



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/02953/2014

THE IMMIGRATION ACTS

Heard at Newport
On 6 May 2015

Determination Promulgated
On 5 June 2015

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DB

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer

For the Respondent: Mr D Neale, instructed by Virgo Consultancy Services Limited

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order by the First-tier Tribunal pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

Introduction

2. This is a resumed hearing of the Secretary of State's appeal against a decision of the First-tier Tribunal (Judge NJ Osborne) allowing the appellant's appeal on humanitarian protection grounds and under Art 8 of the ECHR against a decision that the automatic deportation provisions of the UK Borders Act 2007 applied.
3. Following a hearing on 11 March 2015, in a decision dated 24 March 2015 I upheld Judge Osborne's decision to allow the appeal on humanitarian protection grounds. However, I concluded that his decision to allow the appeal under Art 8 involved the making of an error of law. I set aside that decision and on 6 May 2015 the appeal was relisted before me in order to remake the decision in respect of Art 8 alone.
4. For convenience, I will hereafter refer to the parties as they appeared before the First-tier Tribunal.

Background

5. The appellant is a citizen of Jamaica who was born on 14 April 1965. He arrived in the United Kingdom on 4 November 2000 and was granted leave to enter for a period of six months as a visitor with leave valid until 3 May 2001. The appellant, thereafter, overstayed. He began a relationship with a British citizen "KH" and on 23 April 2004, their son "M" was born.
6. On 7 September 2004, the appellant was served with notice of his liability to be administratively removed as an overstayer. On 16 September 2004 he was served with notice IS151A Part 2 and reporting restrictions were imposed. On 21 July 2005 the appellant was recorded as an absconder as he was in breach of his reporting conditions.
7. On 24 March 2006 the appellant made a human rights claim on compassionate grounds based upon his family life with his partner. On 26 September 2009 the appellant was granted discretionary leave until 26 September 2012 under Art 8. The basis of that grant was that he had custody of his son, M.
8. The appellant's relationship with KH broke down and in 2007 he formed a new relationship with a British citizen, "SL" and their child, "T" was born on 30 January 2010. Both the appellant's children are British citizens.
9. On 14 October 2011, the appellant was convicted at the Bristol Crown Court on two counts of supplying class A controlled drugs, namely heroin and was sentenced to a total of five years' imprisonment, together with a three year Anti-Social Behaviour Order.
10. On 1 October 2013, the appellant claimed asylum on the basis that he was a member of a Jamaican gang known as the "Shower Posse" before coming to the UK. He claimed that before leaving Jamaica in 2000 he had attempted to leave the "Shower Posse" and, as a result, had been subjected on a number of occasions to violence by gang members who had accused him of being a police informer and threatened him

with death unless he returned to the gang. He claimed that he had been beaten up, cut with knives and had suffered a gunshot wound to his lower leg. He claimed that he had briefly hidden in Jamaica before coming to the UK in November 2000.

11. In addition, he relied upon his relationship with his two British citizen children although he was no longer in a relationship with either of their mothers and he claimed that his deportation would breach Art 8 because of the impact upon his relationships with the children.
12. On 1 May 2014, the Secretary of State refused the appellant's claim for asylum, humanitarian protection and to grant leave under Art 8 of the ECHR.

The Appeal

13. The appellant appealed to the First-tier Tribunal. In a determination dated 26 September 2014, Judge Osborne allowed the appellant's appeal on humanitarian protection grounds and under Art 8 of the ECHR. The appellant's asylum claim was not pursued. The judge accepted the appellant's evidence that he had been involved with the "Shower Posse" and he would be at risk from them on return. In addition, Judge Osborne allowed the appellant's appeal under Art 8 on the basis of the interference with his family life with his two children M and T, concluding that the appellant's deportation would be "unduly harsh" upon them.
14. The Secretary of State sought, and was granted, permission to appeal to the Upper Tribunal. In my decision sent on 24 March 2015, I upheld Judge Osborne's decision to allow the appeal on humanitarian protection grounds but set aside his decision under Art 8. The basis for that latter decision was that the judge, although he had found that the impact upon the appellant's children would be "unduly harsh", he had failed to consider that there were "very compelling circumstances" as required by s.117C(6) of the Nationality, Immigration and Asylum Act 2002 (and para 398 of the Immigration Rules).

