



**Upper Tribunal
(Immigration and Asylum Chamber)
Number: DA/00970/2014**

Appeal

THE IMMIGRATION ACTS

**Heard at Field House
On Monday 4 January 2016**

**Determination
Promulgated
On Tuesday 12 January
2016**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR V M C
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr Duffy, Senior Home Office Presenting Officer
For the Respondent: Mr Collins, Counsel

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

An anonymity order was made by the First-tier Tribunal. In the interests of protecting the privacy of the Appellant and his family, I continue that anonymity direction.

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State. For ease of reference, I refer below to the parties as they were in the First-Tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal. The Secretary of State appeals against a decision of First-Tier Tribunal Judge Malone promulgated on 30 September 2015 (“the Decision”) allowing the Appellant’s appeal against the Secretary of State’s decision dated 13 May 2014 that section 32 UK Borders Act 2007 applies and making a deportation order against him on the same date. Permission to appeal was granted on 27 October 2015 by First-Tier Tribunal Judge Landes. The matter comes before me to determine whether the First-Tier Tribunal Decision involved the making of an error of law.
2. The background facts so far as it is necessary to recite them at this stage are that the Appellant who is a national of Jamaica arrived in the UK in 2002 as a visitor aged twenty years. He married a British citizen in 2002 and the couple had a son. He was given indefinite leave to remain as a spouse in April 2004. In July 2004, he fathered a son by another British woman. In July 2008, he divorced his wife. In November 2013, the Appellant was convicted of conspiring to supply Class A drugs and was given concurrent sentences of three years each. The Appellant is now in a relationship with another British citizen, Ms B. That relationship began in 2012. They lived together shortly before the Appellant’s imprisonment and following his release in April 2015. Ms B has two minor children, CA who is aged fifteen years and AB who is aged five years. The Appellant also claims to continue to enjoy family life with his two sons from his marriage and previous relationship who are now aged twelve years and eleven years respectively.
3. The Judge allowed the Appellant’s appeal on human rights grounds, finding that the effect of the Appellant’s deportation would be unduly harsh on Ms B. He expressly did not find that the effect on any of the Appellant’s children would be unduly harsh or that there would be any very significant obstacles to the Appellant’s reintegration in Jamaica.
4. The Respondent raised four grounds of challenge. By ground one the Respondent challenges the basis on which the Judge allowed the appeal. Having found that the Appellants could not satisfy paragraphs 399(a) or (b) or paragraph 399A of the Rules, the Judge went on to consider whether there were “very compelling circumstances” to prevent deportation in accordance with paragraph 398. However, the Judge then went on to decide, as I have noted above, that the deportation of the Appellant would be unduly harsh for Ms B applying section 117C of the Nationality, Immigration and Asylum Act 2002 (“section 117C”) before finally deciding that deportation would be disproportionate and allowing the appeal on the basis that the Respondent’s decision was not in accordance with the law or the Immigration Rules. The confusion in that approach is obvious and stems from what is accepted to be an error of law because the Judge adopted the wrong Rules ie those in force prior to 28 July 2014. Mr Collins accepted that this was an error but said it was not a material

error (and Mr Duffy appeared to agree) on the basis that the application of section 117C would lead to the same conclusion (although Mr Duffy of course submitted that it should lead to the opposite conclusion to the one reached). In the grant of permission, First-Tier Tribunal Judge Landes recognised that the Judge had arguably adopted the wrong Rules but indicated that ground one was misconceived because section 117C would lead to the same result. Mr Duffy confirmed therefore that he did not pursue that ground (although he continued to submit that the Judge applied the wrong Rules which is clearly right following YM (Uganda) v Secretary of State for the Home Department [2014] EWCA Civ 1292).

5. The issue is therefore whether there is any error of law in the Judge's finding that the effect of the Appellant's deportation on Ms B is unduly harsh applying section 117C. The Respondent attacks the Judge's finding on three grounds. Firstly, she says that the Judge has failed to give adequate reasons why the effect would be unduly harsh. Secondly, she says that the public interest is only superficially considered. Thirdly, she says that the Judge failed to have proper regard to the factors in section 117. That third issue is probably subsumed (as Judge Landes recognised in the grant of permission) in the first two grounds.

