



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/08703/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 5 June 2019

Decision & Reasons Promulgated  
On 5 July 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

WHYEN [K]  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr J Dean, counsel instructed via direct access

For the Respondent: Mr S Kotas, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a national of Jamaica born on 29 June 1969. He came to the United Kingdom in November 1997 as a visitor and subsequently met and married a British citizen on 5 May 1999. He applied for leave to remain as the spouse of a British national.
2. On 12 June 2002 the Appellant was convicted and sentenced to five years' imprisonment for supplying crack cocaine. A deportation order was made against him, against which he appealed and his appeal was allowed on 11 April 2006. For

unexplained reasons there was then a delay until the Appellant was given discretionary leave, presumably on 27 January 2009, valid until 27 January 2012. The Appellant then sought to extend his leave, but that application was refused on 14 May 2013 and his appeal against that decision was dismissed. By the time of that hearing the Appellant had pleaded guilty to a charge of possessing a controlled drug i.e. cannabis and had received a fine. The Appellant was unrepresented at that appeal. Subsequent to that decision further submissions were made. These resulted ultimately in a refusal to treat the further submissions or to grant leave to remain on the basis of the Appellant's human rights. The refusal is dated 27 March 2018.

3. Notably there was no fresh decision to deport the Appellant, but rather his human rights and Appendix M applications were refused on suitability grounds due to his criminal convictions. The decision in that respect refers to S-LTR.1.3, 1.5 and 1.6, in light of the Appellant's sentence of imprisonment of five years on 12 July 2002, a conviction on 10 May 2013 for possession of cannabis and a conviction on 4<sup>th</sup> July 2013 for possession of cannabis, in respect of both of which offences the Appellant received a fine, forfeiture and destruction of drugs.
4. The Appellant's appeal came before First-tier Tribunal Judge Seelhoff for hearing on 9<sup>th</sup> November 2018. In a decision and reasons promulgated on 21 November 2018 the judge made the following findings at 28, noting that:

*"28. As a legal principle it is not clear whether or not the suitability provisions should be revisited simply as a consequence of passage of time but in any event the Appellant admitted before me that he still takes cannabis on what was implied to be a relatively regular basis in particular to cope with managing dental pain. That is an admission of ongoing criminality which must be viewed against the previous tribunal's finding that it was extraordinary that the Appellant would take the risk of continuing to offend when he was facing removal from the UK. Whilst the Appellant is engaged in illegal activity it seems impossible that he could be held to be suitable for a grant of leave to remain under the Immigration Rules. The suitability provisions would exclude the Appellant from a grant of leave to remain either as the husband of a British national or on the basis of his private life.*

*29. Accordingly the only basis on which the Appellant could possibly succeed would be outside the rules. I note that I am in any event bound by the findings of the previous tribunal, which included an alternative finding that even if the Appellant did have family life his removal would be proportionate.*

*30. I do have different evidence before me in respect of the Appellant's relationship and in particular in respect of the health of his wife."*

At [31] the judge went on to find that the Appellant is the primary carer of his wife and he does provide the vast majority of care she currently receives. However, he noted that Social Services have engaged with her in the past and if the Appellant were to be removed it is likely they would reassess her care needs and put in a package of care if appropriate.

5. The judge also took into account the fact that they live with her adult son who would be likely to be able to provide a degree of support and assistance if the Appellant was not available [33]. At [34] the judge found that the Appellant and his wife have family life in the UK and he went on to find as follows:

*"34. I do find that the Appellant's wife has health problems which present more of a complicating factor when considering the impact of removing the Appellant from the UK or in the alternative of expecting the couple to make a life for themselves in Jamaica. However regardless of the levels of difficulties for the Appellant's wife living without the Appellant in the UK or with him in Jamaica, the overwhelming factor in my assessment of this case is that the Appellant has admitted to ongoing criminality even if it is at a low level. So long as cannabis is criminalised in the UK and the Appellant is taking it without lawful reason he is engaged in criminal conduct in the UK. Even if the Appellant is not dealing in drugs himself he is supporting the criminal enterprise of those he buys his drugs from.*

*35. Removing the Appellant from the UK may well interfere with his family life and it is entirely plausible that his wife would find that she was unable to travel to Jamaica with him, however, given the very serious conviction the Appellant received in 2002, the subsequent conviction, the tribunal's previous decision and the admission of ongoing criminality I find that any interference with family or private life rights is entirely proportionate."*

At [36] the judge took into account Section 117B noting that his private life was formed when he was in the UK with transient leave, that he had chosen to become involved in serious drug offences after being granted leave and that his subsequent drug use was a matter of choice for him and he must bear the consequences.

