Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04267/2020**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 22 February 2022	**On the 29 March 2022**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

ASANTE FRED KWAME FREMPONG
[NO ANONYMITY ORDER]

Respondent

Representation:
For the appellant: Mr Stefan Kotas, a Senior Home Office Presenting Officer
For the respondent: Mr Aryan Stedman of Counsel, instructed by VMD Solicitors

DECISION AND REASONS

Decision and reasons

1. The Secretary of State appealed with permission from the decision of the First-tier Tribunal allowing the claimant's appeal against her decision to set removal directions to Ghana on 5 March 2020 and to refuse to revoke a deportation order in the light of his human rights claims made with reference to section 32(5) of the UK Borders Act 2007. The claimant is a citizen of Ghana.

2. The claimant is a foreign criminal. He does not dispute that the automatic deportation provisions in section 32 of the 2007 Act are applicable. The Secretary of State must make a deportation order unless the claimant can bring himself within one of the exceptions set out in section 33 of that Act: in this case, he relies on Exception 1 in section 33(2)(a) and on the Human Rights Act 1998.

3. **Mode of hearing.** The hearing today took place face to face.

Background

4. The facts in this appeal are not in dispute. The claimant came to the UK in March 1974 when he would have been 5 years old and was granted a No Time Limit (NTL) passport endorsement in line with his mother. His father died in Ghana in 2017 and in March 2018, the year of his 50th birthday, the claimant visited Ghana for about two months.

5. The claimant has had all his education in the UK and has two British citizen children with previous partners. He is now in a relationship with a British citizen woman and she has six children from a previous relationship.

Criminal history

6. The claimant's history of criminality began in his teens and became increasingly serious. Between 1982 (when he was 14 years old) and the index offences committed in 2018, the claimant was convicted on 14 separate occasions. The earlier offences include three drug possession offences, offences of fraud, theft, burglary and car theft, and a firearms/offensive weapons offences in 1988. He used a number of aliases for his various offences.

7. On 3 September 2018 at Chelmsford Crown Court, the claimant pleaded guilty to: two offences of possession of a controlled Class A drug (heroin and crack cocaine) with intent to supply, one offence of possession of a controlled Class B drug (cannabis) with intent to supply, offences of facilitating the acquisition or possession of criminal property, and possessing a prohibited weapon (a stun gun). The sentencing judge ordered the destruction of the drugs, the gun, drug paraphernalia and a 'burner' mobile telephone.

8. Because of his guilty pleas, the claimant received discounted sentences: from 6 years to 4 years for the drug offences and the criminal property offences, served concurrently, and an additional 6 months for the weapons offence, to be served consecutively, making a total of 4½ years imprisonment.

9. The claimant was released from prison on licence in December 2020 and in the six months between his release and the First-tier Tribunal hearing on 15 June 2021, he committed no further offences.

Error of law hearing

10. Following a hearing on 7 December 2022, on 18 January 2022 Mrs Justice Farbey DBE and I set aside the decision of the First-tier Tribunal. We did so because in reaching a positive decision on the claimant's appeal, the First-tier Tribunal had not taken into account the provisions of Part 5A of the Nationality, Immigration and Asylum Act 2002 (as amended) or the equivalent provisions of the Immigration Rules HC 395 (as amended), nor had he directed himself to the test in section 117C(6) that:

> "117C(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."

11. The appeal was retained for the decision to be remade in the Upper Tribunal.

Remaking the decision

12. The factual evidence summarised above is not in dispute. The Upper Tribunal heard oral evidence from the claimant and his mother, and received supportive witness statements from two other witnesses who were not called, as their evidence was not disputed. One witness had arranged to travel to the United States and was unable to attend the hearing.

Claimant's evidence

13. The claimant's statement dated 5 June 2021 sets out the difficult childhood he had. After his mother remarried to his English speaking, Jamaican born step-father, he never felt fully part of the family. He was not sent to school until he took matters into his own hands, joining a group of children returning from Leyton Swimming Baths, as they returned to the local school. A teacher sorted out the confusion: he was in trouble with his mother and her friend as he could have caused social services to become involved. He was then enrolled at Newport Infant School in Leyton.