Submissions

6. Mr Duffy submitted that this case is a very typical one of an Appellant who is in a relationship with a partner and children and is to be deported because he has committed criminal offences. There are no other obviously unusual factors in this case. The Judge did not consider whether the impact would be unduly harsh on the Appellant's family in any meaningful way. In his consideration of the public interest, the Judge began at [71] with a finding that the public interest did not require deportation before going on to set out the reasons for that finding. He appears to have pre-judged the outcome before considering the public interest.
7. Mr Collins pointed me to the conflict between the Upper Tribunal decisions of Secretary of State for the Home Department v KMO [2015] UKUT 00543 (IAC) and Secretary of State for the Home Department v MAB [2015] UKUT 00435 (IAC) in relation to the appropriate test to assess what is unduly harsh. The former is authority for the proposition that when assessing whether deportation is unduly harsh the Tribunal should have regard to the seriousness of the offence and balance that against the impact. The case of MAB propounds a test which is perhaps best described as a threshold test, on the basis that the public interest is considered to be already balanced by paragraph 398 of the Rules and Section 117C based on the seriousness of the offence by reference to the length of sentence. Mr Duffy naturally relied on KMO and said that I should consider whether the Judge erred by failing to consider the seriousness of the Appellant's offending. Mr Collins said that the issue was whether the impact on Ms B would be excessive and he relied on

what was said in MAB about the meaning of “unduly harsh” as being inordinately or excessively severe or bleak. He submitted that the Judge’s finding that the impact would be at that level is to be found at [65] of the Decision and that adequate reasons were provided for that finding at [70] to [75]. The Judge accepted that Ms B would be “devastated” if the Appellant were deported.

8. Mr Collins pointed out that the public interest was considered at [72] to [80] and what the Judge there considered was whether the public interest impacted on his finding about the level of impact on Ms B such as to render deportation proportionate. The Judge considered section 117C(5) which is the relevant section in this case. As the case of Dube (ss.117A-117D) [2015] UKUT 90 (IAC) makes clear, the Judge was not required to expressly consider every aspect of section 117. Although Mr Collins accepted that section 117C(1) and (2) were not specifically mentioned, he contended that the seriousness of the offence was considered particularly at [48] to [49] and that the Judge had in mind the importance of the public interest in enforcing deportation by reference to the case law at [77] to [78]. He accepted that deterrence was not mentioned in the section at [72] to [80] but pointed me to [49] where the Judge had noted the “public abhorrence” of offences relating to drugs. The Judge also took into account the risk of re-offending by reference to the OASyS report [47]. This was said to be a low risk. The Respondent has not produced any evidence to counter that assessment. The Judge also cited the Judge’s sentencing remarks at [51] which made clear that the Appellant’s role in the conspiracy was a lesser one.
9. Mr Collins pointed out that there was no challenge to the findings of fact or to credibility of the Appellant or his witnesses. This was a challenge to the weight given to the various factors and the Judge’s proportionality assessment. In circumstances where the Judge had considered all relevant matters, there was no basis for me to interfere with his findings.
10. In reply, Mr Duffy accepted that the Judge had made a finding that the effect on Ms B would be “unduly harsh” at [65] but submitted that there was no reasoning attached to that finding. This finding appeared to be based only on the fact that the Appellant and Ms B are in a genuine and subsisting relationship. Nothing is said about what makes deportation harsher in this case than in any other case where there is such a relationship. As to the public interest, Mr Duffy pointed out that [73] looked only at the offence itself. This would be an error of law in itself.
11. At the end of the hearing, I indicated that I reserved my decision whether there is an error of law in the Decision and would provide that decision and my reasons in writing which I now go on to do. If I were to find an error of law, both parties indicated that they were content for me to re-make the decision by reference to the evidence before me unless I considered that further oral evidence or submissions were

required in which case the parties were content that the decision should be re-made following a further hearing in this Tribunal. There would be no need for remittal.

Decision and reasons

12. The difficulty with the Decision in this case is the adoption by the Judge of the wrong set of Rules which makes the reasoning harder to follow. By adopting the wrong set of Rules, the Judge has fallen into error by looking for “very compelling circumstances” in the section of the Decision at [32] to [59]. Both representatives agreed however that this error of law was not material because the Judge went on to consider the case applying section 117C at [60] to [78] before reaching his conclusion at [80] that deportation would be disproportionate. I cannot though ignore what is said at [32] to [59] when considering the Judge’s finding that deportation would have an unduly harsh effect on Ms B.
13. It is clear that the Judge was very impressed by the witnesses in this case, particularly Ms B and her mother, Mrs B. Their testimony about the Appellant’s character and the very strong relationship between the Appellant and Ms B appears to be the focus of the Judge’s finding that deportation would be unduly harsh. The Judge notes, for example, at [43] the evidence from Ms B that the Appellant is her “rock”, her “life” and that the two years during which he had been in prison had opened up an “immense void”. Ms B has been in a previous relationship which was violent [44] and that too appears to have influenced the Judge’s findings. It is that evidence which finds its way into the finding at [65] that the effect of the Appellant’s deportation would be unduly harsh and the reasoning which follows in that paragraph and [66] to [67]. In order to understand the basis of the Judge’s reasoning, it is necessary to set those paragraphs out in full:-