6. The judge then went on to consider Section 117C of the 2002 Act at paragraphs 37 to [38]. This would appear to be in the alternative.
7. Permission to appeal was sought, in time, on the basis that having accepted the Appellant has a family life under Article 8, the judge ought to have allowed the appeal outside the Rules and that the refusal was disproportionate given the Appellant's wife was unable to settle in Jamaica as her condition would not permit it. The cannabis found was minimal and was solely for the Appellant's personal use. His wife has major problems with ill-health leaving her incapable of caring for herself and that removal of the Appellant would severely impact on his wife and the judge's assessment of the Appellant's use of cannabis was disproportionate.
8. In a decision dated 8 March 2019, Upper Tribunal Judge Freeman granted permission to appeal on the basis that it was quite clear that Section 117C does apply to the case due to the fact the Appellant had received a sentence of five years' imprisonment in 2002. The grant of permission states:

*"It is quite clear that s. 117C does apply to this case, where the appellant received a sentence of five years' imprisonment in 2002 for supplying class 'A' drugs: the question for the judge was whether there were 'very compelling circumstances' over and above those in the relevant Exception (2). It was accepted that the appellant has a 'genuine and subsisting relationship' with his wife, but not that*

*the effect on her of his deportation would be unduly harsh. In the case of a child, that means unduly harsh on the child without consideration of the Appellant's record. Since it is not yet clear whether that is also the case with the partner, or what the approach should be where, as here, an appeal against deportation was allowed (following that conviction, under the law as it stood in 2006), permission is granted, so that the 'unduly harsh' question can be considered in the light of the answer to those points."*

9. The appeal came before the Upper Tribunal for hearing on 2 April 2019, when it was adjourned at the agreement of both parties, due to the fact that the Presenting Officer, Ms Everett, had contacted the Respondent's policy unit but had not yet received a response and was thus not in a position to make submissions as to the Respondent's policy position in light of the grant of permission to appeal. The decision by the Tribunal to allow the Appellant's appeal against deportation dated 11 April 2006 was also absent from any of the court documents. Thus, the appeal was adjourned with directions in order to hear submissions from the parties on the correct interpretation of Section 117C(5) in light of the judgment of the Court of Appeal in KO (Nigeria) [2018] UKSC 53.
10. At the resumed hearing both parties, having ultimately provided submissions and skeleton arguments in accordance with the directions, Mr Kotas having consulted with colleagues, submitted that in fact the grant of permission was misconceived as there was no deportation decision and no fresh decision to deport the Appellant. Thus, he did not fall within the scope of Section 117C of the NIAA 2002 as the Respondent was not taking the position that the Appellant is a foreign criminal. His appeal against deportation having been allowed in 2006 and the extant decision of 27 March 2018 was to refuse to grant him leave to remain on the basis of his human rights because he was unable to meet the suitability requirements. On that basis I accepted Mr Kotas' submission and the appeal proceeded on the basis of the grounds as drafted.
11. Mr Dean made submissions in line with the grounds of appeal, essentially maintaining that the judge had placed undue emphasis on the Appellant's ongoing use of cannabis for medical reasons and had thus erred in his assessment of the proportionality of the Appellant's removal, bearing in mind the judge's acceptance that the Appellant had family life with his wife and that his removal to Jamaica would clearly impact on her given that he is her primary carer.
12. In his submissions, Mr Kotas submitted that the grounds of appeal as pleaded are effectively simply a disagreement with the judge's findings of fact, which were open to him. The judge had accepted the medical evidence as to the existence or substance of family life and the Appellant's long residence. Mr Kotas submitted that the crux of the judge's decision is at [35] and that is that the Appellant's ongoing criminality in terms of his cannabis use rendered the refusal proportionate.
13. Mr Kotas submitted that the issue is whether refusal would result in unjustifiably harsh consequences. He submitted that it had not been argued that the judge failed to consider any material facts or considerations. He had discharged his legal duty and the grounds were not sufficiently particularised for the challenge to succeed.

14. In reply, Mr Dean submitted that the judge had placed reliance on the 2013 decision, which was very much in the context of the two very recent convictions. However, that these were of a different level of criminal culpability and that ultimately the judges had placed an irrational interpretation of the factual matrix. The Appellant had been honest as to his cannabis use and this should go to his credit. It was disproportionate to regard that factor as so important, particularly bearing in mind the Secretary of State had not sought to pursue any deportation action against the Appellant since his appeal was allowed in 2006.

*Findings and reasons*

15. I reserved my decision, which I now give with my reasons.
16. The Respondent's position, which had changed since the hearing before the Upper Tribunal on 2 April 2019, was that, given that there was no extant decision to deport the Appellant, since he succeeded in his appeal against deportation on 11 April 2006 and given that the basis of the current refusal was that the Appellant did not meet the suitability requirements of the Immigration Rules *viz* S-LTR.1.3, 1.5 and 1.6, in light of his previous conviction, consequently section 117C of the NIAA 2002 did not apply because the Appellant is not currently subject to deportation.
17. Having given careful consideration to this issue, I have concluded that the Respondent's position is incorrect. Section 32 of the UK Borders Act 2007 defines a foreign criminal as follows:
  - (1) In this section "foreign criminal" means a person –
    - (a) who is not a British citizen,
    - (b) who is convicted in the United Kingdom of an offence, and
    - (c) to whom Condition 1 or 2 applies.
  - (2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.
  - (3) Condition 2 is that –
    - (a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (serious criminal), and
    - (b) the person is sentenced to a period of imprisonment."
18. Whilst the Appellant's conviction pre-dates the coming into force of the UK Borders Act, in terms of his current immigration status the provisions therein clearly apply to him, regardless of the fact that the Respondent has not sought to re-institute deportation action against him following his successful appeal in 2006, but rather has refused his human rights application on the basis that he does not meet the suitability requirements of the Rules, owing to his previous criminality.
19. Sections 117A-D of the NIAA 2002 provide *inter alia* as follows:

***“117A Application of this Part***

- (1) *This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –
  - (a) *breaches a person’s right to respect for private and family life under Article 8, and*
  - (b) *as a result would be unlawful under section 6 of the Human Rights Act 1998.**
- (2) *In considering the public interest question, the court or tribunal must (in particular) have regard –
  - (a) *in all cases, to the considerations listed in section 117B, and*
  - (b) *in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.**
- (3) *In subsection (2), “the public interest question” means the question of whether an interference with a person’s right to respect for private and family life is justified under Article 8(2).*

***117C 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.*

### **117D Interpretation of this Part**

...

- (2) *In this Part, "foreign criminal" means a person –*
- (a) *who is not a British citizen,*
  - (b) *who has been convicted in the United Kingdom of an offence, and*
  - (c) *who –*
    - (i) *has been sentenced to a period of imprisonment of at least 12 months,*
    - (ii) *has been convicted of an offence that has caused serious harm, or*
    - (iii) *is a persistent offender.*

20. I find that the provisions are somewhat contradictory. Section 117A makes clear that “this Part” ie. section 117A-D it is intended to apply to a human rights appeal and is thus applicable. However, section 117C(7) appears to indicate that section 117C applies only where the Tribunal is considering a decision to deport, which is not applicable in the extant appeal. However, the definition of “foreign criminal” in section 117D would include the Appellant. Consequently, I find that section 117(C) of the NIAA 2002 is applicable.

21. I have taken account of the written submissions made on behalf of the Appellant. I have considered the question of the Judge’s consideration of whether it would be unduly harsh on the Appellant’s wife for him to be removed in light of the guidance set out by the Supreme Court in KO (Nigeria) [2018] UKSC 53 and the Presidential panel in RA (s.117C: “unduly harsh”; offence: seriousness) Iraq [2019] UKUT 00123 (IAC) which provides *inter alia*:

*“(2) The way in which a court or tribunal should approach section 117C remains as set out in the judgment of Jackson LJ in NA (Pakistan) & Another v Secretary of State [2016] EWCA Civ 662.*

*(3) Section 117C(6) applies to both categories of foreign criminals described by Lord Carnwath in paragraph 20 of KO (Nigeria); namely, those who have not been sentenced to imprisonment of 4 years or more, and those who have.”*

22. NA (Pakistan) (op cit) provides *inter alia* per Lord Justice Jackson:

*“37. In relation to a serious offender, it will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are “very compelling circumstances, over and above those described in Exceptions 1 and 2” as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6).”*

23. In MS (s.117C (6): "*very compelling circumstances*") Philippines [2019] UKUT 00122 (IAC) the Presidential panel held *inter alia* as follows at [20]:

*"... we find the effect of section 117C is that a court or tribunal, in determining whether there are very compelling circumstances, as required by subsection (6), must take into account the seriousness of the particular offence for which the foreign criminal was convicted, together with any other relevant public interest considerations. Nothing in KO (Nigeria) demands a contrary conclusion."*

24. None of these judgments provide a definitive answer to the question of whether "*unduly harsh*" when applied to a spouse, means that this consideration should take place without having regard to the Appellant's record, however, applying a purposive approach, following the judgment in *KO (Nigeria)* (op cit) this provision should be interpreted in the same manner when applied to a spouse as to a child.
25. In respect of the "*very compelling circumstances*" test, it is clear from *MS* (op cit) that when considering whether there are very compelling circumstances over and above those described in Exceptions 1 and 2, that the seriousness of the particular offence for which the Appellant was convicted must be taken into account, along with any other relevant public interest considerations.
26. In determining the appeal, First tier Tribunal Judge Seelhof did not definitively decide whether section 117C was applicable but concluded even if it was, it would not have made any difference to his decision [38]. I find that, in light of the developments in the jurisprudence, the Judge failed to apply a purposive analysis of the Appellant's particular circumstances, through the prism of section 117C of the NIAA 2002 and failed to give adequate reasons for his conclusion at [38]. Further, given that the Appellant does not qualify for leave under the Rules pursuant to Appendix FM, there is no consideration given in the Judge's decision and reasons to GEN 3.2.(2) and whether the refusal would result in unjustifiably harsh consequences for the Appellant's wife. I find that these errors are material as they could result in a different outcome to the appeal.

*Decision*

27. I find material errors of law in the decision of First tier Tribunal Judge Seelhof. I set that decision aside and remit the appeal for a hearing *de novo* before the First tier Tribunal.

No anonymity direction is made.

Signed *Rebecca Chapman*

Date 29 June 2019

Deputy Upper Tribunal Judge Chapman