The Hearing

15. At the hearing, the appellant was represented by Mr Neale and the respondent by Mr Richards.
16. Without objection from Mr Richards, I admitted in evidence witness statements from the appellant, M and KH all of whom gave oral evidence before me. The only issue before me concerned the application of Art 8. Both representatives acknowledged that the Art 8 issue would be academic if my decision to uphold Judge Osborne's finding in the appellant's favour on humanitarian protection was not challenged. Nevertheless, given the possibility of that decision being further challenged by the Secretary of State, it was agreed that I should decide the Art 8 issue on the hypothetical premise that the appellant had failed to establish that he was at risk on return to Jamaica.
17. It was common ground between the parties that the central issue I should decide was that in s.117C(6) of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act

2002”) as the appellant had been sentenced to a period of imprisonment of “at least four years”, namely five years’ imprisonment. The issue was whether it has been established there were “very compelling circumstances, over and above” those in exception 2 set out in s.117C(5) of the NIA Act 2002 which provides that:

“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.”

18. It was common ground between the parties that Judge Osborne had found that exception 2 applied. The appellant’s children were both “qualifying” children as “British citizens” under s.117D(1). Further, it was accepted that the appellant had a genuine and subsisting parental relationship with both children. Finally, Judge Osborne had found, and I had concluded lawfully so, that the effect of the appellant’s deportation on M and T would be “unduly harsh”. The position of both Mr Richards and Mr Neale was that if s.117C(6) applied, then the appellant succeeded in the appeal. If, on the other hand, it did not apply then the appellant’s appeal failed under Art 8.

The Evidence

19. Mr Neale relied upon the evidence of the appellant, M and KH.
20. Dealing first with the appellant, subject to a correction to his date of birth in para 1 of his statement, the appellant adopted that statement.
21. In that statement, the appellant explained how he had begun his relationship with KH when he came to the UK. She is M’s mother. M was born on 23 April 2002 and is 12 years old and resides with KH, his mother.
22. The appellant’s relationship with KH ended and he began a new relationship with another British citizen in 2007. That also ended in late 2011 and during the relationship on 13 January 2010 T, his 5 year old daughter was born. T lives with her mother.
23. The appellant says that he tries to maintain regular contact with both children. He does not want to affect the children and he loves them. He states that it is in their best interests for them to grow up with him in their lives. He believes that his deportation would have a serious adverse impact on their development as he is very close to them. He says that his primary concern is for their well-being and ensuring that they know they have a father. He has a residence order in respect of M. It would appear that order was originally made in September 2005 and a further order was made on 30 May 2007.
24. In his statement, the appellant says that he has a very special relationship with his children and he has always been around for them. In relation to M, the appellant’s evidence was that prior to his imprisonment he was M’s primary carer. He says that he sees M once a week at school and every weekend. He takes him to play football and to see his family. He told me that his deportation would have an impact on M and his behaviour would deteriorate. He told me that whilst he was in prison, M’s

behaviour had deteriorated because he was missing the appellant. He told me that the intention of both he and KH is that M should live with him. M had reached an age when he needed his father around when he was in his teens. The appellant also told me that he was accessing support from "Mentor Me" which provided him support every week and he had, in fact, been accompanied to the Tribunal today. The appellant said that his physical health was not good. He had high blood pressure, heart problem, stomach ulcer and his sight was going also. He told me he had an appointment at the eye hospital later this month. He had also had a mini stroke whilst in prison.