14. At school, the claimant experienced racism and adopted his step-father's Jamaican ways, becoming a troublemaker and being excluded from school for a time. His mother and step-father had a child of their own, a daughter (Rachel) and he was protective of her, against his father's wrath. His mother ran away often but his step-father would find them and assault or abuse their hosts so that the family had to return to him. The claimant felt unwanted and would often run away himself and stay with friends in the community, getting into bad company.

15. The claimant ascribed his criminality to mixing with the wrong people, trying to fit in. 'It was all about peer pressure'. The claimant said he changed when his elder daughter was born in 2006, and again in 2010 when his younger daughter was born. He started working as an uber driver in 2015, but in 2017 he became depressed and had nightmares about his step-father. He began smoking crack.

16. In February 2018, he went to Ghana for the funeral of his natural father. He had been estranged from him for more than 15 years and felt very guilty. On his return, with big debts for his drug use, he agreed with a dealer to become a supplier, but he said that having been caught and imprisoned, he had made a decision not to use drugs again and to try to give back to his community. He took a Samaritans listening course and worked to support others who felt suicidal in the prison, or who had thoughts of self-harm. He studied Restorative Practices (about conflict resolution) and became a mediator, working for Safer Custody within the prison and working with the young gangs unit as a mentor.

17. Since his release in December 2020, the claimant had got a job as a delivery driver for Hermes. His statement continued:

> "…I am trying to work my way into mentoring the youths because I honestly believe that I have so much to offer them from my experiences. I have been through so much and am now trying to stand firm. I have managed to turn my life around and now staying with my mother, rebuilding a relationship that was lost along the way.
>
> 28. I now feel with [my daughters], my mother, sister, and the mother of my children are my rock, and now I am aging, life comes into more perspective. The UK is my home and has been since I was 6 years old. I would face very substantial obstacles integrating into a country I have left since I was 6 years old. I have no family or other connections in Ghana.
>
> 29. I have established a family and private life here in the UK and know no other culture but British culture and customs. I cannot speak the local dialect from the country of my birth and feels no connection with it."

18. That statement was made just 6 months after the claimant was released on licence. There is no updated statement. The claimant adopted his statement and was tendered for cross-examination.

19. In cross-examination, the claimant confirmed that the was not a baby when he came to the UK: he was nearly 6 years old. He spoke broken English, but the family language was Twi. He said he had continued to speak broken English at home, and no longer remembered his Twi language. His Jamaican step-father spoke unbroken English.

Evidence of Ms Felicia Adjei (claimant's mother)

20. Ms Adjei is the claimant's mother. She is 73 now and has a malignant brain tumour and failing eyesight due to glaucoma. In her statement for the First-tier Tribunal dated 5 June 2021, she set out the appalling domestic abuse inflicted on her by her husband, Mr Antonio Foster, whom she met in the UK. He rejected the claimant, who would be left behind when the family went on trips.

21. In 1984, Ms Adjei finally left her husband and in due course, she divorced him. The children were badly affected. The claimant became uncontrollable and withdrawn and eventually turned to drugs.

22. Ms Adjei blamed herself for not being there for her son when he was young and getting in to trouble. She considers him 'God sent' and a great support. The statement concluded:

> "20. The family ties are now stronger despite the challenging times we faced in the 70s, 80s and 90s, and the conduct of Fred is inexcusable; however, I have been living with the guilt over the years that had I been there for him and provide the guidance needed as a child in his formative years, things would have turned out different.
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> 21. Fred is now my rock and the death of his father with whom he has been estranged since arriving in London in 1974 severed all ties to Ghana as he has no contact with that side of his family. [He] does not understand the local customs and culture and the fear of him returning would adversely affect my health and wellbeing not to mention that damage that it would cause to his two children that is highly dependent on him."

23. Ms Adjei adopted her statement and was tendered for cross-examination. She said that the language they spoke in Ghana, when it was just her and the claimant, was Twi. Twi is the most common language in Ghana, but English is also spoken commonly there.

