



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/01297/2013

THE IMMIGRATION ACTS

Heard at Nottingham Magistrates  
on 18<sup>th</sup> November 2013

Determination Promulgated  
on 3<sup>rd</sup> December 2013

Before

UPPER TRIBUNAL JUDGE HANSON  
DEPUTY UPPER TRIBUNAL JUDGE ROBERTSON

Between

C A C  
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Misra of Crown Solicitors.

For the Respondent: Mr Mills – Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination panel of the First-tier Tribunal composed of PJ M Hollingworth and Mrs Bray JP (hereinafter referred to as "the Panel") who in a determination promulgated on 19<sup>th</sup> September 2013 dismissed the CAC's appeal against an order for his deportation from the United Kingdom made pursuant to UK Borders Act 2007.

Background

2. CAC is a citizen of Jamaica born on 2<sup>nd</sup> May 1976. His immigration history shows he entered the United Kingdom as a visitor on 28<sup>th</sup> May 2000 and was

given six months leave to enter. In August 2000 he applied to join the British Army, and was therefore exempt from immigration control, but was later discharged for medical reasons on 2<sup>nd</sup> April 2001.

3. CAC married RMR on 23<sup>rd</sup> June 2001 after which he was granted leave to remain, as a foreign spouse, valid until 15<sup>th</sup> October 2003. RMR wrote to the Home Office in July 2003 advising that she and CAC had separated. As a result his application for further leave to remain was refused on 4<sup>th</sup> February 2004 with no right of appeal although correspondence was received on 2<sup>nd</sup> February 2006 and 1 January 2007 advising the Home Office that the parties had become reconciled. The couple eventually divorced in March 2007.
4. CAC formed a relationship with EC in July 2005 after which he made an application for leave to remain as her unmarried partner on 19<sup>th</sup> November 2008 which was refused. EC had a daughter from a previous relationship and two sons with CAC. As a result of further representations he was eventually granted three years discretionary leave on 11<sup>th</sup> May 2010.
5. CAC finds himself in the situation he now in as a result of his conviction for conspiracy to supply Class A drugs, heroin and crack cocaine, on two counts at Warwick Crown Court on the 23<sup>rd</sup> February 2012. On 17<sup>th</sup> May 2012 he was sentenced to two concurrent terms of four years imprisonment.
6. In his sentencing remarks HHJ Coates stated:

[CAC], would you stand-up please? I have got to say to you, you should have thought about your partner and children before you went out selling drugs and you were in it, not because you were a drug addict, but you wanted to earn money and that is the way you chose. We have lots of people standing where you are as a result of Operation Aberfoyle, some involved to a lesser extent than you, others more, but you had been involved for quite a bit of time. Let us just look at your telephone usage in August, 12 calls a day on that phone.

I take into account what has been said about you, your lack of previous convictions, your age, your plea of guilty and the sentence on the matters before me will be concurrent sentences of four years' imprisonment. You serve half that sentence. The 13 days on remand will count towards that part of the sentence you have to serve.

7. Having reviewed the evidence, both oral and documentary, the Panel set out their findings which can be summarised as follows:
  - i. The range of corroborative documentary evidence in relation to the addresses lived at by CAC in the context of his claim to have been sharing accommodation with EC is sparse and lacking in regularity and scope [57].

