. It was also considered "*arguable that in assessing whether there are very compelling circumstances over and above the exceptions that the judge had failed to properly balance the public interest*." However, the judge granted permission also pointed out, "*the parties will nevertheless be aware that it may well have been open to the judge to reach the findings he did in relation to Exception 2 and the parties will be expected to address this at the hearing*."

14. The appeal before the Upper Tribunal was originally listed to be heard in Manchester on 20.3.20, but the respondent's application for an adjournment was granted. Because of the Covid-19 pandemic, the Upper Tribunal issued further directions on 20.3.20, proposing that the error of law issue could be determined without a hearing, providing for submissions on the proposed course of action.

15. Submissions were received from the appellant's representatives on 27.3.20, objecting to the matter being dealt with without an oral hearing, but consenting to a remote hearing by video. The Upper Tribunal agreed that the matter was not suitable for paper consideration but anticipated that a face-to-face hearing would be possible by June 2020. Eventually, the appeal was listed for a face-to-face hearing at Bradford on 25.9.20, with notice of the hearing sent out on 8.9.20. However, by email dated 10.9.20, the appellant's representatives asked for the appeal to be listed as a remote hearing by video. Following consideration by an Upper Tribunal Judge, this was agreed to.

16. In advance of the remote appeal hearing, I have received, only the day before the hearing, two skeleton arguments from counsel for the appellant, together with a copy of the recent Court of Appeal decision in HA (Iraq) v SSHD [2020] EWCA Civ 1176. I confirm that I have taken these materials and submissions into consideration alongside the oral submissions made to me at the remote hearing, as well as the other documents now in the Tribunal's court file, before reaching any decision.

17. The decision of the Court of Appeal in HA (Iraq) bears directly on a number of issues raised in the grounds and, in reality, has overtaken those submissions so that several of the points being made are no longer tenable.

18. The first ground of appeal addresses the Exception 2 unduly harsh test but the other three grounds rather overlap and address the judge's alternative conclusion that even if Exception 2 was not made out, the circumstances taken cumulatively amount to exceptional (very compelling) circumstances rendering the appellant's deportation disproportionate.

19. The essence of the first ground of appeal is to assert that the judge failed to properly apply the unduly harsh test, but this ground does so only by directly comparing the circumstances of the appellant in PG with those of this appellant. The grounds assert that the facts of the present case fall squarely within those highlighted in PG and which were found to be commonplace consequences insufficient to meet the unduly harsh test. However, at paragraph [129] the Court of Appeal made clear that the Tribunal has to make its own evaluation of the particular circumstances:

> *"I turn to the question whether, even if it was not approved in KO, the UT's conclusion on the stay scenario in MK (Sierra Leone) should nevertheless have been treated by the UT in this case as having some kind of authoritative status. I agree with the Tribunal that it had no such status. I am not so austere as to say that a tribunal may not sometimes find it useful to consider the outcomes in other apparently similar cases as a cross-check on a conclusion which it is minded to reach. But the exercise can only ever be valuable up to a point. Ultimately the tribunal has to make its own evaluation of the particular facts before it. As the UT put it at para. 14 of its decision, in response to the same submission from Mr Bazini:*
>
> > *"Although the application of a legal test to a particular set of facts can sometimes shed light on the way in which the test falls to be applied, it is the test that matters. If this were not so, everything from the law of negligence to human rights would become irretrievably mired in a search for factual precedents."*
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> *"I would add that it is often difficult to be sure that the facts of two cases are in truth substantially similar. And, even where they are, the assessment of "undue harshness" is an evaluative exercise on which tribunals may reasonably differ. If this kind of factual comparison were legitimate it might indeed be deployed against RA, since in KO Exception 2 was held not to apply on facts that were at least as close to those of his case as those in MK: see para. 83 above."*

20. This approach of Lord Justice Underhill was endorsed by that of Lord Justice Peter Jackson at [158] and [161], referring to the "*limited value of cross-checking outcomes in more or less similar cases. The task of the decision-maker in this respect is to consider the effect of this deportation on this child*." At [58] of the Court of Appeal's decision Lord Justice Underhill also referred to the risks of treating KO as a touchstone of whether the degree of harshness goes beyond that ordinary expected by the deportation of a parent.