24. Both in Ghana and in the UK, the claimant spoke English at school. Her second husband was a Jamaican man who spoke no Twi, so the language at home was also English and she considered that the claimant would have forgotten how to speak Twi.

25. In re-examination, Ms Adjei said that when she arrived in England all those years ago, she only spoke broken English, not proper English. The claimant's step-father spoke English and he learned to speak the language properly here.

Evidence of Ms Rachel Foster

26. Ms Foster is the claimant's half sister. She records in her statement a harrowing account of domestic violence by the claimant's father, visited on the claimant, his sister and his mother. Their mother had no support apart from relatives and close friends in the UK. She repeatedly took their father back because he was the breadwinner of the family.

27. After he left, the claimant became the breadwinner, and they went short on food and other essentials. Her mother had to borrow money, and they had to hide from Radio Rentals or 'loan people' because she could not pay her debts.

28. In her statement she explained that after their father left, and during the divorce, the claimant became estranged from his mother. He began using drugs and managed his own business within the car industry. He became deeply in debt to his drugs supplier and made a really big mistake.

29. The statement concludes:

> "12. I can see that he has tried so hard to make things better but his financial situation and being a parent led to making a really big mistake which is not only affecting him but also his children, who [are] affected

> because they are used to being able to see their father whenever they wanted, and his attendance to their school events and external activities and hospital appointments has created a bit impact. We are trying our best to assist each other, especially with my mother's health issue, doing shopping ,taking her to appointments and helping with the house. Even though I try my best to help I am limited with my own health issues therefore carrying shopping, cleaning, plus working is very difficult, it has caused so much distress. "

Evidence of Ms Verona Oard

30. Ms Oard is the mother of the claimant's older daughter, born in March 2006. Her daughter has sickle cell anaemia, which reduces her life expectancy. Both Ms Oard and the claimant are carriers of the sickle cell gene.

31. Ms Oard is sometimes jealous of the closeness between father and daughter, although their relationship as partners ended many years ago. He has researched what can be done about his daughter's illness and he often takes her out with her younger sister at weekends to the parks.

Evidence of Ms Shamika Williams

32. Ms Williams is the mother of the claimant's younger daughter born in June 2010. Fortunately, the younger daughter has not inherited sickle cell anaemia from her father. Ms Williams lived with the claimant for 4 years, and has known him for 14 years. The claimant pays towards his daughter's financial upkeep, but that was more difficult when he was in prison.

33. Ms Williams says the claimant has bought a van, with his mother's help, and is now a self-employed handyman/mover to enable him to continue to support his daughters financially.

Report of Probation Service Officer

34. Mr Colm Beechinor is the claimant's Probation Officer. In a brief report sent to the Upper Tribunal on 17 February 2022, but which is internally undated, Mr Beechinor says he took over supervision of the claimant on 24 May 2021, following the departure of his original supervisor, Mr Charles Kennison.

35. The claimant was still assessed as presenting a medium risk of serious harm to the public: he could cause someone significant physical or psychological injury, but was unlikely to do so. He had been compliant with his licence conditions, with no warning letters and no missed appointments. He was abstinent from illicit substances and highly motivated to maintain that.

36. The core of Mr Beechinor's report is as follows:

> "… He is currently employed in two separate jobs. He demonstrates what we in Probation call pro-social attitudes, that is he feels it is his duty to find legitimate employment to take care of himself and his family.
>
> One of these roles, is with Yodel, doing package deliveries normally six days a week. He is also working full-time in a Local Authority Care Home; his employers are aware of his conviction. This job in particular appears to be having a very positive impact on Mr. Asante-Frempong and discussing his work with him he appears to be very dedicated to helping the young people in their care, but also very insightful about the issues that they face and their behaviours. He is clearly highly motivated, and it is my assessment that his employment is an important protective factor for him. Not just in terms of providing financial stability, but also giving him a sense of pride and achievement.
>
> I have seen no evidence to suggest that Mr. Asante-Frempong has breached any of his licence conditions. I currently have no concerns about Mr. Asante-Frempong reoffending, and he has made very good progress during the course of his licence."

