



IAC-FH-CK-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: DA/00524/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 8 October 2015**

**Decision & Reasons Promulgated  
On 15 October 2015**

**Before**

**THE HONOURABLE LORD BURNS  
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)  
UPPER TRIBUNAL JUDGE McWILLIAM**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**RRA  
(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Miss A Holmes, Home Office Presenting Officer

For the Respondent: Miss A Sehra, Counsel instructed by Nag Law Solicitors

**DECISION AND REASONS**

A direction for anonymity was made by the First-tier Tribunal and this is maintained by the UT. 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.

1. We shall refer to the respondent as the appellant as he was before the First-tier Tribunal. The appellant is a citizen of Jamaica and his date of birth is 24 September 1982. He has been in the UK since 2000 and he was granted indefinite leave to remain on 11 July 2003 as the spouse of a British citizen.
2. The appellant has ten convictions for thirteen offences which were committed between 17 November 2000 and 2 April 2012. Nine are for possession of cannabis. He has one conviction for breach of a conditional discharge and two convictions for failing to surrender to the Magistrates' Court. He has never been sentenced to a period of imprisonment.
3. The Secretary of State made a deportation order pursuant to Section 3(5) (a) of the Immigration Act 1971. The appellant appealed and his appeal was allowed by the First-tier Tribunal (a panel comprising Judge Nightingale and Mr GH Getlevog). The Secretary of State was granted permission by Upper Tribunal Judge Coker on 11 August 2015.
4. The decision to deport the appellant came about as a result of the UK Border Agency working in conjunction with the Metropolitan Police (Operation Nexus). It was the Secretary of State's case that the appellant was deeply involved with a criminal lifestyle and the supply of drugs. The Secretary of State relied on 138 entries on the Crime Reporting Information System (CRIS) relating to the appellant in support of her case.
5. The Secretary of State relied on paragraph 398 of the Immigration Rules. The relevant part reads as follows:

"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) ...
  - (b) ...
  - (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]."
6. The appellant claimed that deportation would breach his rights under Article 8 ECHR as a result of the genuine and subsisting relationship with

his two British citizen children aged 12 and aged 10 respectively. He relied on paragraph 399 of the Immigration Rule which reads as follows:

“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 seven 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

(c) ...”

7. The panel heard evidence from the appellant, Ms G (the appellant's partner) and PC Dady (who was called on behalf of the Secretary of State). The panel found that the Secretary of State had not established that the appellant was a member of a criminal gang or associated with certain named individuals. They found that it had not been established, on the balance of probabilities, that he was a drug dealer or a gang member or that he was involved in making money in an illegal way. The panel did not accept the evidence submitted by the Secretary of State relating to allegations that the appellant had committed criminal offences over and above those that resulted in convictions.
8. The panel found that the appellant's offending had not caused serious harm, but that he was a persistent offender who had shown a particular disregard for the law. Thus paragraph 398(c) of the Rules applied to him. They found that he was a habitual user of cannabis and that he may have breached an anti-social behaviour order in 2006. The panel noted that the appellant had not committed offences since 2012 and that he had been employed since 2014.
9. The panel found that the appellant's relationship with his estranged wife and the mother of his two children was strained. At paragraph 101 the panel concluded that they could find no basis on which to conclude that it would not be unduly harsh for the appellant's two children to go and live in Jamaica with their father and therefore to be separated from their mother.
10. The panel went on to find that it would be unduly harsh for the children to remain in the UK without their father. They gave a number of reasons for this including the level of the appellant's offending, which they viewed as not “highly criminalised”. They accepted that the appellant played a full

role as a parent and he is a genuinely committed father. They found that the appellant's estranged wife was not assisting him as regards contact with the children and that it was highly unlikely that she would facilitate contact between the appellant and his children in the event of his deportation. She had sent an email to the Tribunal stating that the appellant had no contact with the children but this was inconsistent with a letter produced by the appellant from the children's school. This letter was verified as genuine by PC Dady and the Tribunal found that it established that the appellant in fact played a full role as a parent and that the email from the children's mother did not represent the position and that it was "highly indicative of animosity on her part towards the appellant".

