Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06580/2019

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 17th February 2020	**On 09th March 2020**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

E A B
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Harvey, instructed by MTC & Co Solicitors
For the Respondent: Ms S Cunha, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Jamaica born on 28 November 1970. He appeals against the decision of First-tier Tribunal Judge Buckwell, promulgated on 19 November 2019, dismissing his appeal against deportation on human rights grounds.

2. Permission to appeal was sought on the ground that the judge made the following errors of law:-

(1) Failing to provide adequate reasons for finding that an exception to deportation under section 117C of the NIAA 2002 was not made out;

(2) Failing to consider the effect of deportation on the appellant's children separately from the appellant's offending behaviour;

(3) Failing to determine the extent of the appellant's social and cultural integration and whether there would be obstacles to his re-integration as a distinct issue;

(4) According undue weight to the appellant's conviction and sentence when determining whether the exception under 117C(6) was made out

3. Permission to appeal was granted by First-tier Tribunal Judge Gumsley on all grounds, on 17 December 2019, for the following reasons:

> "The Decision and Reasons contains a very thorough analysis of the facts in the case, and the judge identifies in detail the applicable law to be applied in the case. However having considered the Grounds of Appeal advanced, I am satisfied that is arguable that the judge has approached the question of whether there are exceptions to s.117C and/or very compelling circumstances in the case, wrongly. It is arguable that the judge has taken into account/afforded too much weight to the Appellant's behaviour and criminal convictions when considering this issue. Although the judge identifies the first question to consider is whether it would in fact be unduly harsh to expect the children to remain in the United Kingdom without their father, no specific findings on this appeared to have been made and the judge proceeds directly to consider very compelling circumstances. Further, it is arguable that the effects on the children as identified in the evidence have not been adequately considered. It is also arguable that the reason for concluding that the exceptions in s.117C do not apply are not sufficiently clear."

Appellant's convictions

4. In 2009, the Appellant was convicted of possession of cocaine and cannabis. He pleaded guilty and was sentenced to 40 hours community service for each offence. On 11 to December 2018 the appellant was sentenced, after guilty pleas to four offences of supplying cocaine and heroine, to a term of imprisonment of four years.

Appellant's submissions

5. Ms Harvey submitted that there was no dispute on the facts. The judge accepted the children's behaviour had deteriorated while the Appellant was in prison. It was accepted it would be unduly harsh to expect the Appellant's partner and his children to go to Jamaica. However, no reasons were given for why it would not be unduly harsh for them to remain in the UK. In addition, there were no findings on the best

interests of children. There was evidence before the judge that the Appellant's partner was afraid their son would become involved in a criminal gang and the family unit would break down if the children were taken into care. The judge first addressed the Appellant's criminality, which was not relevant to whether it would be unduly harsh for the children to remain in the UK without the Appellant. The judge assessed the 'unduly harsh' issue through the prism of the offence because he set out criminality at [90] after asking the question at [89].

6. On the facts it would be unduly harsh for the Appellant's partner and children to remain in the UK without him. The judge accepted the situation was deteriorating and the Appellant's partner was receiving less help from her mother. The judge considered how the Appellant's partner was coping in a temporary situation rather than long term. There was evidence that the Appellant's partner was not sleeping and she feared the family unit would break down. The judge failed to address this.

7. Ms Harvey submitted the judge made the following errors of law: He failed to address the best interests of the children; he assessed 'unduly harsh' in the context of the Appellant's criminality; and he failed to look at the accepted factual situation. The effect on the children was not considered outside the test of very compelling circumstances.

8. Ms Harvey relied on GM (Sri Lanka) [2019] EWCA Civ 1630 and submitted the judge had not taken into account factors pertinent to the Appellant himself. Had the judge appreciated the Appellant's length of residence, his health and his lack of connections in Jamaica, he would have concluded deportation was not proportionate. Further, the judge erred in assessing very compelling circumstances with reference to the Appellant's four year sentence of imprisonment. This gave rise to an element of 'double accounting' or 'weighing the offence twice'.

Respondent's submissions

Ground 1

9. Ms Cunha submitted the judge referred to PG (Jamaica) [2019] EWCA Civ 1213 in which the natural consequence of criminal actions, resulting in one parent being a serving prisoner, was a single parent bringing up the children on their own. The separation of the family was a natural consequence of the seriousness of offence. The judge's reasons were adequate and consistent with PG (Jamaica). The judge gave sufficient reasons for why there were no compelling circumstances.