21. In the circumstances, I find no error of law is disclosed by the first ground of appeal. It is evident from a reading of the decision that Judge McClure made a careful and detailed assessment of all relevant circumstances, correctly self-directed himself on the meaning of 'unduly harsh' by reference to MK (Sierra Leone) v SSHD [2015] UKUT 223 (IAC). A different judge may have reached a different assessment and conclusion, but it cannot be said that it was not open to Judge McClure to reach the conclusion he did that it would be unduly harsh for JJ to be separated for the appellant, justified by the cogent reasons open on the evidence and as set out in the decision.

22. Ms Mair submitted that given the way in which the judge phrased paragraph [111] the judge was also finding that it would be unduly harsh for the other two qualifying children to be separated from the appellant. In this regard, she pointed to the phrase "*save for considerations of their relationship with their half siblings*." However, I am satisfied that if Judge McClure intended to make such a finding in respect of K and SS, that would have been made clear at [113] of the decision. In the circumstances, I reject that submission.

23. Given that the other grounds address the alternative finding of very compelling/exceptional circumstances, and I have rejected the first ground of appeal, it follows that whatever the outcome of my consideration of grounds 2-4, the appeal to the Upper Tribunal must fail. However, for completion I go on to address those grounds.

24. In reality all three of the remaining grounds overlap each other in addressing the strength of the public interest of deporting a foreign criminal balanced, in part, against the judge's assessment of rehabilitation or risk of future offending. Mr Diwnycz accepted that the third ground was the weakest, particularly in the light of the Court of Appeal's decision in RA (Iraq).

25. The second ground argues that the judge gave mere lip service to the seriousness of the appellant's offence, pointing to [115] of the decision. It is suggested that little was said about the seriousness of the offence, a drug-dealing offence. Whilst the judge there referred to taking into account the circumstances of the offence and the sentence received, he also noted that "*Drugs cause damage not only to the user but to their families and to the community*." I confess to being initially concerns about the brevity of the entire exceptional circumstances proportionality assessment, amounting to less than a page between [114] and [118] of the decision. However, I accept Ms Mair's submission that one has to consider what is there set out in the context of the decision as a whole, which reveals that these brief paragraphs are but a summary of a detailed consideration earlier in the 18-page decision of the First-tier Tribunal. Ms Mair also pointed to the fact that the judge made repeated reference to the seriousness of the offences, including at [106] where the judge stated, "*Clearly the criminal offence committed by the appellant is a serious criminal offence for which he has received a substantial custodial sentence*." The judge also set out a lengthy extract from the sentencing remarks. In the

premises, the argument that the judge failed to give proper consideration to the public interest cannot be made out.

26. The third ground argues that in the light of the Upper Tribunal's decision in RA, cited above, the judge was in error to have regard to the fact that the appellant had not committed further offences and to the time elapsed since his last conviction. Whilst RA does not seem to have been drawn to the Court of Appeal's attention in RA (Iraq), it did consider other similar cases but between [141] and [143] concluded that rehabilitation could not be excluded from consideration in the overall proportionality assessment:

> *"141. What those authorities seem to me to establish is that the fact that a potential deportee has shown positive evidence of rehabilitation, and thus of a reduced risk of re- offending, cannot be excluded from the overall proportionality exercise. The authorities say so, and it must be right in principle in view of the holistic nature of that exercise. Where a tribunal is able to make an assessment that the foreign criminal is unlikely to re-offend, that is a factor which can carry some weight in the balance when considering very compelling circumstances. The weight which it will bear will vary from case to case, but it will rarely be of great weight bearing in mind that, as Moore- Bick LJ says in Danso, the public interest in the deportation of criminals is not based only on the need to protect the public from further offending by the foreign criminal in question but also on wider policy considerations of deterrence and public concern. I would add that tribunals will properly be cautious about their ability to make findings on the risk of re-offending, and will usually be unable to do so with any confidence based on no more than the undertaking of prison courses or mere assertions of reform by the offender or the absence of subsequent offending for what will typically be a relatively short period.*
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> *142. That summary may come to much the same thing in practice as the UT's proposition that "no material weight ... ordinarily falls to be given to rehabilitation in the proportionality balance"; but I think, with respect, that it is more accurately expressed, and I cannot in any event adopt its reasoning that "rehabilitation will ... normally do no more than show that the individual has returned to the place where society expects him ... to be", notwithstanding its endorsement (not, I think, as a matter of ratio) in Binbuga. I do not think that it properly reflects the reason why rehabilitation is in principle relevant in this context, which is that it goes to reduce (one element in) the weight of the public interest in deportation which forms one side of the proportionality balance. It is not generally to do with being given credit for being a law-abiding citizen: as the UT says, that is expected of everybody, but the fact that that is so is not a good reason for denying to an appellant such weight as his rehabilitation would otherwise carry.*
>
> *143. RA's case on rehabilitation amounts simply to the fact that he has not committed any further offence and there is no reason to believe that he is likely to. The UT did not expressly put that factor into the proportionality balance. I think it should have done, but it follows from what I have said above that it is unlikely that it would carry great weight, and I am far from saying that it would necessarily have made a decisive difference to the outcome."*

