



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

Appeal Number: DA/00868/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 18 January 2016**

**Decision &
Promulgated
On 21 March 2016**

Reasons

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MARLON SAMUEL

Respondent

Representation:

For the Appellant: Ms N. Mallick, Counsel instructed by R Legal Solicitors
For the Respondent: Mr S. Walker, Home Office Presenting Officer

DECISION AND REASONS

1. For the sake of continuity I will refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

Background

2. The appellant appealed against the respondent's decision to make a deportation order under section 3(5)(a) of the Immigration Act 1971. First-tier Tribunal Judge Carroll ("the judge") allowed the appeal in a decision promulgated on 03 September 2015.
3. The respondent seeks to appeal the decision on the following grounds:
 - (i) The First-tier Tribunal failed to give adequate reasons for concluding that deportation would be "unduly harsh" on the appellant's partner.
 - (ii) The judge failed to give adequate reasons for her credibility findings. In particular, she failed to explain why she preferred the appellant's evidence over the information provided in evidence from social services, which suggested that they were no longer in a relationship.
 - (iii) The First-tier Tribunal failed to make adequate findings relating to what weight should be placed on the public interest. The judge failed to explain why the appellant could not return to Jamaica and provide his partner with emotional support from there. The First-tier Tribunal failed to have regard to the public interest factors outlined in section 117A-D of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002").

Decision and reasons

4. After having considered the grounds of appeal and oral arguments I satisfied that the First-tier Tribunal did not involve the making of an error on a point of law.
5. The judge set out the details of the appellant's numerous convictions. Albeit that most of the individual offences are at the lower end of the scale and did not attract lengthy periods of imprisonment, the judge made clear that she considered the appellant to be a "prolific and persistent offender" [8]. She began her assessment by considering the previous decision of the First-tier Tribunal in March 2009. This was consistent with the guidance in *Devaseelan v SSHD* [2002] UKIAT 00702. The judge set out the findings made by the first tribunal in some detail [11]. On that occasion the First-tier Tribunal allowed the appeal against deportation as a result of the compassionate circumstances surrounding the appellant's family life in the UK.
6. The judge went on to set out the details of the most recent notice of intention to deport. She took into account the appellant's "profoundly troubling offending history" and the fact that earlier threats of deportation did not seem to have halted his offending. She observed that the appellant

accrued a number of convictions since the last deportation action and “clearly has a complete disregard for the law” [20]. The judge went through the evidence with care and noted developments relating to the appellant’s family situation, including the fact that he had been convicted for assaulting his own children, who had now been taken into care [21-29]. She went through the evidence from social services in detail and concluded that the best interests of the children would not be served by the appellant remaining in the UK. He did not meet the requirements of the exception to deportation contained in paragraph 399(a) of the immigration rules because he no longer had a genuine and subsisting relationship with the children [29].

7. It seems quite clear that the judge had little sympathy for the appellant, whose behaviour showed a continuing disregard for the law and resulted in his children being taken into care. If the appellant were the only person effected by the deportation decision it is difficult to see how he would be able to resist deportation given the large number of convictions. However, the outcome of the appeal hinged on the compassionate circumstances surrounding the appellant’s wife who suffers from severe disabilities as a result of a massive brain stem stroke, which occurred when she was visiting Jamaica in 1998. She is tetraplegic and as a result has a high level of care requirements.
8. The relationship between the appellant and his wife has also been difficult at times. The judge took into account a report from social services dated January 2015, which indicated that the appellant and his wife were no longer in a relationship. For this reason social services concluded that he was not a reliable second carer [31]. The judge had the benefit of hearing evidence from the appellant and his wife. At the date of the hearing in August 2015 it was clear that she continued to support the appellant. Her evidence was that they were still in a relationship. In the circumstances it was open to the judge to conclude that the appellant continued to provide his wife with a substantial amount of physical and emotional care and support “albeit not regularly or consistently” [32]. I find that the respondent’s second ground of appeal amounts to little more than a disagreement with the judge’s factual findings, which were open to her to make on the evidence.
9. The judge took into account the previous First-tier Tribunal decision as well as up to date evidence relating to the care needs of the appellant’s wife. She concluded:

“35. In spite of its ups and downs, I am satisfied, to the required standard, that the relationship is genuine and subsisting. As required by paragraph 399(b) that relationship was formed at a time when the appellant was in the United Kingdom lawfully. There is no question of the appellant’s wife being able to accompany the appellant to Jamaica. I attach the greatest weight to the public interest in deportation. However, in the light of all the medical evidence, I am satisfied that it would be unduly harsh for the appellant’s wife to remain in the United Kingdom without the appellant.”

