



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

Appeal Number: HU/17389/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 31 March 2022**

**Decision & Reasons Promulgated
On 04 May 2022**

Before

**UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE STOUT**

Between

**O'NEIL NICHOLAS MARTIN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr P Draycott, Counsel, instructed by Hoole and Co Solicitors

For the respondent: Ms K Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against a decision of the First-tier Tribunal (Judge A Lloyd-Lawrie) (the FtT) promulgated on 17 January 2020 following a hearing on 9 January 2020 in which she dismissed his appeal on human rights grounds against a deportation order issued by the respondent on 25 July 2019.
2. Following refusals of permission by First-tier Tribunal Judge Woodcraft dated 14 February 2020 and Upper Tribunal Judge Coker dated 22 April

2020, the appellant was granted permission to apply for judicial review by Jay J on 15 October 2020 and the appeal was by consent set down for this substantive hearing before us.

3. The appellant is a national of Jamaica, born 10 June 1980, who has been in the United Kingdom since 22 October 2000. From 25 March 2014 until 20 January 2020 the appellant had leave to remain as a parent (the appellant has three British children born on 22/5/2005, 25/4/2006 and 21/10/2008). The appellant was served with a deportation notice in the light of convictions for possession with intent to supply a Class B drug, possession of a class A drug and driving a motor vehicle otherwise than in accordance with a licence for which he was sentenced on 5 July 2019 to nine months imprisonment, with two months concurrent and supervision for 12 months post release.
4. The original grounds of appeal, settled by Mark Symes of counsel on 11 March 2020, were:
 - (i) that the FtT had erred in law by taking into account public “*revulsion*” at the appellant’s crimes when that was held by the Supreme Court in *Hesham Ali* [2016] UKSC 60 at [70] *per* Lord Wilson and at [168] *per* Lord Kerr to be irrelevant; and
 - (ii) that the FtT had failed to take account of a relevant consideration in not addressing the impact on the appellant’s children of his partner’s health problems and/or in not properly assessing his Article 8 claim in the light of his strong community ties.
5. By order of 4 January 2022 UTJ Rimington granted permission for a further ground of appeal (ground (iii)), that the FtT had failed to determine (as required by *R (Mahmood)* [2020] 3 WLR 723, CA at [41]-[42]) whether the appellant’s offences “*caused serious harm*” for the purposes of s 117D(2) (c)(ii) of the Nationality Immigration and Asylum Act 2002 (NIAA 2002) and thus was a “*foreign criminal*” for the purposes of both the statute and the Immigration Rules.
6. At the hearing before us the parties were in agreement that the FtT had erred in law as alleged in ground (iii), and so are we. The judge at [20] took it to be sufficient that the appellant had committed what she considered, in the light of the sentencing judge’s remarks, to be a ‘serious offence’ and did not go on to consider whether in fact serious harm had been caused by the offence in the appellant’s case. We observe that the judge may have fallen into error in this regard not only because she did not have the benefit of the Court of Appeal decision in *Mahmood* (which was handed down after the promulgation of the FtT decision in this case), but also because she did not refer to any recent authorities (including in particular *KO (Nigeria)* [2018] UKSC 53 and *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176). Nor did she follow the approach of the Court of Appeal in *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662 at [35]-[36] of starting with ss

117A to 117D of the Nationality Immigration and Asylum Act 2002 (NIAA 2002) which (read together with the Immigration Rules), form a complete code in deportation cases involving “*foreign criminals*” (as defined).

7. In any event, it is necessary for there to be a determination as to whether the appellant is a “*foreign criminal*” within the meaning of s 117D(2) for the purposes of both the statute and the Rules. If the appellant is not a “*foreign criminal*” as defined then Exceptions 1 and 2 in the statute and Rules do not apply and the appellant’s appeal falls to be considered only on Article 8 grounds and by reference to s 117B of the NIAA 2002. The FtT in this case did not approach the case on that basis. If she had done, a different result may have been reached.
8. Mr Draycott for the appellant sought to persuade us to decide at this hearing that the appellant’s offences did not cause “*serious harm*”. However, we do not consider that it is appropriate for us to isolate one element of this appeal in this way because it is not a point on which there is in our judgment only one possible answer. Further, because the Secretary of State has only today conceded that the FtT fell into error in this respect, the Secretary of State has not had an opportunity to consider her position in the light of that concession. Ms Everett submitted that in the circumstances, the appropriate course was to remit this appeal to the FtT.
9. We agree with Ms Everett. Although the default position under paragraphs 7.2 and 7.3 of the *Practice Statement (2012)* is for the Upper Tribunal to remake the decision, in this case extensive further fact-finding is likely to be required. In addition to the “*serious harm*” question, there is a need for fact-finding in relation to the current nature and extent of the appellant’s relationship with his partner and his children. The evidence in the bundle in this regard is two or three years old and the picture is a complex one given the appellant’s partner’s health, the abuse allegations that she has made against the appellant and the differing needs, ages and circumstances of the four children involved (each of which must be individually considered). It will therefore be appropriate on remission for there to be a Case Management Review hearing so that directions may be given to ensure the case is ready for substantive hearing.

Notice of Decision

1. The decision of the First-Tier Tribunal involved the making of an error of law, and we set it aside.
2. We remit the appeal to the First-Tier Tribunal.
3. A Case Management Review must be listed by the First-Tier Tribunal for the first available date.

Signed: H Stout Date: 22 April 2022

Deputy Upper Tribunal Judge Stout