25. He told me that the impact on both M and T would be hurtful if he were deported.
26. In cross-examination he was asked how M's behaviour had deteriorated when he was in prison and the appellant said he had not been behaving in class, he was disturbing class and was rude to the teachers.
27. The second witness who gave evidence was M, the appellant's 12 year old son. Having made proper adjustment to the court, M gave his evidence clearly and helpfully. He adopted his short witness statement. In that statement he said that he wanted his father to live in the UK "with me and my mum". He says that he does not understand why his father cannot remain in the UK. He does not want to live in Jamaica and he belongs in the UK. His statement says that as "a young male" the presence of his father in his life is very important.
28. In his oral evidence, M told me that he was really sad and had not behaved in school when his father was in prison. Since his father has been out of prison, his father has come to see him every weekend and takes him out for something to eat. He said that he was doing "alright now" in school.
29. There was no cross-examination.
30. The third witness was KH, the appellant's former partner and mother of M. She also adopted her witness statement.
31. In that statement she says that it has been very difficult to settle without knowing the outcome of the appellant's immigration status and it has been even more unsettling for their son. She said that the appellant was a "good father" and that his separation from M, whilst he was detained, has "in particular had an impact on our son's behaviour". She said that she could never allow the appellant to take M to Jamaica because of the crime rate and danger to children in that country. She did not wish her son to be exposed to that environment and she would not take her son out of his current school setting. She says that since the appellant's release from prison, M's behaviour has "very much settled" and he has returned to "mainstream school, after being sent to a referral unit". She asks that the appellant's relationship with their son be allowed to develop.
32. In her oral evidence, she said that the appellant had been M's main carer since birth. Whilst the appellant was in prison, M's school work had deteriorated but since the appellant had come out of prison it was much better. She said that M was at a

difficult age, in his teens, and he needed a father. She said that she had agreed with the appellant that he could have full custody of M because M needs to be with his father right now. When asked what impact the appellant's deportation would have on M, she said she would not like to say but it would be not good. She did not want M to go there. It was dangerous and she would not be financially able to afford for M to go over there. There would also be impact she said on her. It would be devastating. She also said that it would affect T whom she saw on some weekends when T was with the appellant.

33. There was no cross-examination.

Deportation and Art 8

34. The appellant is a "foreign criminal" subject to the automatic deportation provisions in the UK Borders Act 2007. Under s.32, he is a "foreign criminal" because he is not a British citizen and he has been convicted of an offence in the UK and sentenced to a period of imprisonment of at least twelve months, namely five years for the supply of class A controlled drugs on 14 October 2011.

35. In this resumed hearing, the appellant relies upon Art 8 as bringing him within the exception to deportation under s.33(2)(a). Deportation and Art 8 is dealt with in Part 13 of the Immigration Rules. For the purposes of this appeal, the relevant provisions are in paras 398 and 399.

36. The proper structural approach to the Rules and Part 5A of the NIA Act 2002 in applying Art 8 in a deportation context is set out in Chege (section 117D - Article 8 - approach) [2015] UKUT 165 (IAC) at [33]:

"It follows that the correct approach, where an appeal on human rights grounds has been brought in seeking to resist deportation, is to consider

- a. is the appellant a foreign criminal as defined by s117D (2) (a), (b) or (c);
- b. if so, does he fall within paragraph 399 or 399A of the Immigration Rules;
- c. if not are there very compelling circumstances over and above those falling within 399 and 399A relied upon, such identification to be informed by the seriousness of the criminality and taking into account the factors set out in s117B.

The task of the judge is to assess the competing interests and to determine whether an interference with a person's right to respect for private and family life is justified under Article 8(2) or whether the public interest arguments should prevail notwithstanding the engagement of Article 8."

37. Turning to the Rules, so far as relevant, para 398 provides as follows:

"Where a person claims that their deportation would be contrary to the UK's obligations under Art 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 interests because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

... 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."

38. Paragraph 399 provides, so far as relevant, as follows:

"This paragraph applies where paras 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; ...; 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; ...".

39. In this appeal, para 399(a) does not apply as it is only engaged in circumstances where para 398(b) or (c) applies, namely where the individual has been convicted of an offence for which he has been sentenced to a period of imprisonment of less than four years but at least twelve months (para 398(b)) or the individual's offending has caused serious harm or he is a persistent offender who shows a particular disregard for the law (para 398(c)).

40. The relevance of setting out para 399(a) is that under para 398 – because the appellant has been convicted of an offence for which he has been sentenced to a period of imprisonment of at least four years – the public interest will only be outweighed by other factors where there are "very compelling circumstances over and above" those in para 399(a).

41. The "very compelling circumstances" rubric of para 398, like its predecessor requiring "exceptional circumstances", enshrines within the "complete code" of paras 398 *et seq* in deportation cases the approach to be applied in determining whether the public interest reflected in an individual's offending is outweighed by other factors.

