



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM First-tier Tribunal No: HU/23496/2018
CHAMBER

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On the 28 February 2023**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

**CLEON OMAR REID
(NO ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Philips, instructed by Turpin & Miller Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 19 December 2022

DECISION AND REASONS

1. The appellant is a citizen of Jamaica. He has been resident in the United Kingdom since 24 August 2000. He appeals against a decision of the Secretary of State made on 7 November 2018 to refuse his human rights claim pursuant to a decision to deport him made pursuant to Section 32(5) of the UK Borders Act 2007. That in turn was based on his conviction on 21 September 2017 for possession with intent to supply cocaine for which he received a sentence of four years' duration. In addition, between 3 November 2009 and 21 September 2017 he received nine convictions for sixteen other offences.

2. The appellant's appeal against that decision was allowed in a decision of the First-tier Tribunal promulgated on 10 February 2020. For the reasons set out in my decision of 1 June 2021, a copy of which is attached, that decision was set aside.
3. As will be noted from that decision, a substantial number of findings of fact were preserved. The judge found:
4. The judge found that:-
 - (1) The appellant is a foreign criminal and having been sentenced to four years' imprisonment, the public interest in deportation would only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 339 and 399A [68];
 - (2) the appellant had not been lawfully resident in the United Kingdom for most of his life but had been for eleven years, was socially and culturally integrated into the United Kingdom, that he would be an outsider and that there would be very significant obstacles to his reintegration in Jamaica [75];
 - (3) the appellant has a genuine and subsisting relationship with his partner and two children [76] although they were not living together [78] owing to being "tagged";
 - (4) life for the appellant's partner would not be harsh and would be far from unduly harsh [82] if he were deported although it would be difficult for her;
 - (5) this was a close and functioning family and that both parents provide support for the children [91];
 - (6) the appellant's removal would not have consequences which are unduly harsh on the children, that being the anticipated outcome of his choices to become more and more involved in the criminal world of class A drugs [93];
 - (7) the appellant now has a clear understanding of all his actions which have been classed as dealing in drugs [96]; and that whilst limited weight falls to be given to rehabilitation that this did not mean that *no* weight should be given [99] but that he presents a low risk of reoffending [100]; and,
 - (8) looking at the situation as a whole taking into account his long period of lawful residence and difficulties of reintegration in Jamaica as well as his close relationship with his children that there were in these case very compelling circumstances such that he should not be deported.
5. In addition, it is accepted by the respondent that the appellant:

- a. has resided in the United Kingdom since 24 August 2000;
 - b. was granted indefinite leave to remain on 28 November 2008 as a dependant of his mother who had been granted indefinite leave to remain on 5 October 2005;
 - c. has established a family life with his British partner, Ms Douglas, and their two children INR, born 2015 and ANR, born 23 October 2016.
6. Since the decision of the First-tier Tribunal and, for that matter, my decision, a number of important factors have come to light. First, the appellant and his partner now have a third child, NR, born in May 2022. In addition, the family are living together; that was not the case in 2020 owing to tagging requirements. In addition, INR has been diagnosed with autism which impacts on the family as a whole given the severity of her behaviour to which I will turn in detail below.
7. The appellant's case is that in the circumstances, there are very compelling circumstances such that it would be unduly harsh for the two older children to remain in the United Kingdom without their father; that it would be unduly harsh for ANR, INR or NR to remain in the United Kingdom without their father and unduly harsh for Ms Douglas to remain in the United Kingdom without the appellant given the cumulative effect that would be on her, in particular on her mental health, and the difficulty in dealing with the children and a young child. It is submitted also that although the appellant had not been lawfully resident in the United Kingdom for most of his life, he was brought to the UK as a child of 10 and cannot be held responsible for his lack of status during the years. It is also submitted that he has lived here for a long time with indefinite leave to remain and that as well as being socially and culturally integrated in the United Kingdom he would face very significant obstacles to integration into Jamaica.
8. It is submitted further that in the circumstances, there are very compelling circumstances such that he should be allowed to remain in the United Kingdom and on the basis of a full proportionality assessment and the existence of the very compelling circumstances over and above Exceptions 1 and 2, that deportation is disproportionate.
9. The respondent's case is that it would not be unduly harsh to expect the children to remain in the United Kingdom without their father although it is accepted that it would be unduly harsh to expect them to relocate to Jamaica. It is submitted that the assistance of the authorities and family members would be sufficient to alleviate any stresses caused to the children should their father be removed nor is it accepted that Ms Douglas would face undue anxiety and depression and the circumstances do not reach the high test identified by the Supreme Court in HA (Iraq) v SSHD [2020] EWCA Civ 1176