27. It is evident from the above that whilst it cannot be excluded from consideration, it may well have limited weight in the overall proportionality assessment, for the reasons the Court of Appeal gave. However, HA (Iraq)

disposes of the third ground of appeal suggesting that the judge was not entitled to give any weight to rehabilitation or length of time since the offences. Further, as Ms Mair pointed out in her submissions, at [146] of Hesham Ali v SSHD [2016] UKSC 60 Lord Kerr stated:

> "*The strength of the public interest in favour of deportation must depend on such matters as the nature and seriousness of the crime, the risk of re-offending, and the success of rehabilitation, etc. These factors are relevant to an assessment of the extent to which deportation of a particular individual will further the legitimate aim of preventing crime and disorder, and thus, as pointed out by Lord Reed at para 26, inform the strength of the public interest in deportation. I do not have trouble with the suggestion that there may generally be a strong public interest in the deportation of foreign criminals but a claim that this has a fixed quality, in the sense that its importance is unchanging whatever the circumstances, seems to me to be plainly wrong in principle, and contrary to ECtHR jurisprudence*"…"

28. In the premises, no error of law is disclosed by the third ground of appeal.

29. The factual basis of the fourth ground is flawed. It is submitted that the judge failed to have due regard to the significant negative factors when considering the public interest and the balancing exercise. Reliance is made on the appellant's poor immigration history, in respect of which it is suggested that he had been working illegally since 2003, which would "*constitute a serious countervailing factor in favour of removal*." However, the appellant did have valid leave and was working legally between 2007 and the making of the deportation order in 2017. Having read the impugned decision of the First-tier Tribunal, I am satisfied that the judge set out in considerable detail the appellant's immigration history, extending to over two pages of the decision, and it is not arguable that this was ignored in the overall proportionality balancing exercise. It follows that no error of law is disclosed by this ground of appeal.

(1) Summarising the position overall, I am satisfied that having made a careful and detailed evaluative assessment of the circumstances of the appellant and his family members, the First-tier Tribunal reached a carefully balanced conclusion that in relation to one of the three qualifying children, JJ, the factors to be considered were sufficient to render that child's separation from the appellant unduly harsh. In reaching that view, I take account of the Court of Appeal recent recasting of the meaning of that phrase in HA (Iraq) and it's deprecation of an expectation that to be unduly harsh, the harshness must be beyond that ordinarily to be expected. The Court of Appeal identified that the threshold lay higher than merely undesirable but below 'very compelling circumstances'. At [53] of that decision, Lord Justice Underhill stated, [53]

> "*Observations of that kind are, I hope, helpful, but they cannot identify an objectively measurable standard. It is inherent in the nature of an exercise of the kind required by section 117C (5) that Parliament intended that tribunals should in each case make an informed evaluative assessment of whether the effect of the deportation of the parent or partner on their child or partner would be "unduly harsh" in the context of the strong public interest*

> *in the deportation of foreign criminals; and further exposition of that phrase will never be of more than limited value."*

30. I am satisfied that an informed evaluative assessment was made in this case as to whether the effects of deportation were unduly harsh on each of the qualifying children, with the judge distinguishing with reasons JJ from the other two qualifying children. I am also satisfied that the judge was entitled to reach the conclusion that in the overall proportionality assessment the circumstances amounted to very compelling/exceptional circumstances so as to render deportation disproportionate. Whilst a different judge may have reached a different conclusion on the same evidence, the grounds do not demonstrate that this judge was entitled to reach this conclusion, justified by cogent reasoning.

31. It follows that I find no material error of law in the decision of the First-tier Tribunal.

Decision

The appeal of the Secretary of State to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands and the appellant's appeal remains allowed on human rights grounds.

I make no order for costs.

Signed: *DMW Pickup*
Upper Tribunal Judge Pickup
Date: 25 September 2020

Anonymity Direction

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

> "*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 to, amongst others, both the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings*."

Signed: *DMW Pickup*
Upper Tribunal Judge Pickup
Date: 25 September 2020