42. In Chege, the UT stated at [24] that:

"The purpose of the phrase "very compelling circumstances over and above those described in paragraphs 399 and 399A" ensures that a decision taken by the Secretary of State (and the Tribunal) does not result in a breach of the UK's obligations under the ECHR. This reflects s117A NIAA 2002, which requires particular regard to be had to the criteria in s117B and s117C in determining the "public interest question". It is essential that particular regard and consideration is had to them in the overall assessment of the public interest in deportation."

At [28], the UT recognised that:

“Those individuals who do not come within paragraph 399 or 399A will need to establish very compelling circumstances over and above those described in paragraphs 399 and 399A because nothing else will be weighty enough to outweigh the public interest in deportation.”

At [29] the UT noted that:

“It is at this stage that everything relevant is considered as the decision maker looks at the circumstances not falling within paragraphs 399 and 399A to see whether they outweigh the public interest in deportation. That is the exercise of striking a balance between the competing interests in play, an exercise to be carried out through the lens of the rules, as Sales LJ expressed it, against the backdrop of s117A to s117D of the 2002 Act so that the deportation of foreign criminals is in the public interest and the more serious the offence the greater is the public interest in deportation.”

43. At [30] the UT noted that:

“Thus the more serious or persistent the offending, the more compelling the circumstances would have to be. This is the consequence of the interplay between s117A(3) NIAA2002, s117C(2) NIAA2002, and paragraph 398 of the Immigration Rules. To construe the Rules in any other way would be to subvert s117A(3) and prevent proper assessment of the UK’s obligations under Article 8.”

44. It is, as the UT stated in Chege, at the “very compelling” circumstances stage of the examination of an individual’s claim under Art 8 that the factors now statutorily set out in Part 5A of the NIA Act 2002 must also be taken into account. Section 117A states that in determining the “public interest question” under Art 8.2, a court or tribunal:

“Must (in particular) have regard –

- (a) in all cases, to the considerations listed in s.117B, and
- (b) in cases concerning the deportation of foreign criminals, to the considerations listed in s.117C.”

45. Section 117B provides as follows:

“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.”

46. Section 117B is applicable in all cases.

47. Section 117C sets out a number of “additional considerations” applicable to cases involving “foreign criminals” as defined in s.117D(2). That provides as follows:

“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."

48. Both Mr Neale and Mr Richards focused exclusively upon s.117C(6). Mr Neale submitted that the appellant's circumstances were "very compelling" over and above those described in Exception 2 in s.117C(5) and Mr Richards submitted they were not.

49. It is clear that in Chege the Upper Tribunal considered that the phraseology of the Rules (and s.117C(6)) introduced from 28 July 2014 was intended to identify a more onerous test to assess the factors which could outweigh the public interest than the previous phraseology of "exceptional circumstances" (see [23]).

50. At [25] the UT in Chege commented on the phraseology now in the Rules (and s.117C(6)) as follows:

"They can only be circumstances, which are sufficiently compelling to outweigh the public interest in deportation and render such deportation a breach of Art 8. The present Rules set out particular aspects that must be taken into account in the weighing of proportionality; they allow for consideration of other circumstances that may not fall within that rubric but, in the language of the Rules, those circumstances "must be very compelling". The purpose of 398 is to recognise circumstances that are sufficiently compelling to outweigh the public interest in deportation but do not fall within 399 and 399A. It is for reasons that the Rules in the deportation scheme constitute a complete code in relation to Art 8 claims."

51. At [26] the UT glossed the words as follows:

"Compelling" as an adjective has the meaning of having a powerful and irresistible effect; convincing."

52. The UT continued:

"The annexing of the word "very" indicates the very high threshold that has to be passed to meet the requirements of the Rules."

53. I agree with, and gratefully adopt, what was said by the UT in Chege. That approach is to be adopted in assessing proportionality at the fifth stage of the well-known Razgar tests.

54. The five questions set out by Lord Bingham of Cornhill at [17] ([2004] UKHL 27) are as follows:

1. Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or family life?
2. If so, will such interference have consequences of such gravity as potentially to engage the operation of Art 8?