10. It is further submitted that there are not very compelling circumstances over and above the Exceptions or that the appellant would find it difficult to integrate into life in Jamaica and that the decision is proportionate.

The Law

11. Both parties accept that the material issues are related to a consideration of Article 8 Human Rights Convention and are agreed as to the relevant law.
12. Section 117C of the 2002 Act 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.
- (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
- (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

Paragraph 398 of the Immigration Rules replicates the framework.

13. In the case of individuals who have been sentenced to a period of imprisonment of four years or more or if neither Exception is to be met, the test is one of “very compelling circumstances, over and above those described in Exceptions 1 and 2”.

14. I accept that “over and above the Exceptions” does not exclude or restrict the analysis to factors relevant to the issues dealt with in the Exceptions and we adopt the approach endorsed by Jackson LJ in NA (Pakistan) v SSHD [2016] EWCA Civ 662 at [37]:

37. In relation to a serious offender, it will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are “very compelling circumstances, over and above those described in Exceptions 1 and 2” as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6).

15. I observe also the comments made by the Upper Tribunal in MS (s.117C(6): “very compelling circumstances”) Philippines [2019] UKUT 122 (IAC) at [16] and [20]:

16. By contrast, the issue of whether “there are very compelling circumstances, over and above those described in Exceptions 1 and 2” is not in any sense a hard-edged question. On the contrary, it calls for a wide-ranging evaluative exercise. As NA (Pakistan) holds, that exercise is required, in the case of all foreign criminals, in order to ensure that Part 5A of the 2002 Act produces, in each such case, a result that is compatible with the United Kingdom's obligations under Article 8 of the ECHR.

...

20. For these reasons, despite Ms Patyna's elegant submissions, we find the effect of section 117C is that a court or tribunal, in determining whether there are very compelling circumstances, as required by subsection (6), must take into account the seriousness of the particular offence for which the foreign criminal was convicted, together with any

other relevant public interest considerations. Nothing in KO (Nigeria) demands a contrary conclusion.

16. I accept also that in determining the public interest, regard is to be had to what is said in Section 117C(2); namely, that the more serious the offence, the greater is the public interest in deportation (MS at [47]). Further, by making the seriousness of the offence the touchstone for determining the strength of the public interest in deportation, parliament, in enacting Section 117C(2), must have intended courts and Tribunals to have regard to more than the mere question of whether the particular foreign criminal, if allowed to remain in the United Kingdom, would pose a risk to United Kingdom society(MS at [50]).
17. An element of the general public interest is the deterrent effect upon foreign citizens “of understanding that a serious offence will normally precipitate their deportation [might] be a more powerful aid to the prevention of crime than the removal from the UK of one foreign criminal judged as likely to reoffend” (MS at [69]).
18. With regards to the extent to which rehabilitation is to be taken into account I have applied the principles set out in HA (Iraq) at [132] to [141].
19. Section 117C of the Nationality, Immigration and Asylum Act 2002 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.
 - (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting

parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

...

- (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

20. The Immigration Rules provide, so far as is relevant, as follows:

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;

(b) 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 less than 4 years but at least 12 months; or

(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.

21. Paragraph 399 and 399A provide:

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

...

22. With respect to Section 117C and paragraph 398 of the Immigration Rules the key issue here is undue harshness. The law on this is summarised in TD (Albania) [2021] EWCA Civ 619 at [20]ff:

20. In *KO (Nigeria)*, Lord Carnwath, with whom the other members of the Supreme Court agreed, explained the nature of the test of undue harshness:

"23 On the other hand 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 faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence..."