“[65] After careful consideration I have come to the conclusion that the effect the Appellant’s deportation would have on [Ms B] would be unduly harsh. She told me the Appellant was “The man of my life” and that she loved him “with all her heart”. I am satisfied those statements were not mere platitudes. Her statements were backed up by the prison visit logs I had. They showed [Ms B] visiting the Appellant two or three times a month at all four prisons in which he served his sentence.

[66] The Appellant and [Ms B] have been living together for a short period, but they have been in a relationship since 2012. Before the Appellant went to prison, they had daily contact, although they were living in separate properties. I accept that [Ms B] had an unfortunate experience in her last relationship. She entered into the relationship with the Appellant when he was here legally and when he had no “relevant” convictions as the sentencing judge observed. The Appellant was sentenced as a man of good character.

[67] He has shown himself to be a model partner and has had an extremely beneficial effect on [Ms B’s] children. Her parents happily blessed her relationship with the Appellant. [Ms B] told me she would be devastated if the Appellant were deported. I accept that statement. The

devastation would have an adverse effect on her ability to work and care for her children. She would be emotionally bereft. That her last relationship was so unsatisfactory makes this one with the Appellant all the more important.”

14. The Judge reinforces his reasoning about the impact on Ms B at [69] to [70] in the following terms:-

“[69] In coming to my conclusion I have very much borne in mind [Mrs B’s] words:

‘[Ms B] is our third child, she is a very caring person who wears her heart on her sleeve. [Ms B] is hard working, determined and very ambitious, all qualities that we are very proud of.

However, she has experienced a lot of disappointment in her life and has been let down by those that she has trusted the most. The effect of these let downs have been hard to watch over the years as parents, but the way in which she continues to look ahead and remain positive is truly inspirational...

[VC] is a good man and we have welcomed him into our family like a son, he too is very caring and generous to all...

The impact this is having on [Ms B], the girls and also [VC’s] son is a very negative one and this worries me greatly’

[70] In my judgment, devastation is an appropriate word to describe what would happen to [Ms B] on the Appellant’s deportation, given her history as described by her mother. I do not consider she deserves that fate. I regard the effect the Appellant’s deportation would have on her as being unduly harsh.”

15. As noted above, the Judge also accepted the evidence he was given also about the Appellant’s character, that he is a “good man” and “a worthwhile individual”. The findings at [45] to [50] of the Decision find their way into the Judge’s assessment under section 117C at [68] where the Judge says:-

“[Ms B] is convinced the Appellant will not re-offend. I find the chances of his doing so to be minimal. I accept he is a good man and that the index offence was wholly out of character. If permitted to stay, the Appellant would be employed as [sic] [Ms B] would be able to experience the security and happiness a young woman and mother like her should experience. In contrast, the situation she would find herself in without the Appellant would be unduly harsh. All the people who would suffer as a result of the Appellant’s deportation are British citizens.”

As Mr Collins points out, the Respondent has not challenged the credibility of the evidence in this case.

16. It is of course though highly relevant that the Appellant has been convicted of a criminal offence and a serious one involving drugs. Whether the test of what is “unduly harsh” is one which imports a proportionality balance against the seriousness of the offence or not, a consideration of the public interest has to find its place in any assessment of whether deportation is proportionate. However, once again, the Decision needs to be looked at as a whole. True it is that the

passage of the Decision beginning at [71] starts off as a finding that the public interest does not require the Appellant's deportation and what follows sets out the consideration of the public interest. Read in that way, the Decision might suggest that the Judge has reached his conclusion without properly considering the public interest which must form part of that assessment. That must though be read in the context of what precedes it.