3. If so, is such interference in accordance with the law?
 4. If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
 5. If so, is such interference proportionate to the legitimate public aim sought to be achieved?
55. At [20] Lord Bingham pointed out that the answering of question (5) must:
- “always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention.”
56. It is well established that the public interest is reflected in the three facets of: seriousness of the offence, deterrence of other foreign criminals and society’s abhorrence at the offending (see, e.g., N (Kenya) v SSHD [2004] EWCA Civ 1094 and OH (Serbia) v SSHD [2008] EWCA Civ 694).
 57. It is also accepted that the public interest in deportation cases is stronger than in other cases such as administrative removals (see e.g, JO (Uganda) v SSHD [2010] EWCA Civ 10 and KB (Trinidad and Tobago) v SSHD [2010] EWCA Civ 11). A reality only strengthened by the introduction of the legislative scheme for automatic deportation of ‘foreign criminals’ (see, e.g., SS (Nigeria) v SSHD [2013] EWCA Civ 550 and LC (China) v SSHD [2014] EWCA Civ 1310). As the UT in Chege pointed out, the wording of both para 398 of the Rules and s.117C(6) in particular makes plain the considerable weight to be given to the public interest where the foreign criminal has been sentenced to a period of imprisonment of at least four years.
 58. As I have said, both Mr Neale and Mr Richards accepted that the appellant’s case turned simply on whether para 398 and its mirrored wording in s.117C(6) was satisfied or not.
 59. In applying those provisions, the children’s “best interests” must be taken into account. Those interests are a “primary consideration” although they need not be determinative and can be outweighed by sufficiently weighty other considerations of the public interest (see ZH (Tanzania) v SSHD [2011] UKSC 4, especially [33]; Zoumbas v SSHD [2013] UKSC 74 and EV (Philippines) v SSHD [2014] EWCA Civ 874).

Findings

60. Judge Osborne found that the appellant had a genuine and subsisting relationship with both M and T. I accept that finding which is clearly supported by all the evidence before me. I accept, therefore, that the appellant has family life with both his children. His relationships with his ex-partners have broken down and there is clearly no family life between them.

61. The clear evidence of KH was that she would not allow M to live with the appellant in Jamaica and, indeed, there would be difficulties in visiting him there, not least because of the financial burden. There was no direct evidence in relation to T. However both children are young and are British citizens and it would not be reasonable, in my judgment, to expect the children to live with the appellant in Jamaica and there would be undoubted difficulties even in visiting him. Judge Osborne, of course, found that it would be “unduly harsh” for the children to live with the appellant in Jamaica. I accept that finding.
62. Consequently, I am satisfied that if the appellant is deported to Jamaica there will be a sufficiently serious interference with his family life with M and T to engage Art 8.1.
63. The respondent’s decision is clearly in accordance with the law and for a legitimate aim, namely the prevention of disorder or crime and for the economic well-being of the country. The crucial issue is one of proportionality.
64. In assessing that, I must consider the “best interests” of both M and T. Judge Osborne concluded, in effect, that it was in their best interests to retain contact with their father. The evidence in relation to M was particularly apparent. It was both the evidence of the appellant, M himself and M’s mother, KH that the appellant was a positive factor in M’s life. There was less direct evidence in relation to T but I am content to accept that it is also in her best interests to retain contact with the appellant. The appellant appears to be a dutiful father having contact with both M and T on a weekly basis at weekends and there is also evidence from M’s school that the appellant is “supportive” and “is always willing to attend meetings when asked”. The evidence before me, which was not challenged, was that the appellant had been the primary carer of M until he was imprisoned in 2011. M has clearly lived with his mother since that time and the appellant only has contact with him although there is in existence a residence order in the appellant’s favour. I have taken into account the views of M who gave his evidence clearly and with confidence before me that he wished to continue his relationship with the appellant.
65. Judge Osborne found that, taking into account all the circumstances: “it would be unduly harsh upon [M] and [T] to deprive them of a direct physical relationship with their natural father the appellant.” I, of course, accept that finding which was properly open to the judge. The issue for me is whether the circumstances are “very compelling” “over and above” those set out in para 399(a) or in Exception 2 in s.117C(5).
66. I accept the evidence that M’s behaviour deteriorated when the appellant was in prison. The cause of that was said by both the appellant and KH to be the appellant’s imprisonment. No independent supporting evidence was produced for that opinion. It is, however, the case that M’s behaviour has improved and he has been returned to mainstream school having been sent to a referral unit previously. There is no evidence in relation to that from the school. The evidence of the appellant was that M’s behaviour had deteriorated by him not behaving in class, disturbing the class and being rude to teachers. KH’s evidence did not add to the severity of the impact

said to have been upon M. There is no evidence of the impact upon T who is now aged 5.