Submissions

37. For the claimant, Mr Stedman filed a skeleton argument. He set out the sequence of events and confirmed orally that the claimant's licence would end on 21 December 2022. He had turned his life around and responded positively to imprisonment. The most recent report by his Probation Services Officer, Mr Beechinor, was favourable.

38. Mr Stedman went through the two Exceptions in section 117C but did not address the 'very exceptional circumstances' test in section 117C(6) which is required where the sentence is longer than 4 years.

39. In oral argument, Mr Stedman said that there were no factual or legal disputes. The balance fell in favour of the claimant, who had turned his life around since coming out of prison. He had paid his debt to society and done everything possible to change his life.

40. Removing the claimant would have a significant effect on him and on his daughters. He had no knowledge of Ghana and the Tribunal should be prepared to find that there were very compelling reasons to allow the appeal. Mr Stedman asked me to allow the appeal.

41. For the Secretary of State, Mr Kotas relied on his skeleton argument, in which he set out the legal framework. The Secretary of State accepted that the claimant had been lawfully resident in the UK for most of his life and that he had no close or immediate family members in Ghana. He did, however, have Ghanaian heritage through his mum and was in generally good mental and physical health. He spoke English, which was the official language of Ghana, and had obtained gainful employment in the past.

42. There would unquestionably be obstacles to the claimant's integration in Ghana, but they were not 'very significant' which was the test.

43. The claimant did not live with either of his daughters and there was nothing in the evidence to show that their separation from him would be

unduly harsh. Their mothers had primary responsibility for the daughters, and there was no evidence about them other than assertion of a close relationship by the daughters' mothers. They would naturally be upset and distressed at his removal, but that was nowhere near the unduly harsh standard: see *KO (Nigeria) and others v Secretary of State for the Home Department* [2018] UKSC 53 at [23] and following in the judgment of Lord Carnwath JSC, with whom Lord Kerr JSC, Lord Wilson JSC, Lord Reed JSC and Lord Briggs JSC agreed.

44. Mr Kotas relied on *HA (Iraq)* at [141]-[143] in the judgment of Lord Justice Underhill, with whom Lord Justice Peter Jackson and Lord Justice Underhill agreed. Rehabilitation, even when a factor, would not carry much weight against the public interest in deportation.

45. While it might be difficult and distressing for the claimant to go to Ghana and be physically separated from his children, this should carry little or no weight in the balancing exercise. There was no evidence, other than the undated probation officer's note produced just before the hearing, to indicate that the claimant's rehabilitation was continuing. His pre-conviction history showed him returning to criminal activities regularly. His offences were 'clearly very serious'. There was no powerful or irresistible case outweighing the public interest: see *Secretary of State for the Home Department v PF (Nigeria)* [2019 EWCA Civ 1139 at [33] and *Chege (section 117D – Article 8 approach* [2015] UKUT 165 (IAC).

46. The public interest must emphatically prevail: the claimant had been involved with the supply of drugs, which has a particularly destructive effect on society, and has shown egregious and arrogant contempt for the laws of the UK, in a pattern of prolific and serious offending over many years.

47. In oral submissions, Mr Kotas summarised his skeleton argument. He reminded me that the decision of the European Court of Human Rights in *Maslov v. Austria* - 1638/03 [2008] ECHR 546 (23 June 2008) had been subject to interpretation in the Court of Appeal in *Secretary of State for the Home Department v AJ (Zimbabwe)* [2016] EWCA Civ 2021 at [47] in the judgment of Lord Justice Elias, with whom Lord Justice Vos agreed, to the effect that the UK's statutory framework reduces the weight which *Maslov* has in this jurisdiction.

48. Mr Kotas asked me to dismiss the appeal. I reserved my decision, which I now give.

Analysis

49. The facts in this appeal are not in dispute. The claimant is undoubtedly a foreign criminal, and can benefit from section 117C(6) only if he can show very exceptional circumstances over and above the matters provided for in exceptions 1 and 2 in section 117C(4) and (5).