- ii. It was found extraordinary that a witness who was able to send a number of photographs claimed she did not know how to operate equipment to print off more photographs which the Panel were told were in existence reflecting the claimed relationship over the years. When this witness, EC, was asked why she should be believed now when she had lied to the authorities previously, she claimed she was now telling the truth [61]. The Panel found this witness had demonstrated she was prepared to give an account depending on the circumstances in which she finds herself and did not accept that on the basis of her evidence she had lived with CAC at the claimed addresses. She was not found to be a witness of truth for the reasons stated [62].
- iii. The Panel did not accept that CAC is a witness of truth and did not accept he had lived with EC at the addresses claimed [88].
- iv. The relationship between CAC and EC is far more limited than has been claimed by either of them. It is not accepted they lived together as asserted [96].
- v. The Secretary of State conceded that CAC has two sons under ten years of age [96]. The Panel do not accept that S is the daughter of the CAC and EC based upon discrepancies in the evidence relating to the start of the relationship and its relevance to the date of birth of S. The evidence did not satisfy the Panel as to paternity and no DNA evidence was provided. It is considered CAC may have maintained a limited family life with EC and her three children through visits at their address [97].
- vi. The Panel accept such contact has been maintained, including whilst CAC has been in prison [98].
- vii. It is accepted CAC has a private life in the United Kingdom [98].
- viii. CAC has committed serious offences involving drugs for economic gain over a sustained period [99].
- ix. CAC has engaged in conduct which undermines the foundations of British society. He deliberately refused to answer the question put to him in cross-examination regarding the scope of his involvement. The sentence reflects the gravity of the offence [100].
- x. The Panel did not accept the NOMS assessment with regard to risk of reoffending. CAC failed to substantiate the basis for his disagreement with the analysis of the sentencing Judge and declined to answer questions about his offending [101].

- xi. CAC has sought to minimise his role and failed to recognise the extent of it or his responsibility. In all the circumstances it is unrealistic to take the view the risk of reoffending is low. The Panel find on the contrary there is a substantial risk of reoffending [102].
- xii. On the basis of the claimed relationship with his partner and children CAC had every incentive not to engage in criminal conduct. The relationship acted as no incentive to avoid such criminal behaviour and no realistic basis has been put forward to demonstrate that CAC has sufficient incentive to avoid further criminal offending [103].
- xiii. The Panel took into account references provided on CAC's behalf, the fact he joined the British Army and the positive factors advanced in support of his appeal including time in the United Kingdom. The Panel take into account the contents of the NOMS report and submissions made by Mr Misra on his behalf regarding progress made by CAC [104].
- xiv. The Panel considered the best interests of the children. They did not find CAC's behaviour in selling drugs to be consistent with promoting the best interests of the children. The Panel did not find CAC a good role model. The best interests of the children were found to be served by limited contact with him which is all that has been achieved for some time in light of his imprisonment. The Panel find the reality of the situation is that the children have been brought up by EC. Both the children and their mother are British citizens. The medical evidence regarding Rushaun was considered by the Panel [105].
- xv. CAC worked in Jamaica and the Panel found he can readapt to living there. He lived in Jamaica longer than he has lived in the United Kingdom. The positive factors in his favour are outweighed by his criminal conduct and the risk of further offending. It was not found disproportionate to remove him and therefore not found there would be a breach of Article 8 including in relation to the Article 8 rights of CAC's sister in the United Kingdom [106].
- xvi. CAC cannot bring himself within the exceptional circumstances in relation to the new Immigration Rules [107]. It was not argued he has any fear of returning to Jamaica and no exceptions were proved to the provisions governing automatic deportation [108].

## Discussion

8. We announced in court our primary finding that the Panel had made no legal error material to the decision to dismiss the appeal and now give our reasons.
9. CAC is a foreign criminal as defined in law. The UK Borders Act 2007 now mandates that in certain circumstances the deportation of a foreign criminal is deemed to be conducive to the public good and a deportation order should be made. The Secretary of State for the Home Department has a duty to make a deportation order against a foreign criminal who does not fall into one of the exceptions in section 33.
10. CAC relies upon the exceptions provided in the 2007 Act, limited to consideration of Article 8 ECHR, to avoid deportation. Section 33 of the 2007 Act states that the obligation to deport under these provisions does not apply if an exception applies. Exception 1, to be found in s. 33 (2), is where removal of the foreign criminal would breach a persons Convention rights (s 33 (2) (a)) or the UK's obligations under the Refugee Convention.
11. Since the passing of the Act the Secretary of State has amended the Immigration Rules to reflect her convictions in relation to the way in which Article 8 factors should be considered and applied, which have subsequently been approved by Parliament. Although s. 33 only refers to Convention rights, which is a reference to ECHR, the Panel was required to consider both the Rules and Convention as part of their assessment which they did - see paragraphs 397 - 399A.
12. The grant of permission to appeal is critical of the style of the Panel but a full reading of the determination shows they considered the evidence with the degree of care required in an appeal of this nature, that of anxious scrutiny, and gave reasons for the findings they made. As a result the challenge to the determination in the Grounds based upon allegations of undue or inappropriate weight fail as weight was a matter for the Panel in such circumstances - see SS (Sri Lanka) v SSHD [2012] EWCA Civ 155.
13. In relation to the Rules, the Panel found CAC had not proved he was able to bring himself within the exceptional circumstances required by paragraph 397. As a result of the fact he was sentenced to period of imprisonment of at least four years paragraphs 399 and 399A are not applicable and so, if there is no breach of the Refugee or Human Rights Conventions, paragraph 397 states it will only be in exceptional circumstances that the public interest in deportation is outweighed.
14. There have been two recent decisions of importance relating to the Rules in relation to deportation. The first of which is MF (Nigeria) [2013] EWCA Civ 1192

