



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

Appeal Number: HU/17400/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 23 April 2019**

**Decision & Reasons
Promulgated
On 15 May 2019**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**GW
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer
For the Respondent: Mr J Martin, Counsel, instructed by Biruntha Solicitors

DECISION AND REASONS

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure
(Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

1. This is an appeal against the decision dated 14 January 2019 of First-tier Tribunal Judge Swaney which allowed an Article 8 ECHR appeal in the context of a decision to deport
2. For the purposes of this decision I refer to the Secretary of State for the Home Department as the respondent and to GW as the appellant, reflecting their positions before the First-tier Tribunal.
3. The background to this matter is that the appellant is a citizen of Jamaica born on 27 January 1983. He came to the UK in 2001 at the age of 18. On arrival he was refused leave to enter, granted temporary admission and then absconded. He did not present himself to the immigration authorities again until 5 October 2013 when he made an application for leave to remain on Article 8 grounds. He was granted leave until 19 April 2016 and subsequently until 11 February 2019.
4. However, on 24 May 2017 the appellant was convicted of two counts of supplying a Class A drug and sentenced to 32 months imprisonment. In response to those convictions, the respondent served the appellant with a decision to deport on 18 April 2017. On 6 July 2017 he made submissions relying on Article 8 ECHR as to why he should not be deported. The respondent refused the human rights claim in a decision dated 14 December 2017 which also maintained the decision to deport.
5. The appellant appealed the refusal of his Article 8 ECHR claim to the First-tier Tribunal. There was little dispute as to the facts concerning his family and private life. Shortly after coming to the UK in 2001, the appellant formed a relationship with SM and became close to her daughter. He remained close to the daughter although he separated from SM. The appellant then entered into a relationship with CA and they have a child together, DM, born on 24 August 2003. The appellant and CA did not remain together, however, CA marrying another man in 2005. During her marriage DM lived with his mother but maintained his relationship with the appellant. When CA divorced in 2012 she and DM lived in the home of the appellant's mother. CA moved in with the appellant's family as she was not well and she wanted DM to be in a stable, supportive environment. The appellant came to live in his mother's home in 2015. When the appellant was sent to prison in 2017, CA and DM continued to live with the appellant's mother.
6. There was also no dispute that CA has health problems, having been diagnosed with rheumatoid arthritis. This led to her requiring a wheelchair for a period of time but, fortunately the condition remitted somewhat and

she has been able to work since 2013. CA is waiting for a knee replacement. She has also suffered from depression and has been referred to a psychiatrist. It was also undisputed that the appellant's mother has been unwell, suffering from heart problems and cancer, from which she is currently in remission.

7. In the decision issued on 14 January 2019, the First-tier Tribunal set out in paragraphs 54 to 59 the correct legal provisions for assessing an Article 8 ECHR claim in the context of deportation. At paragraph 62 she found that the appellant had a genuine and subsisting parental relationship with his son. In paragraph 63 the judge found that it was in the best interests of the appellant's son that he remain in the UK.
8. Judge Swaney then proceeded to assess whether the appellant could benefit from the provisions of paragraphs 398-399A of the Immigration Rules. In paragraphs 64 to 77 she considered whether paragraph 399(a) could be met, that is, whether it would be unduly harsh for DM if the appellant were to be deported. She referred herself in paragraph 64 to the correct legal approach to the "unduly harsh" requirement provided by KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53. At paragraph 67, the judge stated that a family being separated was a normal consequence of deportation and that "something more" was required for a finding of undue hardship.
9. The First-tier Tribunal concluded that it would be unduly harsh for DM if the appellant were to be deported to Jamaica. The indeterminate separation arising from deportation was more serious than the period of time the appellant was in prison and the period of time when DM lived with CA and her husband but remained in contact with the appellant; see paragraph 68. CA was a credible witness and her evidence of the behavioural problems DM developed whilst the appellant was in prison were accepted; see paragraph 69. The positive impact on DM when the appellant returned home in the summer of 2018 was also accepted.
10. In paragraph 71 the judge also accepted that CA cannot always cook easily or go out from the home to attend meetings at DW's school because of her arthritis and her depression. The judge noted that the appellant's mother is also limited in the support she can offer DM because of her health problems. In paragraph 72 the judge found that notwithstanding the "close supportive family" around DM, "the absence of the appellant would have a significant detrimental impact" on him. DM's evidence of the emotional impact of being separated from the appellant while he was in prison was accepted at paragraph 73. The judge noted in paragraph 74 that having a supportive family around him and having indirect contact with the appellant whilst he was in prison were not sufficient to prevent DM having difficulties during that period.
11. Judge Swaney set out her conclusions in paragraphs 76 to 77:

“76. It is a consequence of the appellant’s actions that he is facing deportation. His deportation will inevitably cause a certain amount of distress to his son. I find in the particular circumstances of this case that it would be unduly harsh for the appellant’s son to remain in the United Kingdom without the appellant. I rely on all my findings above, but the particular factors in this case which combine to make it unduly harsh, i.e. worse for the appellant’s son than any other child whose parent faces deportation include:

- (i) the emotional difficulties he faced while the appellant was in prison, the lack of impact of the support he had from his family during that period and the link between the appellant’s return and his subsequent improvement.
- (ii) The impact of CA and VA’s medical problems on their ability to meet the needs of the appellant’s son, in particular his emotional needs, the role the appellant plays in that regard, and the reasonably foreseeable detrimental impact of the appellant’s absence.
- (iii) The foreseeable detrimental impact on the appellant’s son’s education if he is separated from the appellant at this stage of his education, i.e. a few months before he is due to begin his GCSE exams.

77. It would be unduly harsh to expect the appellant’s son to remain in the United Kingdom without him. Accordingly, the appellant satisfies the exception to deportation set out in paragraph 399(a) of the Immigration Rules. This means that the public interest in his deportation is outweighed notwithstanding the seriousness with which his offences must be viewed.”

12. The Secretary of State’s challenge to the decision of the First-tier Tribunal is, in essence, that the conclusion that it would be unduly harsh for the son was not open to the judge on the evidence. The consequences that the First-tier Tribunal identified might be harsh but were to be expected in the context of deportation and could not be found to be “unduly” harsh.

13. The guidance as to the meaning of “unduly harsh” in paragraph 399 and Section 117C of the Nationality and Immigration Act 2002 is that approved in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53. In paragraph 27 the Supreme Court confirms the guidance given in MK (Sierra Leone) v SSHD [2015] UKUT 223 (IAC) which states:

“Unduly harsh does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. ‘Harsh’ in this context, denotes something severe, or bleak. It is the antipathy of pleasant or comfortable. Furthermore, the addition of the verb ‘unduly’ raises an already elevated standard still higher.”

14. Lord Carnwath also indicated in paragraph 23 of KO that:

“... the expression ‘unduly harsh’ seems clearly intended to introduce a higher hurdle than that of ‘reasonableness’ under Section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further, the word ‘unduly’ implies an element of comparison. It assumes that there is a “due” level of “harshness, that is a level which may be acceptable or justifiable in the relevant context. “Unduly” implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child facing the deportation of a parent.”

15. As indicated above, the First-tier Tribunal Judge clearly referred herself to KO and the need for “something more” for a finding of undue harshness. Caution has to be exercised where the decision maker identified the correct legal precedent. It is still my judgment that the material before the First-tier Tribunal did not permit a conclusion that the facts, even at their highest, showed circumstances for DM going beyond those which would necessarily be involved for any child facing the deportation of a parent. DM experienced distress, depression and difficulties at school as a result of the separation from his father whilst he was in prison and as a result of the inability of his mother and other relatives to make up for the absence of his father. His difficulties, even taken at their highest, show the “due” level of “harshness” expected where a parent is deported. They are not capable of amounting to the elevated level or “severe” or “bleak” circumstances required for a finding that the test of undue harshness was met. It is therefore my conclusion that the decision of the First-tier Tribunal discloses a material error on a point of law and that it must be set aside to be remade.
16. The remaking of the assessment of paragraph 399(a) and the unduly harsh test is relatively straightforward given the nature of the error of law finding. It is not my view that the appellant’s deportation would be “unduly harsh” for his son. I accept that it is manifestly in DM’s best interests that his father remain in the UK. I also accept that the separation of DM from his father will be harsh but not to the elevated degree required to outweigh the public interest in the appellant’s deportation. The evidence here does not show that the difficulties DM will face are materially worse than other children whose parents faces deportation, even taking into account the impact of the medical problems of his mother and grandmother on him and accepting that he will experience at least the same emotional disturbance as he did when the appellant was imprisoned. Paragraph 399(a) of the Immigration Rules is not met.
17. It was not argued for the appellant that he could meet the provisions of paragraph 399(b) as he is not in a relationship with a person settled in the UK or a British national. It is also not arguable that he can meet paragraph 399A as he has not been lawfully resident in the UK for most of his life and, where he lived in Jamaica until the age of 18, not arguable that he would face very significant obstacles to integration there.