50. The correct approach to rehabilitation is set out in the passage in *HA (Iraq)* cited by Mr Kotas:

> "141. … the fact that a potential deportee has shown positive evidence of rehabilitation, and thus of a reduced risk of re-offending, cannot be excluded from the overall proportionality exercise. The authorities say so, and it must be right in principle in view of the holistic nature of that exercise. Where a tribunal is able to make an assessment that the foreign criminal is unlikely to re-offend, that is a factor which can carry some weight in the balance when considering very compelling circumstances. The weight which it will bear will vary from case to case, but it will rarely be of great weight bearing in mind that, as Moore-Bick LJ says in *Danso*, the public interest in the deportation of criminals is not based only on the need to protect the public from further offending by the foreign criminal in question but also on wider policy considerations of deterrence and public concern. …
>
> 142. … [Rehabilitation] goes to reduce (one element in) the weight of the public interest in deportation which forms one side of the proportionality balance. It is not generally to do with being given credit for being a law-abiding citizen: as the UT says, that is expected of everybody, but the fact that that is so is not a good reason for denying to an appellant such weight as his rehabilitation would otherwise carry."

51. I have considered the weight I can give to the *Maslov* factors. The claimant has lived in the UK for a very long time. I bear in mind the Court of Appeal's guidance in *AJ (Zimbabwe)*. I remind myself that the Human Rights Act 1998 requires me to 'have regard to' Strasbourg jurisprudence. I am bound by the statutory provisions in section 117C(6). Even if I were not so bound, having regard to the nature and gravity of this claimant's offences and the weak social, cultural and family ties he seems to have here (although his ties are even weaker to Ghana), I am not satisfied that the *Maslov* test would have availed him.

52. I have considered whether the claimant's removal would be unduly harsh in relation to his two British citizen daughters, with whom he does not live. In *KO (Nigeria),* at [23], Lord Carnwath said this:

> "23. On the other hand the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. *One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent.* …." [*Emphasis added*]

I am satisfied that the removal of this claimant would be 'duly harsh', on the evidence before me, and no more than that.

53. I turn therefore to section 117C. Exception 1 in Section 117C(4) deals with long residence, social and cultural integration, and very significant obstacles to reintegration. The claimant has had several jobs since coming out of prison: the job referred to in his witness statement, with Hermes parcels, is not the same as the Yodel job or the care worker post

which his probation officer mentions in his undated statement. The claimant's probation officer still considers him a medium risk of harm to the public.

54. The claimant's social and cultural ties in the UK are not strong, despite his long residence. He does have links to Ghana: he speaks the official language, his mother is Ghanaian, and he spoke Twi as a child. He has visited in 2018, for the funeral of his natural father. There is not enough evidence to show that there would be *very* significant obstacles to his reintegration there.

55. Even if – which I do not accept – the claimant could satisfy the Tribunal that he is socially and culturally integrated in the UK and that there would be very significant obstacles to his reintegration in Ghana, he must show more than that. He has to demonstrate some other 'very exceptional circumstances' under section 117C(6).

56. The same is true of Exception 2 in section 117C(5). The claimant must show not only a genuine and subsisting relationship with a qualifying partner (which, on the facts, he cannot do today) and/or a genuine and subsisting parental relationship with a qualifying child, which he does have with his daughters, on the evidence, but again, he must show 'very exceptional circumstances' over and above those relationships.

57. The evidence before the Tribunal does not approach the section 117C(6) standard. At its highest, both mothers of his daughters confirm that (when not incarcerated) the claimant is supportively involved with his daughters and there is a family bond between him and them. He is currently single and his relationships with his three known partners have all ended.

58. The evidence before me does not demonstrate either 'very significant obstacles' to reintegration in Ghana, or that there are 'very exceptional circumstances' over and above what is provided for in section 117C by Exceptions 1 and 2, which outweigh the significant public interest in the deportation of foreign criminals, particularly offenders who have multiple serious offences, as this claimant has.

59. I therefore substitute a decision dismissing the appeal against the Secretary of State's refusal to revoke the deportation order on human rights grounds.

DECISION

60. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by dismissing the appeal.

Signed Judith AJC Gleeson Date: 15 March 2022
Upper Tribunal Judge Gleeson