17. At [49] the Judge records that the index offence was a very serious one which involved a conspiracy to supply Class A drugs over a two week period. The Appellant provided his co-defendants on four occasions with a vehicle and actually drove it on two of those occasions. As I have noted at [8] above, the Judge records the Respondent's submission that offences involving drugs involve "public abhorrence". The Judge notes that there was no recommendation for deportation and that the sentencing Judge regarded the Appellant's role as lesser than that of his co-defendants and found that there were no aggravating factors in his case. The Judge notes at [45] that the Appellant behaved well in prison and followed several courses. He also notes that the OASyS report rates his risk of re-offending as "low". Although, as the Respondent points out, the Appellant entered into the relationship with Ms B and her family at around the same time as the offences which were committed in May and June 2012 so that the evidence of Ms B and Mrs B about the risk of reoffending can only be given limited weight, the Judge was entitled to have regard to the OASyS report. There is no other formal evidence dealing with the risk the Appellant might pose. Although the overall conclusions of such reports are sometimes of limited value in their assessment of risk, in this case, the narrative of the report supports the conclusion and the Judge's finding of low risk and stresses the importance of Ms B's support of the Appellant to the risk of the Appellant re-offending in future.
18. Even if the Judge has proceeded on the basis that deportation would have an unduly harsh effect on Ms B without consideration of the public interest applying section 117C(5) as a threshold question ie the MAB approach, what follows the finding at [71] does amount to a proper consideration of the public interest before the conclusion is reached at [80] that deportation would be disproportionate. Although the public interest is summarised in relation to the criminal offending at [73] quite shortly, the Judge has clearly considered the public interest in deportation at [77] and [78] as follows:-

"[77] In coming to my decision, I have borne in mind SS (Nigeria), At paragraph 54, Laws LJ stated: 'The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgment only be justified by a very strong claim indeed'

[78] In paragraph 58, the learned Lord Justice identified the 'public interest in the appellant's deportation' as 'extremely pressing'. I have

had regard to the dicta of Sales LJ in AJ (Angola) to the effect that the seriousness of the offence must not be brushed aside. As I have recorded above, in general the public rightly abhor offences of the nature of that committed by the Appellant.”

19. I am satisfied that the Judge there has proper regard to the public interest and is not merely paying lip service to it. That deals also with the Respondent’s challenge to the Judge’s failure to consider sections 117C(1) and (2) because the Judge has considered those aspects within that reasoning albeit not expressly directed to those sections. The Judge is clearly aware of the public interest imperative in deportation and the need for a strong claim to counter it. The Judge has here found that there is such a strong claim. I might not have reached the same conclusion as did the Judge but he heard the evidence from the witnesses which I did not. He was clearly impressed by what he found was evidence of the devastating impact on Ms B if the Appellant were to be deported. It cannot be said that the word “devastating” is not adequate to encompass what was said by the Tribunal in MAB to be needed for deportation to be unduly harsh. The Judge set out his reasons for so finding and the Decision cannot be impugned as irrational for lack of reasons or for failure to consider relevant material.
20. For the sake of completeness and notwithstanding Mr Duffy’s submissions on the issue, I have also considered whether the application of the wrong Rules in this case makes a material difference. The Rules in their post 28 July 2014 form are not in precisely the same form as section 117C(5). In particular, paragraph 399(b) of the July 2014 Rules refers to the need for the relationship to be formed at a time when a person’s status was not unlawful or precarious and a requirement that the effect of deportation be unduly harsh in terms of the deportee’s partner accompanying him to his home country. The former finds its equivalent in section 117B(4) which the Judge did not consider and the latter is properly encapsulated in section 117C(5) but this option was not explored in the Decision. However, in this case the Judge notes at [66] that the Appellant was here legally when the relationship was formed in 2012. He had indefinite leave to remain and that was not revoked until the deportation order in May 2014. I note also at [72] the Judge’s finding that there was no question of the Appellant’s family members (which there includes Ms B) going to live in Jamaica. This is not considered in the Respondent’s decision (although that proceeds on the basis of there being no genuine, subsisting relationship) but also and more importantly, this does not form the basis of challenge in the Respondent’s grounds. Indeed, the Respondent’s grounds at [2](g) and (h) proceed on the basis that Ms B would remain in the UK without the Appellant. I am therefore satisfied that the error of law which clearly does exist in the Decision is not material.

DECISION

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

I do not set aside the Decision

Signed

A handwritten signature in black ink, appearing to read 'E. Smith', written in a cursive style.

Date 8 January 2016

Upper Tribunal Judge Smith