



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal no: IA/17759/2014 & IA/17858/2014

THE IMMIGRATION ACTS

At **Field House**
On 6th July 2016

Decision & Reasons Promulgated
On 12th July 2016

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Michelle Vanessa PETGRAVE & another
(ANONYMITY DIRECTION NOT MADE)

appellants

and

Secretary of State for the Home Department

respondent

Representation:

For the appellants: Mrs Sorour Bassiri-Dezfouli (counsel instructed by Grand & Machyle)

For the respondent: Miss Julie Isherwood

DETERMINATION AND REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Bernard Andonian), sitting at Taylor House on 20 November 2015, to allow appeals by a citizen of Jamaica, born 24 April 1973, and her son J, born here 25 September 2005. The (main) appellant also has a daughter, S, born here on 17 April 2015; but her father is a British citizen, so she is too.

2. **History** The (main) appellant first came here in 1999 on a false passport; but she was caught on arrival with £25,000 worth of cocaine about her, and in due course sentenced to four years' imprisonment and deported in 2001. Not deterred, she returned on a visit visa in her own passport in 2002, and overstayed till after the birth of J, by a father who has returned to Jamaica and with whom she is not now in touch, in 2005.
3. Next the appellant was caught shoplifting in 2006: the police finger-printed her, and let the Home Office know that she had been deported under another name. On this the appellant claimed asylum, which was refused, and her appeal finally dismissed in 2007, when she applied for leave to remain for herself and J on private and family life grounds.

NOTE: (1) *no anonymity direction made at first instance will continue, unless extended by me.*
(2) *persons under 18 are referred to by initials, and must not be further identified.*

The Home Office did nothing at all about that, even when J made an application on his own account in 2012: Miss Isherwood was unable to explain why not. Finally on 21 March 2014 both applications were dismissed, followed by the birth of S in 2015.

4. **Law** Starting with the statutory scheme, it is clear that the appellant could not benefit from the ‘qualifying child’ provision in s. 117B of the Nationality, Immigration and Asylum Act 2002, since she remains liable to deportation as a foreign criminal. Turning to s. 117C, it is clear that

- (1) The deportation of foreign criminals is in the public interest.
- (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
- (3) In the case of a foreign criminal (“C”) who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

Again, she had been sentenced to four years’ imprisonment, so the public interest required her deportation, whether or not those exceptions applied.

5. Turning to the Rules, this is the position in the present case:

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

...

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

6. Paragraph 399 (a) is the provision which allows people sentenced to between 12 months’ and four years’ imprisonment, or liable to deportation on conducive grounds, to remain here with a qualifying child (one who is a British citizen, or who has been here for seven years or more: see s. 117D) with whom they have a ‘genuine and subsisting relationship’ and it would be unduly harsh to require the child either to go with them, or stay here without them. Paragraph 399A applies to people in the same categories; but only where they have been lawfully resident in this country for most of their lives, which this appellant most certainly has not.
7. J is a qualifying child, having lived here ever since he was born in 2005. It follows that, for the judge lawfully to allow both these appeals on the basis of the effects of separating the appellant from J, he needed to consider first whether it would be unjust to J to do so; but, if the answer were yes, then to go on and ask himself whether there were ‘very compelling circumstances’ over and above that. This was the main point taken on appeal.

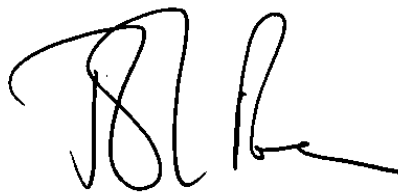
8. **Decision under appeal** The very experienced judge described the appellant's earlier conduct as 'appalling', and went on at paragraph 11 to note the requirement for 'very compelling circumstances', if the appeals were to be allowed on an article 8 basis. It is now clear of course that the deportation section of the Rules forms a complete code; so that was what the judge needed to look at first, as the following paragraphs show he did.
9. At paragraph 13 the judge found on the facts that it would be unduly harsh for either J or S to be removed to Jamaica with their mother, or to remain here without her. At paragraphs 11 and 14 he made findings of fact which the grounds of appeal suggest were not enough to support his conclusions; but for the moment I am concerned with the terms in which he expressed those at paragraph 15:
- I do believe in the above circumstances that it would be unreasonable to expect the children to leave the UK or to live in the UK without their mother.
10. While the judge had noted the requirement for 'very compelling circumstances', there is nothing more about them in his decision, and nothing to explain what those circumstances might have been, over and above his finding that it would be unduly harsh for the children to be separated, one way or the other, from their mother. On this ground alone, the judge's decision was wrong in law, and has to be set aside and re-made.
11. **Fresh decision** I put it to both sides that the judge had made enough findings of fact for me to re-decide the case there and then, and neither dissented. Dealing first with S's position, at not quite 15 months old, she is at the age where above all she needs to be with her mother, almost whatever the circumstances. While Mrs Bassiri-Dezfouli suggested that the appellant and her children would face destitution on return to Jamaica, Miss Isherwood pointed out that they had clearly lived in a Jamaican *milieu* in this country: S's father is from that island, and takes some care of his daughter here. It follows that the appellant and her children are not likely to be entirely friendless in Jamaica. The appellant gave her occupation as hairdresser on both children's birth certificates, so is by no means without a useful skill.
12. S is of course a British citizen, and cannot be removed; but equally she could return from Jamaica to this country as of right whenever she was old enough for her to leave her mother, or enough time had passed for the appellant to seek re-admission. It does not seem to me that making a decision where her best interests would require her to leave this country with her mother would be unduly harsh in the first place, let alone raise 'very compelling circumstances' for that not to be done. So, if S were the only child involved, I should dismiss the appellant's appeal.
13. However the real questions are about J. Miss Isherwood referred to a decision she was not able to hand up, and was only able to cite as 'AM', apparently meaning *AM*(s.117B) [2015] UKUT 260. As the full title suggests, this, like *MA (Pakistan) & others* [2016] EWCA Civ 705, handed down the day after this case was heard, was a decision about s. 117B of the Nationality, Immigration and Asylum Act 2002, which as already explained does not apply in this case. It is quite clear that the appellant's own appeal could not possibly succeed, if no child were involved; nor is it likely that J's could, if he were of age and had established his private and family life in this country while he was unlawfully here.