21. The appeals in *HA (Iraq)* arose from decisions of the Upper Tribunal giving guidance on the application of *KO (Nigeria)*. The decision of this court underlined that what is required in all cases is an informed evaluative assessment of whether the effect of deportation on a child or partner would be unduly harsh in the context of the strong public interest in the deportation of foreign criminals. The leading judgment of Underhill V-P contains these passages:

"51 ... The underlying question for tribunals is whether the harshness which the deportation will cause for the partner and/or child is of a sufficiently elevated degree to outweigh that public interest in the deportation of foreign criminals."

"53 ... It is inherent in the nature of an exercise of the kind required by section 117C(5) that Parliament intended that

tribunals should in each case make an informed evaluative assessment of whether the effect of the deportation of the parent or partner on their child or partner would be "unduly harsh" in the context of the strong public interest in the deportation of foreign criminals; and further exposition of that phrase will never be of more than limited value."

"56 ... if tribunals treat the essential question as being "is this level of harshness out of the ordinary?" they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly-encountered pattern. That would be dangerous. How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of "ordinariness". Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child.

57 ... Tribunals considering the parent case under Exception 2 should not err in law if in each case they carefully evaluate the likely effect of the parent's deportation on the particular child and then decide whether that effect is not merely harsh but unduly harsh applying *KO (Nigeria)* in accordance with the guidance at paras 50—53 above."

22. The decision in *HA (Iraq)* does no more than explain that what is required is a case-specific approach in which the decision-maker addresses the reality of the child's situation and fairly balances the justification for deportation and its consequences. It warns of the danger of substituting for the statutory test a generalised comparison between the child's situation and a baseline of notional ordinariness. It affirms that this is not what *KO (Nigeria)*, properly understood, requires.

The Hearing

23. It is unfortunate that it was not possible to hear this appeal until 19 December 2022. I had before me a consolidated bundle containing the bundle before the First-tier Tribunal, the supplementary bundle before the Tribunal, the respondent's bundle and updated evidence covering in significant detail the condition of ANR.
24. I heard evidence from the appellant and his partner, Ms Douglas. Both were cross-examined.

25. The appellant adopted his witness statement adding that his deportation would have an extremely harsh impact on Ms Douglas given the difficulty she would face in having to deal with a child with autism who does not understand simple instruction, has no idea of danger, no idea of how to make friends; and, that he is her only outlet. He explained that there is a possibility that ANR has ADHD as well as autism.
26. The appellant explained that the impact on ANR would be devastating. She is quite rough and boisterous, cannot sit down and she is difficult on school trips which are possible only because he always accompanies her. At times she bangs her head on the table, bites the skin of her fingers and this reduces him to tears. He said it is difficult for the family as a whole and her behaviour has a significant impact on INR who takes a lot of the burden on herself. He takes her out on her own.
27. In cross-examination the appellant said he had last visited Jamaica in 2013. He had no contact with his son, Shayden, except through a social worker in prison. Whilst there there was no support from family for his partner there is less of that now.
28. The appellant said INR goes to an afterschool club which is run for young carers because of the things she has gone through with her younger sister. She is not getting any tuition.
29. The appellant explained that ANR gets a support worker who sits with her during classes at all times. Her behaviour is getting more challenging; she does not like new people and gets overwhelmed. Most of the time he takes them to school, and they are on a housing list for a bigger property but there is nothing coming up recently. At present they have three children in one bedroom.
30. He said he would take a course if there was one available as to how to help with the children. He had been looking at videos on how to deal with autism. He said sometimes ANR still wets herself at school and she does run to see him when she sees him afterwards.
31. He said he works mainly doing deliveries which he fits round the school dropping off but not in the evenings.
32. In response to my questions about the daily routine, the appellant said that ANR does not follow instructions such as brushing her teeth or taking a shower but just mirrors what her older sister does. He cannot leave her with the baby as she is a bit forceful and does not know that she would hurt her. He said it is very difficult to go out as a family even just a trip to the shops. ANR spits out her breakfast, will make excuses, rips up clothing and her behaviour is getting scarier. She used to climb onto windowsills and likes a lot of sensory input. He accepted that now, mainstream education may no longer be suitable for her. She does not know how to play with other children which upsets him. He feels he has to hold on to her in the street as she would just run across roads otherwise as she does not understand the dangers.

