



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/08802/2017

THE IMMIGRATION ACTS

Heard at Field House  
On 7<sup>th</sup> February 2018

Decision & Reasons Promulgated  
On 16<sup>th</sup> February 2018

Before

RIGHT HONOURABLE LORD BOYD OF DUNCANSBY  
DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SG

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr. T Melvin, Home Office Presenting Officer  
For the Respondent: Ms. F Clarke, instructed by Fadiga & Co

DECISION AND REASONS

1. This is an appeal against a decision and reasons by First-tier Tribunal Judge Lewis promulgated on 27<sup>th</sup> October 2017 in which he allowed the appeal against the decision of the Secretary of State dated 9<sup>th</sup> August 2017, to refuse a human rights claim made by SG.
2. The appellant in the appeal before us is the Secretary of State for the Home Department and the respondent to this appeal is SG. However, for ease of reference, in the course of this determination we shall adopt the parties' status as it was before the FtT. We shall in this determination, refer to SG as the appellant, and the Secretary of State as the respondent.

3. The First-tier Tribunal (“FtT”) has made an anonymity order and for the avoidance of any doubt, that order continues. We emphasise at the outset that no report of these proceedings shall directly or indirectly identify the appellant.

### The background

4. The appellant is a national of St. Lucia. As set out in the decision of the FtT, the appellant arrived in the UK shortly before his twelfth birthday on 23<sup>rd</sup> August 1985 in the company of his sisters and was granted indefinite leave to enter for settlement with his mother.
5. On 7<sup>th</sup> May 2016, the appellant was convicted of a number of offences including committing an offence during the operational period of a suspended sentence. He was sentenced to 5 months and 15 days imprisonment. A Deportation Order was signed on 27<sup>th</sup> July 2016 after the respondent refused a human rights claim made by the appellant. The respondent certified the claim under s94B of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”). Further representations were made on behalf of the appellant by letter dated 26<sup>th</sup> June 2017 and in light of the decision of the Supreme Court in Kiarie & Byndloss -v- SSHD [2017] UKSC 42, the respondent reconsidered the appellant’s human rights claim. The respondent refused the claim for the reasons set out in a Notice of Decision dated 9<sup>th</sup> August 2017 and it was that decision that gave rise to the appeal before the FtT.
6. The respondent seeks to deport the appellant and to that end, applying paragraph A 362 and paragraphs A398 to 399D of the immigration rules, concluded that the appellant is unable to meet the family and private life exception to deportation. The respondent concluded that there are no compelling circumstances which outweigh the public interest in seeing the appellant deported, on Article 8 grounds.
7. The Judge of the FtT allowed the appellant’s appeal. The Judge summarises his conclusion at paragraph [40] of the decision in the following way;

*“For the avoidance of any doubt in this context, although I am not satisfied that either Exemption 1 or Exemption 2 under section 117C is applicable (see similarly paragraphs 399 and 399A of the Rules), I am satisfied pursuant to paragraph 398 of the Rules that the public interest in deportation is outweighed on the basis that there are very compelling circumstances over and above those described in paragraph 399 and 399A, bearing in mind the balance to be struck between the nature and gravity of the Appellant's offending behaviour and the private life established in the UK pursuant to the substantial and significant time lawfully spent here from a young age, throughout which period the Appellant would have understood that pursuant to his indefinite leave to remain he could consider the UK to be his permanent home.”*

### The appeal before the Upper Tribunal

8. The respondent appeals on the ground that in light of the prior findings made by the Judge, the Judge's conclusion that the public interest in deportation is outweighed on the basis that there are very compelling circumstances over and above those described in paragraph 399 and 399A of the immigration rules, is irrational. The respondent contends that the Judge relies upon the substantial and significant time that the appellant lawfully spent in the UK, but it is well established that long residence alone, is not sufficient to overcome the strong public interest in the deportation of those who are persistent offenders.
9. Permission to appeal was granted on 19<sup>th</sup> December 2017 by Upper Tribunal Judge Kekic. The matter comes before us to determine whether the decision of the FfT contains a material error of law, and if so, to re-make the decision.
10. After hearing submissions, we announced that in our judgement, the decision of the FfT is infected by a material error of law and the decision of the FfT Judge is set aside. We said that we would give the reasons for our decision in writing.
11. Having decided that the decision of the FfT should be set aside, Ms Clarke invited us to remit the matter to the FfT for hearing *de novo*. She submitted that there is an issue as to the appellant's contact with his son who is the subject of a full Care Order made by the Family Court on 16<sup>th</sup> February 2017. She submits that the