14. As the judge noted at paragraph 14, J has lived here since he was born, and is now ten, so long enough in this country to be registered as a British citizen as of right if he applied for that. However, like the judge, I have to deal with the case as the facts are now, which make it necessary, if I am to allow both appeals, to find not only that it would be unduly harsh to J to require him either to go to Jamaica with his mother, or to stay here without her; but also that there are ‘very compelling circumstances’ in his case why that should not be done. While his best interests must of course be a primary consideration, they can only decide the case in favour of the appellants if these criteria are satisfied.
15. So far as the ‘unduly harsh’ question is concerned, the judge found that J
- ... has not been to any other country and only knows England as his home. He is going to school here and doing well. He interacts with his peers and considers England as his home. It is unfair to make a decision which would affect his welfare and well-being by his having to leave the UK, when he is the innocent party and should not be blamed for his mother’s misdeeds.
- J was present at the hearing, though I suggested it might be better for him to stay outside court, where his mother’s character was likely to be discussed, which she on Mrs Bassiri-Dezfouli’s advice agreed to. However I saw enough of him to see that he was a very well-behaved ten-year old, smartly dressed in his school uniform, and able to sit and amuse himself quietly for quite a long time. For that he is a credit to his mother.
16. At J’s age, where he has been right through primary school, but not quite finished there yet, it is clearly as unrealistic, as it would be unduly harsh to expect him to stay here without the appellant. So the first question is whether it would be unduly harsh to expect him to go to Jamaica with her. Even in a non-deportation case, where the question is whether it would be unreasonable to expect a qualifying child to leave this country with a parent with whom he has a ‘genuine and subsisting relationship’, it is now clear that the public interest, in that case in the maintenance of immigration control, has to be taken into account: see *MA* (above).
17. That must be all the more so when considering the meaning, in context, of ‘unduly harsh’: there is a very strong interest indeed in the prevention of crime, including the enforcement of deportation orders, as to which see *CT (Vietnam)* [2016] EWCA Civ 488. The judge in the present case did not flinch from calling the appellant’s conduct appalling, which indeed it was, in terms of the potential for human misery of what she was carrying. He was equally entitled to note that it happened a long time ago, and the appellant has been in no further trouble since, apart of course from the shoplifting in 2006.
18. The balancing exercise to be carried out is between the best interests of J, which as the judge noted are very strongly in favour of him, as an innocent party, being allowed to stay here, in the only country he has ever known, and where he has almost finished at primary school; and the very strong public interest, even after the time which has gone by, in removing his mother. However, even after considering that public interest, I agree with the judge that it would be unduly harsh in these particular circumstances to make a decision which, for practical purposes, would require J to go with the appellant to Jamaica, where he has never been.

19. The remaining question is whether there are ‘very compelling circumstances’ over and above that to justify allowing these appeals. It is clear from *CT (Vietnam)* that these must amount to something exceptional. Looking at the circumstances of this case, one factor does stand out as exceptional. The Home Office knew in 2006 that the appellant was the person who had been deported in 2001; they knew no later than 2007 that she had a child born here, with whom she was applying for leave to remain; and yet they did precisely nothing about this situation, despite the reminder given by J’s own application in 2012, till 2014.
20. If the Home Office had dealt with these applications with anything like proper efficiency, or even, to a diminishing extent, at any time before 2012, when J became a qualifying child, then they would have been fully entitled to remove him and his mother to Jamaica. However, instead they chose to sit on their hands, while J grew up and went nearly all the way through primary school here. If those are not ‘very compelling circumstances’, over and above its now being unduly harsh to uproot him, for not requiring him to go there with her now, then I cannot think of a case where the provisions of paragraph 398 could be satisfied, where 398 (a) applied.

Home Office appeal allowed; decision under appeal set aside

Decision re-made: appellants’ appeals allowed



(a judge of the Upper Tribunal)

12 July 2016