33. I then heard evidence from Ms Douglas who adopted her witness statement. She said that at present INR is doing well in school and is settled but fears that if the appellant were deported she would only regress. She was only 7 and already having to deal with the pressures of her sister's aggressive behaviour towards her and she would be worried about her and her daughter's mental state if he was deported. She said it was very difficult when the appellant was in jail and this would have a massive impact and her mental state would change too.
34. With regard to ANR, Ms Douglas said that she was probably the sterner parent but the appellant was the "fun" parent and they had a good relationship. She said that she is not good in dealing with change and she would not know how to begin and to explain why her father was no longer there. That would lead to behaviour which impacts on INR as if ANR has a bad day she takes it out on her sister. She said that they are waiting for an ADHD diagnosis.
35. Ms Douglas explained that ANR's behaviour is impulsive. Sometimes she rocks back and forth, cannot stay still and, will run into the roads if she sees birds or a dog, just without thinking. Her problems had started early and eventually she was able to get an Education Health and Care Plan ("EHCP") but that had been a struggle. The local authority had assisted in getting locks placed on the windows to stop ANR from jumping out and they have to be careful opening the balcony door as she is curious and may jump off the balcony. She could not be left on her own and she could not even risk going to the bathroom herself without putting the baby in the pram or with the appellant in case ANR harms him.
36. ANR's behaviour makes it impossible to leave her alone. She said that today was the first day that she had ever left all three children with somebody else, in this case her mother.
37. She said that she did not want to say that she felt down and depressed but that is so. She said she is still trying to accept the fact that ANR is autistic and may have ADHD, her main concern on a day-to-day basis being ANR being safe.
38. Ms Douglas said she had had CBT in the past and is on the waiting list for more, she wants something to help her deal with ANR. She said she had asked for ANR to be moved to a different school. Her current school had gone against the plans put in place for her although fully aware that she has problems in coping. Every day she gets a text saying ANR has hit her head or banged it and she is not properly treated for it.
39. In cross-examination, Ms Douglas confirmed that INR is getting counselling every Thursday in school. That is because she lives with her little sister (ANR) who takes out her anger on her which can be physical. She said she is doing well at school and is part of a young carers' group.
40. She confirmed that ANR had been referred to a sleep clinic as she has sleep problems. She wakes up in the night, roams around the house

putting herself in danger, screams and sometimes jumps on her sister. She had sent in a report of the activities which she had been asked to monitor in 2021 and still not heard anything yet.

41. She said she has some help from her mother, not that she goes out of the way to do so. But when she is free they go to her house.
42. Ms Douglas said she was not taking medication at present.
43. She said that she and her husband share taking the children to school but that getting ANR ready is a struggle as she will not comply. There was no support from the appellant's family, the relationship with his mother had broken down. She had helped but more in terms of bringing things to the house rather than interacting with the children.
44. In a response to my questions Ms Douglas said that to an extent her family are blind to the problems. They did not believe in labelling ANR's behaviour. She said that it was easier when ANR had been diagnosed and to control her but she is now 6 and quite tall and that she self-isolates because of the problem she causes. She said she could not cope without the appellant.

Submissions

45. Mr Melvin relied on the skeleton argument submitting that less weight should be attached to the social work report from Julia Meeks given its age and the reference to ASD and because autism is a developmental disorder, not a mental illness. He pointed to numerous statements from friends and that family support would be available to some extent. He submitted it would not be unduly harsh although accepted there were difficulties with the middle child's needs but not over and above any family that is separated. There was nothing compelling over and above the Exceptions.
46. Ms Philips relied on her skeleton argument submitting that in reality the situation was likely to get worse and that the family needed to be looked at as a whole given the impact that ANR has on everybody and what the effect would be of her behaviour getting worse without the appellant there to help control her. She drew attention to the evidence that the family could not go out with just one carer because ANR tends to run away. She submitted that Ms Douglas would not be able to cope which would have a hugely damaging effect, she would be effectively confined to the house.