10. The judge's conclusions must be read in the context of the whole decision, in which she analysed and made findings on the relevant evidence. Having set out the history of his wife's devastating stroke, and outlined the extent of her condition as well as the high level of her care needs, it was not necessary for the judge to explain in further detail why she would not be able to accompany him to Jamaica. The fact that it would be "unduly harsh" on her to do so was obvious from the evidence the judge had already set out. In light of her finding that the appellant continued to provide his wife with a sufficient level of physical and emotional support it was open to the judge to conclude that it would also be "unduly harsh" for her to remain in the UK without the appellant if he were deported. Had his wife's condition been less severe the judge might have come to a different conclusion, but given the very serious and debilitating nature of her condition I find that there is no error of law in the judge's findings relating to 'undue harshness'. The wife's condition is sufficiently severe to engage even the high threshold envisaged by the Upper Tribunal in *MAB (para 399; "unduly harsh") USA* [2015] UKUT 00435.
11. I find that it is not arguable that the First-tier Tribunal erred in failing to make specific reference to the public interest considerations contained in sections 117A-D of the NIAA 2002. The exception to deportation contained in paragraph 399(b) is in essence the same test contained in section 117C(5) i.e. whether deportation would be "unduly harsh" on a family member.
12. In *KMO (section 117 - unduly harsh) Nigeria* [2015] UKUT 00543 the Upper Tribunal took a different view to the tribunal in *MAB (USA)*. It suggested that the question of whether a decision is "unduly harsh" should be answered with reference to the seriousness of the appellant's offending behaviour. I prefer the reasoning in *MAB (USA)*. The partial proportionality exercise suggested by the Tribunal in *KMO (Nigeria)* is no proportionality exercise at all for the purpose of a proper proportionality assessment under Article 8. The public interest considerations are nevertheless reflected in the high threshold required to satisfy the "unduly harsh" test. Section 117A(3) defines the "public interest question" as the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2) of the European Convention i.e. at the stage when a balancing exercise is required for the purpose of assessing whether a deportation decision is proportionate. The 'exceptions' to deportation contained in paragraphs 399 and 399A of the immigration rules and section 117C(4)-(5) are just that, exceptions. Nothing in the wording suggests a full balancing exercise in which all the circumstances should be taken into account. The only part of the rules that indicates a balance between the individual's circumstances and the public interest is paragraph 398.
13. For these reasons I conclude that it was not necessary for the judge to take into account each and every factor contained in sections 117B-C of the NIAA 2002 in circumstances where she had not yet reached a point in

her assessment where she had to consider whether interference with the appellant's rights was justified under Article 8(2). She gave more than adequate and sustainable reasons for concluding that the appellant met the exception to deportation contained in paragraph 399(b) of the immigration rules, which is echoed in section 117C(5). As such, it was not necessary for her to go on to consider whether there were very compelling circumstances that might outweigh the public interest in deportation under paragraph 398. In any event, she did quite clearly "attach the greatest weight to the public interest in deportation" [35].

14. The First-tier Tribunal allowed the appellant's appeal against deportation in March 2009. At the time the tribunal took into account his relationship with his children as well as the compassionate circumstances surrounding his wife's significant care needs. Since then he has accrued a number of convictions, some of which involved assaults on his own children, which led directly to them being taken into care. As a result of his own actions the appellant no longer has any meaningful contact with his children. On this occasion the judge considered that his relationship with his wife was still sufficiently supportive to render deportation "unduly harsh" given the extent of her disabilities. Nevertheless, she expressed some doubt about the level of commitment that the appellant has shown to his wife at times. No doubt it is a difficult situation. However, if he continues to commit offences, especially if he receives a custodial sentence that would preclude him from being able to care for his wife, it will be open to the respondent to consider deportation action in future. The appellant's position in the UK is very much dependent on the relationship he has with his wife. If that relationship was to change, and he continued to commit offences, it is highly unlikely that he would be able to resist deportation in future.
15. I conclude that the First-tier Tribunal decision did not involve the making of an error on a point of law. The decision shall stand.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law

The First-tier Tribunal decision shall stand

Signed  Date 14 March 2016

Upper Tribunal Judge Canavan