Ground 2

10. Ms Cunha submitted the judge applied KO (Nigeria). The 'unduly harsh' test had a high threshold. The Appellant had not met the test of 'unduly harsh' and was unable to meet the higher threshold of 'very compelling circumstances'. She submitted that JG (Jamaica) [2019] EWCA Civ 982 endorsed NA (Pakistan) [2016] EWCA Civ 662. There had to be something more to establish very compelling circumstances.

Ground 3

11. The judge noted the Appellant's precarious immigration history and his ties with the UK. The Appellant had associated with 'bad company' and engaged in criminality for financial gain. The judge's findings open to him on the evidence before him and his reasons were adequate.

Ground 4

12. There was no error of law. The judge applied the correct test and considered the evidence holistically, including the best interests of the children. The Appellant had failed meet the unduly harsh test and had failed to show very compelling circumstances.

13. In response, Ms Harvey submitted that PG (Jamaica) could be distinguished on its facts. She accepted the Appellant had to show more than the consequences of separation. In this case, it would be unduly harsh for the Appellant's partner and children to remain in the UK without him. Very compelling circumstances can take into account all factors including those in exceptions 1 and 2. The judge failed to apply the structured approach required by section 117C and misapplied the law to the facts.

Conclusions and reasons

14. The Appellant's partner and children (aged 11 and 13) are British citizens. Both of the Appellant's children have ADHD, suffer from outbursts and are having difficulties at school. The Appellant's son has asthma, vocal tics and sickle cell traits. He does not sleep and his prescribed sleeping tablets do not work. The Appellant's daughter has asthma and a stutter. She attends two schools. Both children have one to one teaching.

15. The Appellant's partner is struggling to cope as a single mum and is worried that the children will be taken into care. Social services are not involved and the children are currently well cared for. The Appellant's partner is worried her daughter will be excluded from school and her son will be come involved in a criminal gang. Her mother is not able to look after the children as often because she has sickle cell.

16. The Appellant's two sisters live in the UK and one of his sister's has contact with the children on a regular basis. The Appellant is in contact with his grandparents and uncles in the UK. There were family members who could assist the Appellant's partner, although she was not inclined to depend on people (see the Appellant's evidence at [48]). The Appellant stated that his deportation would mess up the family unit and the children would misbehave more.

17. I find the judge properly directed himself in law at [79] to [82]. He gave adequate reasons for why it would not be unduly harsh for the Appellant's partner and children to remain in the UK at [91] to [93].

18. The judge stated at [100] "I have also found that it would not be unduly harsh for the Appellant to be removed and for his family to remain in this country." This finding was open to the judge on the evidence before him. Any failure on the part of the judge to make this finding before he concluded at [95] that there were no compelling circumstances was not material. At [89] the judge asked himself whether it would be unduly harsh for the family to remain in the UK if the Appellant was removed. It is apparent that he addressed his mind to this issue. There was no material error of law as alleged in ground 1.

19. The judge does not use the phrase 'the best interests of the children' but the judge's findings at [91] to [93] adequately address this issue. The judge found that the Appellant's partner was able to care for the children and had the support of other family members. The children had support at school notwithstanding the deterioration in their behaviour.

20. The judge did not assess the effect of deportation on the Appellant's children through the prism of his criminality as submitted by Ms Harvey. The judge acknowledged the significant weight to be attached to the public interest at [90] and then went on to assess whether the effect on the Appellant's family could outweigh it. The judge properly balanced the effect on the children against the significant public interest in deportation given the seriousness of the offence.

21. The judge's finding that there were no very compelling circumstances was open to him on the evidence before him. The separation of the family is a natural consequence of the Appellant's deportation. The Appellant has to show the impact on his partner and children would be unduly harsh to a special degree. The judge took into account the report of the independent social worker, which dealt with the significant impact on the Appellant's family. It was open to the judge to find that the deterioration of the children's behaviour and the effect this had on the Appellant's partner did not reach the level of severity required. Ground 2 fails for these reasons.

22. Ground 3 has no merit. The Appellant's length of residence, ties to the UK and lack of connections in Jamaica, in addition to the effect on his family life, could not outweigh the public interest. Any failure on the part of the judge to consider this as a distinct issue was not material.

23. There was no question of 'double accounting'. The Appellant had committed a serious offence and the judge was entitled to attach significant weight to the public interest. The judge made no error of law in his application of section 117C and he gave adequate reasons for concluding that the Appellant's deportation was proportionate.

24. Accordingly, I find that there was no material error of law in the judge's decision and I dismiss the appeal.

Notice of decision

Appeal dismissed

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 her or any member of her 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.

J Frances

Signed Date 24 February 2020
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 24 February 2020
Upper Tribunal Judge Frances