in which the Court of Appeal states that exceptionality is a likely characteristic of a claim that properly succeeds rather than a legal test to be met. In this context the Court also found that the new Rules relating to Article 8 claims advanced by foreign criminals seeking to resist deportation are a complete code and the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence: MF (Nigeria) at para 43. The second case is Kabia (MF: para 398 - "exceptional circumstances") [2013] UKUT 00569 (IAC) in which the Tribunal found that "exceptional" means circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that a deportation would not be proportionate".

15. Whether there are exceptional circumstances that prevent deportation will depend upon the outcome of a properly conducted balancing/proportionality exercise.
16. Before us, Mr Misra concentrated on three issues which he submitted warranted a finding that the Panel had made a legal error(s) material to their decision to dismiss the appeal. The first of these related to the way in which the Panel considered the best interests of the children which is to be found in paragraph 105 of the determination. We do not find it can be said that the Panel were unaware of their obligation to consider the best interests of the children, that they were unaware of the evidence relied upon in relation to the children, or the fact that their primary carer has always been their mother, EC.
17. The submission that the best interests of the children should have been determinative of the appeal has no merit in law. In SS (Nigeria) [2013] EWCA Civ 550 Laws LJ, in summarising the findings of the Court stated:
  55. None of this, I apprehend, is inconsistent with established principle, and the approach I have outlined is well supported by the authorities concerning the decision-maker's margin of discretion. The leading Supreme Court cases, *ZH* and *H(H)*, demonstrate that the interests of a child affected by a removal decision are a matter of substantial importance, and that the court must proceed on a proper understanding of the facts which illuminate those interests (though upon the latter point I would not with respect accept that the decision in *Tinizaray* should be regarded as establishing anything in the nature of general principle). At the same time *H(H)* shows the impact of a powerful public interest (in that case extradition) on what needs to be demonstrated for an Article 8 claim to prevail over it. Proportionality, the absence of an "exceptionality" rule, and the meaning of "a primary consideration" are all, when properly understood, consonant with the force to be attached in cases of the present kind to the two drivers of the decision-maker's margin of discretion: the policy's source and the policy's nature, and in particular to the great weight which the 2007 Act attributes to the deportation of foreign criminals.

18. It is accepted that the best interests of any child are, in most cases, to be brought up in a stable and loving environment parented by both parents. The Panel analysed the evidence made available regarding the accommodation situation and found the claim that CAC and the children's mother have lived together for the period alleged was not true. The Panel clearly understood the facts surrounding the regime in place for meeting the needs of the children which have been met by their mother as their primary carer, an arrangement which will continue if CAC is removed.
19. The Panel found the interaction between CAC and the children has been limited to contact indicating that although family life recognised by Article 8 exists, the nature of such family life is limited. The Panel note the nationality of the children and their mother as British citizens and so were clearly aware of the fact this is a family splitting case.
20. Mr Misra was asked what evidence was made available to the Panel relating to the best interests of the children and their circumstances, which he confirmed was only that to be found in the written and oral evidence of CAC and EC. There was no evidence from a childcare expert or any other source showing serious or irreparable harm to the children, of a physical or emotional/psychological nature, if CAC is deported. We accept there will be a period of upset and distress and adjustment but do not accept there was sufficient evidence before the Panel to show there will be devastating consequences, as submitted on CAC's behalf before us, should he be removed.
21. We accept the language used in paragraph 105 does not state that the Panel considered the best interests of the children as a paramount consideration but they were clearly considered and we find this an error of form rather than substance. The situation of the children both as it will be with CAC in the United Kingdom and following his removal, was understood, and we do not find it proved that this element was somehow demoted in significance in the minds of the Panel when they were conducting the proportionality exercise.
22. In any event, the best interests of the children are not the paramount factor and even if it was shown to be in their best interests for CAC to remain in the United Kingdom this is only one element of the balancing exercise, albeit one of substantial importance.
23. The second challenge was to the Panels treatment of the NOMS Report. We have considered the decision in AM v SSHD [2012] EWCA Civ 1634 in which section 32 of the UK Borders Act 2007 applied. The Court of Appeal took issue with the UT Tribunal's assessment on risk of reoffending. The assessment of low risk had been made by a trained probation officer whose job it was to assess risk and it could not be lightly dismissed. There was no reference in any part of the tribunal's reasoning to an examination of the probation officer's assessment or

