Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02159/2017

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 28 February 2018	**On 6 March 2018**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

[A M]
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms G S Peterson, Counsel instructed by CK Solicitors
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a Jamaican national born on [ ] 1974. He is the subject of a deportation order made against him on 8 November 2016 and he appeals the respondent's decision of 18 January 2017 to refuse his human rights claim.

2. The appeal against the refusal was heard by First-tier Tribunal Judge Walker at Hendon Magistrates' Court on 3 November 2017 and was

dismissed by way of a determination promulgated on 27 November 2017.

3. The appellant takes issue with the findings and conclusions of the judge and argues that.

4. Permission was granted by Judge Birrell on 29 December 2017. The matter then came before me on 26 February 2018.

5. Submissions

6. Ms Peterson expanded on the two arguments put forward in the grounds. She submitted that the judge erred in his assessment of whether it would be unduly harsh to separate the appellant and his children. The judge's error was to factor in the seriousness of the appellant's offence whereas he should have conducted a stand-alone assessment of the unduly harsh test. She relied on the judgment of Hesham Ali [2016] UKSC 60. The second error made by the judge was his approach to the issue of the appellant's re-integration to Jamaica. She argued that the judge had found that the appellant had family there. He had relied on earlier determinations from 2004 and 2006 which had made such findings but he failed to consider the appellant's claim that he had no one left there and he did not put this matter to the appellant at the hearing. Whether or not the appellant had relatives in Jamaica was relevant to the issue of re-integration and so the error was material. She urged that the decision be set aside and the matter remitted for a fresh hearing before the First-tier Tribunal.

7. In response, Mr Kotas submitted that it was wrong in law to maintain that the unduly harsh assessment had to be a stand-alone undertaking. He relied on the judgment of MM Uganda and another (KO) [2016] EWCA Civ 617 which had been before the judge. He submitted that whether something was unduly harsh was itself a balancing exercise involving the public interest and that Hesham Ali looked at the broader issue of whether the rules constituted a complete code. The citation in the grounds related to the issue of deterrence and, in any event, the appellant had not lived here most or all of his life and so it did not apply to him. With respect to the second ground, Mr Kotas argued that if there was an error, it was not material to the outcome. The appellant knew there were previous determinations and it was for him to present his case. However, as he could only have succeeded under paragraph 399, on the issue of compelling circumstances, the issue of whether or not he had relatives in Jamaica could not be material to the outcome. The appellant was a grown man, he was fit and healthy and he had spent only 4 of 17 years here lawfully. It was not possible that the absence of a brother or son in Jamaica would tip the balance in his favour. When the serious drugs offences were taken into account, the public interest had to take precedence.

8. Ms Peterson replied. She agreed the judge had other relevant case law before him but the Hesham Ali judgment needed to be considered. The public interest was not a fixed entity. It was also in the public interest that families were not separated. The decision on the unduly harsh test should not be clouded by the appellant's offending. with respect to the second ground, the judge made an assumption which was wrong. He relied on evidence that was no longer relevant and his finding was unsafe. As it formed part of the proportionality assessment, it was a material point.

9. That completed submissions. At the conclusion of the hearing, I reserved my determination which I now give with reasons.

10. Discussion and Conclusions

11. I have considered all the evidence and the submissions made. Emphasis was placed by the appellant on Lord Kerr's dissenting judgment in Hesham Ali (as the First-tier Tribunal Judge noted at paragraph 57 of his determination) but with no attempt to address the principles of the other judgment before the First-tier Tribunal Judge. MM and KO specifically addressed the meaning of *"unduly harsh"* in paragraph 399 of the Immigration Rules and s.117C (5) of the Nationality, Immigration and Asylum Act 2002 and the approach to be taken by Tribunals in appeals concerning the deportation of foreign criminals. Of particular relevance are the following findings of the court:

> *"22. I turn to the interpretation of the phrase "unduly harsh". Plainly it means the same in section 117C(5) as in Rule 399. "Unduly harsh" is an ordinary English expression. As so often, its meaning is coloured by its context ...*
>
> *23. The context in these cases invites emphasis on two factors, (1) the public interest in the removal of foreign criminals and (2) the need for a proportionate assessment of any interference with Article 8 rights. In my judgment, with respect, the approach of the Upper Tribunal in MAB ignores this combination of factors. The first of them, the public interest in the removal of foreign criminals, is expressly vouched by Parliament in section 117C(1). Section 117C(2) then provides (I repeat the provision for convenience):*
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> > *"The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal."*
>
> *24. This steers the tribunals and the court towards a proportionate assessment of the criminal's deportation in any given case. Accordingly the more pressing the public interest in his removal, the harder it will be to show that the effect on his child or partner will be unduly harsh. Any other approach in my judgment dislocates the "unduly harsh" provisions from their context. It would mean that the question of undue hardship would be decided wholly without*

> *regard to the force of the public interest in deportation in the particular case … What is due or undue depends on all the circumstances, not merely the impact on the child or partner in the given case. In the present context relevant circumstances certainly include the criminal's immigration and criminal history.*
>
> *…*
>
> *26. … The expression "unduly harsh" in section 117C(5) and Rule 399(a) and (b) requires regard to be had to all the circumstances including the criminal's immigration and criminal history".*

12. The appellant first arrived in the UK in May 2000 as a visitor. He overstayed and subsequently made an unsuccessful asylum claim. His appeal was dismissed and he was removed on 17 March 2004. In October 2009 he was granted entry clearance following a successful appeal, after several failed applications, as the spouse of a British national; that marriage ended prior to March 2012 when he commenced another relationship. His leave expired on 22 January 2012 and he overstayed. In September 2016 he had a successful appeal against the refusal of leave and he was granted leave to remain until 3 April 2019.