appellant's mother is in the process of being assessed as a carer for the child, and that the appellant himself intends to commence proceedings in the Family Court to resolve the question of his contact with his son. Ms Clarke confirmed that the appellant has not yet issued an application in the Family Court and there was no evidence of any further assessment of his mother before us. We declined to remit the matter to the *FtT* for further hearing. Directions had been issued to the parties making it clear that there is a presumption that, in the event of the Tribunal deciding that the decision of the *FtT* is to be set aside as erroneous in law, the re-making of the decision will take place at the same hearing. The appellant was reminded in further directions issued on 18<sup>th</sup> January 2018 that any Rule 15(2A) notice to be relied, was to be filed no later than 7 days prior to the hearing. There was no application made by the appellant to permit new or further evidence to be admitted. The Care Order was made by the Family Court in February 2017, and before the *FtT* it was asserted that the appellant's mother was in the process of being assessed as a potential carer. The Judge of the *FtT* noted that the appellant's mother had previously failed in challenging the Care Order, and that the local authority did not plan to place the child with his grandparents. In the absence of any evidence that begins to demonstrate that there have been further developments in the care proceedings since the making of the Care Order, in our judgement it is in the interests of justice to re-make the decision on the evidence before us, taking into account the unchallenged findings made by the Judge of the *FtT*, and after hearing submissions from the parties.

12. We went on to hear submissions from the parties and at the end of the hearing before us, we said that we reserve our decision and would give our decision and reasons in writing. This we now do.

#### Error of Law

13. The appellant's offending history is set out in the respondent's decision and is uncontroversial;

*Your deportation is conducive to the public good and in the public interest because you have been convicted of an offence which has caused serious harm and are a persistent offender. You have amassed 15 convictions covering 28 offences, and are the subject of two Court Orders because of your behaviour.'*

14. At the hearing of the appeal, the Judge of the FtT heard evidence from the appellant, his mother, his sister and one of his friends. The Judge's findings and reasons are to be found at paragraphs [8] to [41] of the decision. The Judge states at paragraph [8]:

*"In light of the decision in ETA v SSHD [2017] EWCA Civ 10 – see in particular paragraph 27, "Decisions of tribunals should not become formulaic and rarely benefit from copious citation of authority" et seq. -I do not propose to recite the applicable law and principles. Suffice to say I have had particular regard to the applicable jurisprudence in respect of deportation and the ECHR, and have had regard to the applicable burden and civil standard of proof. "*

15. At paragraph [10] of the decision, the Judge states that he has "*..given very careful consideration to the evidence and arguments in respect of the claim that the appellant enjoys family life in the UK. For the following reasons, I have reached the conclusion that I am not satisfied in this regard.*". Having found that the appellant does not enjoy a family life in the UK, the Judge went on to make the following further findings:

*"The appellant is not wholly without ties in St Lucia";* paragraph [12]

*"... the Appellant will more likely than not face some difficulties in integrating into his country of nationality given that he would be returning essentially as a stranger with no previous experience of having lived there as an independent adult, I am not persuaded that he has shown that there would be very significant obstacles to integration.....I accept his evidence that he has no meaningful contact with anybody in St Lucia at present - the presence or absence of a support network is not, in my judgement, determinative in the context of an able bodied man in his early 40s able to converse in the official language of the country. In any event, in circumstances where [the appellant's mother] appears to have been able to assist in providing care for her own mother, and has continued to visit the island every few years, I am not persuaded that the family is wholly without contacts*

*in St Lucia that might be called upon to provide the Appellant with a degree of steerage or guidance towards integration.” [paragraph 13]*