any reasoned basis for the substitution of its own view for that of the probation officer. The appeal was remitted.

24. The Panel refer in paragraph 47 to the case of Vasconcelos (risk- rehabilitation) [2013] UKUT 00378 (IAC)(Blake J) it which it was held that in assessing whether an EEA national represents a current threat to public policy by reason of a risk of resumption of opportunistic offending, the Tribunal should consider any statistical assessment of re-offending provided by NOMS but is not bound by such data if the overall assessment of the evidence supports the conclusion of continued risk.
25. The Panel clearly considered the contents of the NOMS assessment with regard to the risk of offending but, as a result of issues that arose during the course of the hearing, found they were not willing to place weight upon the assessment that CAC presented a low risk. The OASys assessment was completed on 24<sup>th</sup> July 2012 and assessed the risk of serious harm as medium based upon a number of risk factors including drug users, local community, serious health issues to drug users, financial loss to the community, the community in general becoming rundown with uninvited drug users visiting the area, and CAC failing to gain full time employment and being unable to support his family.
26. In relation to the risk of reconviction, using the established assessment tools, the risk was found to be low. The report does not contain a great deal of detail and in particular fails to comment upon whether the fact CAC attempts to minimise his role, does not recognise the extent of it, and declines to face up to the reality of what he has done, if this fact was known to the author of the report, was factored into the assessment of risk. If such factors were known and not considered it does cast doubt the reliability of the conclusion; especially as CAC sold the drugs for personal economic gain and one of the issues highlighting risk is economic need and inability to provide for his family. The above form part of the assessment for finding a risk of reoffending over and above that contained in the NOMS Report in paragraph 102 of the determination. We do not find that such a finding has been shown to be perverse or irrational.
27. In any event, even if the risk of reoffending was low, this does not prove legal error material to the decision to dismiss the appeal. In Gurung v SSHD [2012] EWCA Civ 62 the Court of Appeal said that the absence of a risk of reoffending, though plainly important, is not the “ultimate aim” of the deportation regime.
28. In Masih (deportation – public interest – basic principles) Pakistan [2012] UKUT 00046(IAC) the Tribunal said that so long as account is taken of the following basic principles, there is at present no need for further citation of authority on the public interest side of the balancing exercise. The following basic principles can be derived from the present case law concerning the issue of the public interest in relation to the deportation of foreign criminals: (i) In a case of automatic deportation, full account must be taken of the strong public interest in



removing foreign citizens convicted of serious offences, which lies not only in the prevention of further offences on the part of the individual concerned, but in deterring others from committing them in the first place. (ii) Deportation of foreign criminals expresses society's condemnation of serious criminal activity and promotes public confidence in the treatment of foreign citizens who have committed them. (iii) The starting-point for assessing the facts of the offence of which an individual has been committed, and their effect on others, and on the public as a whole, must be the view taken by the sentencing judge. (iv) The appeal has to be dealt with on the basis of the situation at the date of the hearing. (v) Full account should also be taken of any developments since sentence was passed, for example the result of any disciplinary adjudications in prison or detention, or any OASys or licence report.

