



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

Appeal Number: HU/09251/2017

THE IMMIGRATION ACTS

**Heard at the Royal Courts of Justice
On 6 August 2018**

**Decision & Reasons Promulgated
On 13 August 2018**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DANOVAN BUCHANAN

Respondent

Representation:

For the Appellant:

Mr. T. Melvin, Home Office Presenting Officer

For the Respondents:

The Respondent did not appear and was not legally represented

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondent is a national of Jamaica. He first arrived in the United Kingdom, as a visitor, on 2 July 2002 and was granted indefinite leave to remain as a spouse on 9 October 2003. On 12 August 2016 he was convicted of importing over 22 kilos of a Class B drug, namely cannabis, into the United Kingdom from Jamaica and was given a sentence of 27 months imprisonment.

2. The Appellant made a decision to deport him and the Respondent made a human rights claim, which was refused on 8 August 2017. His subsequent appeal was allowed by First-tier Tribunal Judge Adio in a decision promulgated on 15 February 2018. However, the Appellant appealed against this decision and Upper Tribunal Judge Hanson granted him permission to appeal on 21 June 2018.

ERROR OF LAW HEARING

3. The Respondent was not legally represented and did not attend the hearing. I heard this appeal last and my clerk had by that time called his name outside the court on a number of occasions without success. My file indicated that he had been properly served with notice of this hearing. Therefore, I found that it was in the interest of justice to continue with the appeal by the Secretary of State for the Home Department in his absence. The Home Office Presenting Officer made short submissions in support of both sets of grounds of appeal and I have referred to the content of these submissions, where relevant, in my decision below.

ERROR OF LAW DECISION

4. The Respondent was sentenced to 27 months imprisonment and, therefore, he was subject to automatic deportation under section 32 of the UK Borders Act 2007.

5. Paragraph 398 of the Immigration Rules states that:

“Where a person claims that their deportation would be contrary to the UK’s obligations under Article 8 of the Human Rights Convention, and

(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 18 months”.

6. Paragraph 399 of the Immigration Rules states that:

“This paragraph applies where paragraph 398(b)...applies if-

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 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 7 years immediately preceding the date of the immigration decision; and in either case

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

7. Section 117C of the Nationality, Immigration and Asylum Act 2002 states that:

- (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.

...

- (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 the child would be unduly harsh”.

8. First-tier Tribunal Judge Adio found in paragraph 51 of his decision that it would be unduly harsh for the Respondent’s twin sons to remain in the United Kingdom without him. He went on to explain that this was “not so much because of the absence of the Appellant by itself but more because of the support he gives to their mother and the consequent losses to them and the family as a whole...which would follow the Appellant’s deportation”. This was based on his finding in paragraph 49 that the Appellant “plays an active and positive role in his boys lives and his support enables their mother to hold down a number of jobs with the advantages that higher earnings bring and which will be lost without his help”.

9. When considering whether deportation would be unduly harsh, the First-tier Tribunal Judge correctly took into account the Appellant's offence and the public interest in his deportation as a serious criminal. He did note that what is unduly harsh depends on the seriousness of the offence and that there were no aggravating features connected with his offence and that his risk of re-offending was low. When passing sentence, Ms Recorder Sjolín had accepted that the Appellant was not involved in the planning of the drug importation and that he was not going to derive a direct profit from the sale of the drugs. Therefore, he had performed relatively limited functions under direction.

10. I have also taken into account that paragraph 26 of *MM (Uganda) v Secretary of State for the Home Department* [2016] EWCA Civ 450 states that:

“The expression “unduly harsh” in section 117C(5) and Rules 399(a) and (b) requires regard to be had to all the circumstances including the criminal's immigration and criminal history”.

11. In paragraph 49 of his decision the First-tier Tribunal Judge gave weight to the lengthy lawful period of leave that the Appellant had enjoyed here; from his arrival in 2002 until his leave was invalidated by the making of a deportation order on 2 February 2017.

12. The First-tier Tribunal Judge also gave due weight to the length and seriousness of the Appellant's criminal offence. Although he did not remind himself of the particular harm to the public which arises from the importation of a large quantity of prohibited drugs.

13. However, when reaching a decision that the Appellant's deportation would be unduly harsh the First-tier Tribunal Judge failed to apply the test which was formulated in *MAB (para 399, “unduly harsh”) USA* [2015] UKUT 00435 (IAC) and followed in paragraph 26 of *KMO (section 117 – unduly harsh) Nigeria* [2015] UKUT 00543 (IAC), which stated that:

“Although, for these reasons, I respectfully depart from the approach advocated by the Tribunal in *MAB* I do adopt the other guidance offered by that decision:

“Whether the consequences of deportation will be “unduly harsh” for an individual involves more than “uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging” consequences and imposes a considerably more elevated or higher threshold.

The consequences for an individual will be “harsh” if they are “severe” or “bleak” and they will be “unduly” so if they are “inordinately” or “excessively” harsh taking into account all of the circumstances of the individual.”

14. This was clearly an error of law.
15. In the grounds of appeal to the First-tier Tribunal, the Appellant also sought to rely on a number of other cases involving appeals brought by those who were subject to deportation orders. However, unlike in *AJ (Zimbabwe) v Secretary of State for the Home Department* [2016] EWCA Civ 1012, the First-tier Tribunal Judge did give due weight to the public interest in the deportation of a serious criminal. The other cases referred to by the Appellant were not factually or legally relevant to the circumstances of this particular appeal. In particular, I note that the extract relied upon from *LC (China) v Secretary of State for the Home Department* [2014] EWCA Civ 1310 was a partial one and did not represent what was found about those sentenced to between one and four year imprisonment.
16. However, in the grounds of appeal to the Upper Tribunal the Appellant relied upon the case of *Danso v Secretary of State for the Home Department* [2015] EWCA Civ 596, where it was found at paragraph 20 of the judgment that “the protection of the public from harm by way of future offending is only one of the factors that makes it conducive to the public good to deport criminals. Other factors include the need to mark the public’s revulsion at the offender’s conduct and the need to deter others from acting in a similar way”. In his decision, First-tier Tribunal Judge Parkes failed to take these factors into account.
17. In addition, at paragraph 21 of *Velasquez Taylor v Secretary of State for the Home Department* [2015] EWCA Civ 845, Lord Justice Moore-Bick said “I would certainly not wish to diminish the importance of rehabilitation in itself, but the cases in which it can make a significant contribution to establishing the compelling reasons sufficient to outweigh the public interest in deportation are likely to be rare. “
18. In the current case it was not even possible to give credit for rehabilitation as the Respondent continues to deny any involvement in the offence for which he was found guilty.
19. As a consequence, there were errors of law in First-tier Tribunal Judge Parkes’ decision.

DECISION

- (1) The Secretary of State's appeal is allowed.
- (2) First-tier Tribunal Judge Parkes's decision is set aside.
- (3) The appeal is remitted to the First-tier Tribunal for a *de novo* hearing before a First-tier Tribunal Judge other than First-tier Tribunal Judge Parkes.

Nadine Finch

Signed

Date 6 August 2018

Upper Tribunal Judge Finch