*“.., he has produced no supporting evidence as to limitations in employment opportunities either generally, or in the context of a person who has trained as a bricklayer, and has worked variously as a painter/decorator and in car shops as a panel beater and a paint sprayer - and who might otherwise be reasonably expected to be able to turn his hand to other similar unskilled and semiskilled jobs.”; [paragraph 14]*

16. At paragraphs [17] to [22] of his decision, the Judge refers to the appellant’s offending history and the convictions that gave rise to the Deportation Order. The Judge considered the appellant’s explanation that many of the offences arise by reason of the appellant’s fractious relationship with his son’s mother and the deterioration in their relationship. At paragraph [25], the Judge states:

*“However, there is nothing in this that begins to explain or justify what followed. It appears that both the Appellant and D drank heavily on this occasion. The subsequent events culminated in the Appellant being charged and convicted not only in relation to the breach of the restraining order but also on three counts of assault on a police officer, destroying or damaging property, and restricting or obstructing a constable. It was these matters that triggered the deportation process.”*

17. Having had regard to the appellant’s offending, the Judge states, at [28];

*“Whilst I am not persuaded that it might be said that the Appellant has been convicted of an offence that has caused serious harm, I am persuaded that he is a persistent offender, and as such is to be classified as a 'foreign criminal' within the meaning of section 117D(2) - with particular reference to subsection (2)(c)(iii) - for the purpose of Part V of the Nationality, Immigration and Asylum Act 2002.”*

18. As we have set out previously, the Judge of the FtT found, at [10], that the appellant does not enjoy a family life in the UK. At paragraph [29], the Judge notes that the appellant’s case is ultimately based on his private life in the UK. Applying the five-stage approach set out in **Razghar**, the Judge turned to the question of proportionality at paragraphs [31] to [39] of his decision. We have

already referred to the Judge's overall conclusion that is to be found at paragraph [40] of the decision. The Judge was not satisfied that either Exception 1 or Exception 2 under section 117C of the 2002 Act or that the exclusions under paragraphs 399 and 399A of the Rules apply. Nevertheless, the Judge concluded that the public interest in deportation is outweighed on the basis that there are very compelling circumstances over and above those described in paragraph 399 and 399A by reference to the balance to be struck between the nature and gravity of the appellant's offending behaviour, and the private life established in the UK pursuant to the substantial and significant time lawfully spent here from a young age.

19. Mr Melvin submits that in reaching his decision, the Judge fails to give any clear reasons as to why the high threshold to establish that the public interest in deportation is outweighed, is met. He submits that the Judge erred in his conclusion that the length of time that the appellant has spent in the United Kingdom without offending is capable of amounting to the "very compelling circumstances" required.
  
20. Ms Clarke submits that although the Judge does not set out the relevant statutory provisions and the immigration rules, it is to be inferred from what the Judge states at paragraph [8] of his decision, that the Judge had in mind the relevant considerations. She submits that the Judge identified that a balance must be struck between the public interest in deportation and the Article 8 rights of the appellant. In reaching his decision the Judge had careful regard to the appellant's offending history and had proper regard to the context in which the offending occurred. She submits that in reaching his decision, the Judge appears to have had in mind the difficult relationship between the appellant and his former partner that formed the backdrop to the offending. When pressed, she accepted, rightly in our judgement, that the "very compelling circumstances" over and above those described in paragraphs 399 and 399A of the immigration rules are not readily identifiable in the decision of the FtT.

21. After retiring to consider the submissions made by the parties, we informed the parties that we find there to be a material error of law in the decision of the Judge capable of affecting the outcome of the appeal. The error of law lies in the Judge's failure to give any or any adequate reasons for his finding that there are very compelling circumstances over and above those described in paragraphs 399 and 399A of the immigration rules, to outweigh the public interest in deportation of the appellant.
22. The FfT Judge was required to have regard to the considerations set out in Section 117C of the 2002 Act. The public interest required the claimant's deportation unless sub-sections (4) of Section 117C could be said to be met. The Tribunal was faced with the requirements of the immigration rules and public interest considerations enshrined in statute, that the deportation of the appellant is in the public interest and, since he had been sentenced to a period of five months and fifteen days imprisonment, it was only if the test of undue harshness was met, that the public interest in deportation would be outweighed.
23. We remind ourselves that s117C of the 2002 Act, insofar as is relevant, provides as follows:

**117C Article 8: additional considerations in cases involving foreign criminals**

- (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.
- (4) Exception 1 applies where –
  - (a) C has been lawfully resident in the United Kingdom for most of C's life,
  - (b) C is socially and culturally integrated in the United Kingdom, and
  - (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.