29. The third challenge relates to the Article 8 balancing exercise conducted by the Panel. It was accepted before us that this challenge relates solely to the fifth of the Razgar questions, namely the proportionality assessment. It was submitted by Mr Misra that having considered the evidence, including the impact upon the relationship with EC and the fact they would no longer be able to live together, that it should have been found that the decision was disproportionate.
30. During the course of the hearing an interesting point arose in relation to the comment by the Panel that CAC disagreed with remarks made by the Sentencing Judge. It was advanced before us that this disagreement was a relevant factor especially when considering the proportionality of the decision. We set out above the sentencing remarks and in particular the comment by HHJ Coates that CAC should have thought of his partner and children before he went out selling drugs. The submission made appeared to suggest that CAC did not accept the statement because rather than being reckless about his partner and children he had thought about them. If he did think about them and claims his motive in selling the drugs was for their economic betterment to meet the needs of his family it could equally be argued that he embarked on this venture not only with the full knowledge of the benefits but also the risk to his ties to the family as a result of imprisonment or deportation if caught. In QJ v SSHD (2009) UKSIAC 84/2009 the Appellant had been involved in terrorist activities. Deportation was found to be legitimate deterrent to those who were non British citizens who had committed such crimes. SIAC said that by undertaking those activities, the claimant had knowingly put at risk the opportunity of enjoying family life and he could have no legitimate complaint at the disruption, either short or long term, of his family life as a result of his deportation. Although this is a SIAC case we find the same approach can in principle apply in the case of lesser offences.
31. It is established jurisprudence that a challenge to a properly conducted proportionality exercise is only susceptible to challenge on Public Law grounds. The submissions made before us do not identify any such ground as the Panel took into account every aspect in favour of CAC and the family and the

seriousness of his offending and harm that drugs caused to the community. As stated in paragraph 46 of SS (Nigeria) "the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail. This antithesis, in my judgment, catches in the present context the essence of the proportionality test required by Article 8(2)."

32. In SS (Nigeria) the appellant had been sentenced to 3 years for dealing drugs. He appealed relying on the best interests of his children. The Court of Appeal said that in previous cases in which potential deportees raise claims under Article 8 rule lying on the children's interests insufficient attention had been paid to the weight attached to the policy of deporting foreign criminals which came from primary legislation. The finding that deportation was proportionate was upheld.
33. In Richards v Secretary of State for the Home Department [2013] EWCA Civ 244 the Jamaican claimant arrived in the United Kingdom in 1999 and had a daughter aged six. He had a number of serious drugs offences. The Upper Tribunal dismissed his appeal. The Court of the Appeal upheld the decision and said that the important point was that the strong public interest in deporting foreign criminals was not merely the policy of the Secretary of State but the judgement of Parliament. That gave it special weight which the courts needed to recognise.
34. When weighing up the factors in favour of the Secretary of State as set out in Masih and the case law above, including the deterrent element, the evidence considered by the Panel in relation to the best interests of the children (which will continue to be met by their remaining with their mother), the situation of EC and other associated with CAC, the potential damage to society caused by drug dealing, the refusal of CAC to engage with the Panel and answer questions relating to his role, and his attempts to minimise or recognise the extent and culpability for his offending, it cannot be said that the finding of the Panel that the Secretary of State had discharged the burden of proof upon her to the required standard to show that the decision was proportionate or that CAC had not shown he could bring himself within the exceptional circumstances envisaged by the Rules, is a finding that is either perverse, irrational, or contrary to the evidence. We do not find it proved that the decision is infected by legal error material to the decision to dismiss the appeal even accounting for the ages of the children and the period of time for which CAC will be refused entry to the UK.
35. In AD Lee v SSHD [2011] EWCA Civ 348 Sedley LJ said "the tragic consequence is that this family... Would be broken up forever, because of the appellant's bad behaviour. That is what deportation does."

**Decision**

36. **There is no material error of law in the First-tier Tribunal Panel’s decision. The determination shall stand.**

Anonymity.

37. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

We continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed.....  
Upper Tribunal Judge Hanson

Dated the 19<sup>th</sup> November 2013