13. The appellant has four criminal convictions. The first three pre-date his removal and he received non-custodial sentences for possession of an offensive weapon and two for possession of cannabis. On 13 October 2016 he pleaded guilty to ten counts of supplying Class A drugs on eight different dates between April and August 2016. He was sentenced to 44 months' imprisonment on each count to be served concurrently. According to the judge's sentencing remarks, he had played a *"significant role"* and were it not for his guilty plea, he would have received a 66 months' sentence.

14. The judge considered article 8 and paragraphs 398, 399 and 399A of the Immigration Rules and also s.117C of the Act. He heard oral evidence from the appellant, his current partner and a daughter from his previous relationship. The respondent accepted that the children were all British and that it would not be unduly harsh for the twin daughters from the appellant's previous relationship to live in Jamaica and no argument was taken at the hearing in respect of the child from the present relationship although in her decision letter the respondent had maintained she could live in Jamaica. It was agreed by the parties that the main issue was the appellant's separation from his children. No reliance was placed on any claim for protection (at 48 and 59). It was conceded by Counsel for the appellant that the seriousness of the offending was a key issue (at 60)

15. The judge made clear findings of fact. He found that the appellant's offences were very serious, that they had been committed recently and that he was not a home grown criminal (at 67). He found that the

appellant had parental relationships with his children and that he was in a genuine and subsisting relationship with his current partner which had commenced after his leave had expired (at 69). He noted that the appellant did not live with his twin daughters and that there had been a period when he had been refused contact with them (at 71). He noted that the twins had travelled with their mother to Jamaica on a number of visits to see her family (at 71). Neither they nor their mother had any health issues and she was able to act effectively as their primary carer (at 71). Whilst the appellant's third child lived with him and her mother, the latter was the bread winner, had no medical problems and could provide for the child (at 73). Both women get along and the children consider each other as sisters and attend the same school (at 74). The judge accepted that the children were finding separation from the appellant whilst he was in prison to be difficult (at 75) but he found that the impact on their education had been minor (at 77). There was no social report and no intervention by social services (at 53 and 79). The appellant had been behaving well in prison (at 81) and that although there was an ongoing risk of re-offending, this was not as high as stated in the OASys report (at 82). He had worked in Jamaica and had supported himself when he had been removed there in 2004 (at 85). Of the last 17 years only four had been spent lawfully here (at 65). He had some cousins here and had worked as a volunteer at a soup kitchen (at 86). He also worked in prison (at 85). It was not accepted that he would be unable to work in Jamaica (at 85).

16. The judge was clearly aware that the appellant had asserted that he had lost all contact with Jamaica (at 23 and 58 and 84) but chose not to accept that claim. He noted that he had *"been told nothing"* about the relatives of family members in Jamaica other than those in the US. He found that the appellant's contention that all his children were British was undermined by the fact that he had a Jamaican son who would now be aged 21 and who may still be in Jamaica (at 84). He considered that the appellant had not been forthcoming about the true extent of family ties (at 84).

17. The judge then applied the law to his findings. He considered the position of the children and section 55 first (at 90 and 91). He found that their best interests would be met by having the appellant remain in the UK but properly noted that that was not the end of the matter (at 91). That approach is in accordance with what the court held in MM, and in Hesham Ali (at 29). The judge relied on all his findings of fact and concluded that it would not be unduly harsh to separate the children from the appellant. He gives clear reasons for that conclusion at paragraph 92. Although his findings at paragraph 93 form the focus of criticism, they follow the finding he has made about the children and have been, in my view, taken out of context and read in isolation to the remainder of the determination. Whatever the format of the Tribunal's approach, the crucial issue is whether a fair balance has been struck (Hesham Ali at 32). The Tribunal is required to consider

all factors when considering whether article 8 is engaged. The relevant factors identified by various judgments and summarised at paragraph 28 of Hesham Ali are all matters that were considered. There can be no criticism on him for failing to follow an approach set out in a dissenting judgment. The judge gave full consideration to all the evidence, reached clear findings of fact and arrived at sustainable conclusions. He was entitled to find that in all the circumstances it would not be unduly harsh to separate the appellant and the children. As required by MM he had regard to *"(1) the public interest in the removal of foreign criminals and (2) the need for a proportionate assessment of any interference with Article 8 rights"* and he plainly had regard to the sliding scale when considering the first issue. It follows that I conclude that the judge did not err in his approach to the unduly harsh test.

18. The second criticism relates to the judge's findings on the appellant's links with Jamaica; specifically, with whether he has family there. It was argued for the appellant that the judge erred in relying on the earlier determination of First-tier Tribunal Judge Housego which, it is said, is from several years ago. There is no merit in this submission. The skeleton argument and Counsel's submissions before the First-tier Tribunal both relied heavily on that determination and the judge was entitled to take all of it into account not just the sections that were cherry picked. As Mr Kotas submitted, this was evidence before the Tribunal, the appellant knew the contents of the determination and yet as Judge Walker found, nothing was said as to the whereabouts of the appellant's son. Whilst the appellant claimed he had no ties to Jamaica, the judge did not accept that evidence (see paragraph 16 above). There is no error in this respect. It was open to the judge to find as he did.

19. In conclusion, therefore, I find that the judge did not err in his approach to the evidence or in the conclusions he reached. He undertook a thorough assessment of all the evidence, properly applied the law and reached fully sustainable findings in respect of the appellant and his children. It was open to him to find that this was not a very strong or very compelling case and that the public interest in this case outweighed the appellant's family life and the rights of his family members.

20. Decision

21. The First-tier Tribunal did not make any errors of law and the decision to dismiss the appeal stands.

22. Anonymity

23. I continue the anonymity order made by the First-tier Tribunal.

Signed

Upper Tribunal Judge

Date: 5 March 2018