11. The thrust of the grounds is the panel failed to consider the public interest and the seriousness of the appellant's offences and the panel did not appreciate the high threshold required in regard to unduly harsh under the rules. Ms Holmes produced the case law cited in the grounds. At the start of oral submissions she conceded that there would be difficulty in challenging the panel's findings in relation to the appellant's estranged wife.
12. Miss Holmes argued that the findings in relation to the impact of deportation do not meet the high threshold in relation to unduly harsh and she made reference to paragraphs 102 and 104 of the determination submitting that there was no evidence before the panel about how the children would feel about their father being deported and remaining here in the UK without him. In assessing unduly harsh the panel did not properly assess public interest and they did not factor in the amount of offences committed by the appellant and the extent of his criminal activity. They did not factor into their findings that he is a persistent offender with a clear blatant disregard to the law in the overall assessment. Miss Holmes referred us to paragraphs 17, 18, 43 and 44 of KMO (section 117 - unduly harsh) Nigeria [2015] UKUT 00543. She argued that the ties between the appellant and his children in KMO were closer to those between the appellant and his children in this case.
13. Miss Seehra relied on the appellant's Rule 24 response and submitted that the decision was detailed and the panel had examined all of the evidence. Many of the points raised were a disagreement with the findings and the grounds do not identify an arguable error of law. The Tribunal was clearly aware of the public interest and attached weight to it accordingly and of the extent of the appellant's offending and factored this into the assessment. The panel sufficiently considered unduly harsh in accordance with MAB (para 399; "unduly harsh") USA [2015] UKUT 00435 and Bossade (ss.117A-D-interrelationship with Rules) [2015] UKUT 00415. If the UT were correct in KMO, it is not material because the panel considered the public interest and the seriousness of the offences committed by the appellant.

## **Conclusions**

14. We find that the decision of the panel is detailed and well-reasoned. Most of the findings relate to the appellant's criminality in the context of Operation Nexus and there is no challenge to these. The Secretary of State's case in relation to the appellant being involved in extensive and serious criminal conduct, over and above those offences for which he was arrested and convicted, was wholly rejected. The panel's assessment was based on the appellant's convictions which were, by any account, far less serious than the crimes which the Secretary of State alleged the appellant had been involved in.
15. We are of the view that the findings in relation to the appellant's estranged wife at paragraphs 103 and 104 were open to the Tribunal and there was no need for independent corroborative evidence. It was open to the Tribunal to attach weight to the obvious conclusion that, should the appellant's two children leave the UK, they would effectively be separated from their mother, who is estranged from the appellant. Likewise it was open to the Tribunal to attach weight to the appellant's evidence of his wife's hostility towards him and to conclude that this would lead to real difficulties in maintaining contact between the appellant and his children. We do not find that it was necessary for the appellant to produce evidence relating to the impact of separation on the children in the circumstances in this case. The children were young and the appellant's role in their lives was accepted. It is unarguable in our view that it was not in the children's best interests for their father to remain in the UK notwithstanding his cannabis habit and persistent low level offending.
16. The panel considered the public interest and at paragraph 107 properly directed themselves that the maintenance of effective immigration control is in the public interest. From paragraph 108 it is clear that they were properly aware that the legislative framework is such that Parliament has decided that the public interest is injured if a criminal's deportation is not effected. The panel adequately considered the seriousness of the offences committed by the appellant and it was open to them to conclude at paragraph 108 that they did not regard them as "at the more serious end of the criminal calendar." The panel understood that frequent and continuing offences that are not individually serious may amount to serious offending which may justify expulsion, but did not consider this to be the case here. They noted that the appellant had never received a custodial sentence, which reflected the seriousness of the offences. The panel accepted that he was a persistent offender and it is implicit in this that there is a risk of re-offending and we are satisfied that the panel were mindful of this. It was incumbent on the panel to consider this in the context of the seriousness of the offences which in our view they did. It was open to the Tribunal to attach weight to the fact that the appellant was in employment at the date of the hearing and had not committed an offence since 2012.
17. There is no express reference by the panel to OH (Serbia) v SSHD [2008] EWCA Civ 694. For the reasons articulated above, we are satisfied that the panel factored into the assessment the risk of re-offending. There is no

express reference to deterrence or society's revulsion at serious crimes; however, in the context of the appellant's offences this is not in our view a material omission. It must be remembered that the assessment was conducted after the panel had rejected the Secretary of State's evidence about the extent of the appellant's credibility. In any event, having considered the Reasons for Refusal letter it does not appear that the Secretary of State has at any time has explicitly relied on the public interest in the context of these discrete components in OH.

18. The panel made extensive findings about the appellant's criminality and the public interest. On a proper reading of the decision these should be read together with the unduly harsh assessment. The unduly harsh decision has properly been informed by the public interest findings. This approach is consistent with the findings of the UT in KMO and indeed the position of the Secretary of State in relation to paragraph 399. If we are wrong about this, it is not material. This is because the unduly harsh findings also stand alone. We are satisfied that the panel was entitled to conclude, on the basis of their lawful and sustainable findings that the impact of deportation would be unduly harsh. If we were to conduct our own assessment either in accordance with MAB or KMO, we would allow the appeal on the basis that the impact of deportation would be unduly, inordinately or excessively harsh
19. We find that the assessment conducted by the panel was adequate and in accordance with the legislative framework and relevant jurisprudence. The Secretary of State's appeal is dismissed and the decision of the First-tier Tribunal to allow the appeal under Article 8 is maintained.

### **Notice of Decision**

The Secretary of State's appeal is dismissed.

Signed Joanna McWilliam

Date 13 October 2015

Upper Tribunal Judge McWilliam