67. The appellant has been convicted of a very serious criminal offence, namely the supply of class A drugs and received a substantial sentence of five years' imprisonment. It is not his first offence involving drugs. The policy set out in the Immigration Rules and legislatively in the UK Borders Act 2007 and Part 5A of the NIA Act 2002 places a great significance and weight on the public interest reflected in such offending. The Upper Tribunal in Chege stated that "compelling" meant "powerful and irresistible effect; convincing" and that the addition of the word "very" meant that a "very high threshold" had to be passed to meet the requirements of the Rules.
68. The appellant cannot succeed unless there are circumstances "over and above" the fact that his deportation would be "unduly harsh" upon M and T. In my judgment, the evidence does not take the appellant's case to that level of compulsion. There is an inevitable effect upon a parent/child relationship which is genuine if a parent is separated from that child. That will be, of course, the effect of the appellant's deportation. Both M and T are very likely to be deprived of direct contact with the appellant for some considerable period of time. Certainly, the financial circumstances of KH - which were not explored in her evidence - may make visits to Jamaica unrealistic. That is, of course, providing KH would be prepared to take, or send unaccompanied, M to Jamaica at all. I was not shown any evidence in relation to the circumstances of T's mother. I am content to assume they are no better. I accept, as did Judge Osborne, that direct physical contact between the appellant and his children is the "best". It is trite to state that modern electronic forms of communication cannot be a wholly satisfactory substitute. That said, of course, a video contact over the internet through, for example Skype, is a modern development that adds a dimension to contact between separated individuals which did not exist until relatively recently. That would provide some continuing face-to-face contact between the appellant and M and T.
69. In my judgment, the evidence of M's deterioration when the appellant was in prison does not, whether taken alone or in combination with all other factors, amount to "very compelling circumstances" having regard to the appellant's criminality so as to outweigh the public interest reflected in his offending.
70. Based upon his relationship with M and T I am not satisfied that the requirements of para 398 and s.117C(6) are met. Consequently, as I understood Mr Neale's submission, he accepted that the public interest required the appellant's deportation.
71. That said, I have also considered all the appellant's circumstances, including his evidence before me concerning his health. No evidence was presented that his health would suffer if he returned to Jamaica or that what treatment he required would be unavailable. Indeed, Mr Neale's written skeleton argument made no reference to this aspect of the appellant's case which emerged in his oral (but not written) evidence.
72. Looking at the factors under s.117B, I accept that the appellant speaks English and therefore is better able to integrate into society and potentially be less of a burden on

taxpayers. However, no evidence was drawn to my attention concerning the appellant's ability to be "financially independent". As I understood it, at present he is unable to work. Mr Neale did not place any weight in his submissions on the appellant's private life in the UK. He has obviously been in the UK since 2000 and initially had leave as a visitor and had discretionary leave between September 2009 and September 2012. His immigration status has, at best, always been precarious and so little weight should be given to his private life.

73. Turning to s.117C, his deportation is in the public interest and, given the very serious nature of his offending, the public interest is substantial and strong. In my judgment, whether seen through the prism of para 398 or s.117C(6) and the requirement to establish "very compelling circumstances", the public interest reflected in the seriousness of the appellant's offending outweighs both M and T's best interests to remain in direct physical contact with the appellant.
74. For these reasons, I am satisfied that the appellant's deportation is a proportionate interference with his family life with M and T.
75. I dismiss the appeal under Art 8 of the ECHR.

Decision

76. The decision of the First-tier Tribunal to allow the appellant's appeal on humanitarian protection grounds did not involve the making of an error of law and that decision stands.
77. The decision of the First-tier Tribunal to allow the appellant's appeal under Art 8 did involve the making of a material error of law. That decision is set aside.
78. I remake the decision dismissing the appellant's appeal under Art 8.

Signed

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT **FEE AWARD**

No fee is paid or payable and therefore there can be no fee award.

Signed

A Grubb
Judge of the Upper Tribunal