...

24. The Judge of the FtT found that Exception 1 referred to in s117C(4) of the 2002 does not apply for the reasons given at paragraphs [12] to [14] of his decision. The findings made by the Judge are not challenged.

25. We also remind ourselves that the relevant provisions of the Immigration Rules provide as follows:

A362. Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.

...

390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.

....

#### **Deportation and Article 8**

A398. These rules apply where:

- (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

...

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

...

- (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, 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.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

26. In our judgement, it is clear from the language of s117C and the relevant immigration rules, that the public interest in deportation here, will only be outweighed by other factors where there are very compelling circumstances over and above those described in s117C(4) of the 2002 Act and paragraph 399A of the immigration rules. Both s117C(4) and paragraph 399A of the Immigration Rules take account of the length of time that a person has lived in the UK, whether they are socially and culturally integrated in the UK, and whether there would be significant obstacles to the persons integration into the country to which it is proposed they be deported.
27. The Judge reached his decision seeking to strike the balance between the nature and gravity of the appellant's offending behaviour and the private life established in the UK pursuant to the substantial and significant time lawfully spent here from a young age. The length of residence in the UK is already a factor relevant to the public interest consideration under s117C(4) of the 2002 Act and paragraph 399A of the rules. What is required is very compelling circumstances over and above those described in s117C(4) of the 2002 Act and paragraph 399A of the immigration rules. The Judge does not identify what those very compelling circumstances are in his decision. Having carefully read the decision of the FtT Judge, we are satisfied that the decision of the FtT discloses a material error of law and should be set aside.

#### Re-making the decision

28. Ms Clarke reminds us that the Appellant arrived in the United Kingdom when he was aged 11, and has now lived in the United Kingdom for some 32 years. She accepts that the appellant has been convicted of a number of offences between 1993 and 2016. She submits that the convictions that give rise to the deportation order arise against the backdrop of a very difficult relationship between the appellant and the mother of his son. She submits that the public interest in the circumstances does not demand the deportation of the appellant.

29. In reply, Mr Melvin submits that the only matter that weighs in favour of the appellant is the length of time that the appellant has spent in the UK. However, that is not a factor that is capable of amounting to very compelling circumstances that outweigh the public interest in the deportation of the appellant.
30. In reaching our decision we have had very careful regard to the unchallenged findings that were made by the Judge of the FtT. The Judge was not satisfied that either Exception 1 or Exception 2 under section 117C of the 2002 Act or that the exclusions under paragraphs 399 and 399A of the Rules apply. We have no reason to go behind that finding. Despite her best efforts, Ms Clarke has been unable to point us to any evidence that is capable of establishing that there are very compelling circumstances over and above those described in paragraph 399 and 399A of the Immigration Rules, to outweigh the public interest in the deportation of the appellant. We find there to be no very compelling circumstances over and above those described in paragraph 399 and 399A of the Immigration Rules, to outweigh the public interest in the deportation of the appellant.
31. It follows that we dismiss the appellant's appeal against the respondent's decision dated 9<sup>th</sup> August 2017, to refuse the appellant's human rights claim.

### **Notice of Decision**

32. The appeal by the SSHD against the decision of FtT Judge Lewis is allowed and the decision of the FtT promulgated on 27<sup>th</sup> October 2017 is set aside.
33. We remake the decision and dismiss the appeal by SG against the respondent's decision dated 9<sup>th</sup> August 2017, to refuse the appellant's human rights claim.
34. An anonymity direction is made.

Signed

Date

Lord Boyd of Duncansby

Deputy Upper Tribunal Judge Mandalia

**FEE AWARD**

There can be no fee award in the circumstances.

Signed

Date

Lord Boyd of Duncansby

Deputy Upper Tribunal Judge Mandalia