18. I must therefore proceed to assess whether, being unable to meet the provisions of paragraphs 399 and 399A, the appellant can show that there are very compelling circumstances over and above those provisions such that his deportation is not in the public interest.
19. The correct approach in the very compelling circumstances assessment has been clarified in a number of cases from the higher courts. The Supreme Court has done so in the case of Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60. This case confirms in paragraph 38:

“38. The implication of the new rules is that rules 399 and 399A identify particular categories of case in which the Secretary of State accepts that the public interest in the deportation of the offender is outweighed under article 8 by countervailing factors. Cases not covered by those rules (that is to say, foreign offenders who have received sentences of at least four years, or who have received sentences of between 12 months and four years but whose private or family life does not meet the requirements of rules 399 and 399A) will be dealt with on the basis that **great weight should generally be given to the public interest in the deportation of such offenders**, but that it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a **very strong claim indeed**, as Laws LJ put it in *SS (Nigeria)*. **The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders**, as assessed by Parliament and the Secretary of State. The Strasbourg jurisprudence indicates relevant factors to consider, and rules 399 and 399A provide an indication of the sorts of matters which the Secretary of State regards as very compelling. As explained at para 26 above, they can include factors bearing on the weight of the public interest in the deportation of the particular offender, such as his conduct since the offence was committed, as well as factors relating to his private or family life. Cases falling within the scope of section 32 of the 2007 Act in which the public interest in deportation is outweighed, other than those specified in the new rules themselves, are likely to be a very small minority (particularly in non-settled cases). They need not necessarily involve any circumstance which is exceptional in the sense of being extraordinary (as counsel for the Secretary of State accepted, consistently with *Huang* [2007] 2 AC 167, para 20), but they can be said to involve ‘exceptional circumstances’ in the sense that they involve a departure from the general rule. (my emphasis)”

20. In NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662, the Court of Appeal also considered the meaning of “very compelling circumstances” and how the test might be met. The Court concluded at paragraph 29, referring to the exceptions in section 117C which mirror paragraphs 399 and 399A, that a foreign criminal facing deportation is not “altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that “there are very compelling circumstances, over and above those described in Exceptions 1 and 2”. The position is, rather, that:

"As we have indicated above, a foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paragraphs 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those exceptions and those paragraphs, which made his claim based on article 8 **especially strong**. (my emphasis)".

In the case of a medium offender, the Court sets out, at paragraph 32:

"Similarly, in the case of a medium offender, if all he could advance in support of his article 8 claim was a 'near miss' case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that there were 'very compelling circumstances, over and above those described in Exceptions 1 and 2'. **He would need to have a far stronger case than that by reference to the interests protected by article 8 to bring himself within that fall back protection.** But again, in principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to article 8 but not falling within the factors described in Exceptions 1 and 2. The decision-maker, be it the Secretary of State or a tribunal, must look at all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation. (my emphasis)"

21. Following this guidance, it is not my view that this case is a "near miss" under either paragraphs 399 or 399A. The circumstances faced by DM are harsh but not unduly so. The provisions of paragraphs 399(b) and 399A are far from being met. The appellant therefore has to show other "especially strong" factors able to meet the "very compelling circumstances" test.
22. There are matters that must weigh on the appellant's side of the balance in this assessment. He has strong relationships with his immediate relatives in the UK, albeit resumed after he came to the UK in 2001 as an adult. Also, the appellant has a relationship with a former step-daughter, SS, albeit there was very little information about her in the materials beyond a letter dated 20 December 2018 which describes the appellant as her dad and refers to the appellant supporting her through a difficult time when her uncle died. The letter does not indicate how often the appellant sees her, however. Her mother's statement dated 20 December 2018 states that her daughter "would break again if he was not here" but there is little other than these subjective opinions to support a serious detriment to SS if the appellant is deported.
23. The appellant's residence in the UK for 18 years must also be weighed on his side of the balance. The weight attracting to that residence is reduced by his poor conduct in absconding immediately on arrival, remaining


illegally for 12 years and having had leave for only a few years during the time that he has been here.

24. The absence of reoffending and rehabilitation have been found not to be significant factors capable of making a material difference in the assessment of very compelling circumstances; see RA (s.117C “unduly harsh”; offence seriousness) [2019] UKUT 123 and MS (s.117C(6)) “very compelling circumstances”) [2019] UKUT 122.
25. Against the factors that can be weighed on the appellant’s side of the balance, the public interest in his deportation attracts “great weight” as indicated by the Supreme Court in Hesham Ali. The Supreme Court confirmed that only a “very strong claim indeed” can outweigh the public interest in deportation of “medium” offenders such as this appellant. The same case confirms in paragraph 38 that “the countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders”.
26. It is not my conclusion that the positive factors set out above are capable of amounting to very compelling circumstances capable of outweighing the public interest, even taking them at their highest, cumulatively and again taking account of the harshness that DM will experience if the appellant is deported. I therefore find that the decision to deport the appellant is proportionate and does not amount to a breach of Article 8 ECHR.

Notice of Decision

The decision of the First-tier Tribunal discloses an error of law and is set aside to be remade.

I remake the appeal as refused.

Signed: 
Upper Tribunal Judge Pitt

Date: 9 May 2019