Findings

47. I have considered carefully the evidence relating to INR and ANR. There is less evidence relating to NR but she is under a year old.
48. There is no challenge to the extensive evidence regarding ANR's condition which is confirmed by letters from the NHS and the Education, Health and Care Plan reviews and the plan itself. The challenges she generates through her severe autism are set out in significant detail in

these letters and the annual review carried out by Lewisham Council on 1 September 2022. It is evident also from the documents that ANR has problems with speech and learning.

49. It is evident from the multiagency referral form that ANR has outbursts; can be physical with her sister and parents, for example biting and scratching her sister; that when getting ready for bed ANR jumps on the beds including on her sister; wakes up during the night, turns on the lights, the TV both during the week and weekends. ANR also is reluctant to follow routines and has got more restrictive with her diet as she grows older. It is noted the parents are concerned that this is becoming worse and getting no better despite trying different means of trying to calm her.
50. It is noted also in the reports that ANR is unable to communicate her needs clearly, has frequent meltdowns and her mother has difficulty in managing these. This behaviour impacts on INR who has difficulty understanding her sister's behaviour. The letter from "Drumbeat", a service for schools and children with Autism Spectrum Disorder in Lewisham, records observations of ANR which confirm the aforementioned behaviour and the difficulties there are with any transition in circumstances. Her rocking behaviour and damaging her fingers is also confirmed. This is consistent with the evidence of Ms Douglas and the appellant.
51. The dangerous behaviour which ANR exhibits is also confirmed by the community occupational therapy assessment of 13 May 2021 describing climbing on kitchen counters, putting her hands in the toaster, and attempts to climb onto furniture on the balcony to escape.
52. In the light of this evidence and in light of a lack of effective challenge to the evidence of the appellant and his partner, I accept what the reports and Mr Douglas and the appellant say about ANR's behaviour.
53. I accept also the effect and impact it has on INR who already needs support and assistance from the school in terms of counselling and afterschool club and the impact on her of her sister's behaviour.
54. The cold reality of the situation is that things are not going to improve with ANR. As she gets older and bigger, it becomes more difficult to restrain her behaviour. It is relatively easy to hold on to a 3-year-old to prevent them running into a road; it is much harder to restrain a 6 year old, let alone a 7 or 8 year old who does not understand danger and will not accept instructions. A violent 6-year-old like ANR can and will inflict more and more serious harm than a younger child, with a significant and increasingly damaging effect on the rest of the family.
55. I have no doubt that ANR's condition and how it manifests itself in her unregulated behaviour causes significant distress to the appellant and to his partner. That is entirely understandable. It is also, no doubt, exacerbated by the fact that they cannot have a normal life. It is difficult to go out as a family because of the behaviour. It is difficult to open the

windows because of the need to have window locks. Access to the balcony in the flat has to be restricted. ANR is to be supervised at all times in case she harms herself or her younger or older sister. Although the appellant works, I accept his evidence that he has structured his work as a delivery driver in such a way that he is able to help prepare the children to go to school, take them there and/or collect them taking turns with the mother.

56. I accept that there has been some family support in the past but equally on the basis of Ms Douglas's evidence in particular, I note that it was more on the terms of bringing things to the house rather than the day-to-day support that is necessary to look after a child like ANR. I note also her indication the family do not like attaching labels to the behaviour; equally, it is entirely understandable that they too have difficulty with the challenging behaviour shown by ANR. That is, perhaps, inevitable.
57. In assessing how the appellant's deportation would affect the children, and Ms Douglas, it is difficult to separate the different impacts. That is because any effect on either of the elder children would necessarily affect their behaviour which in turn affects the other sibling, the youngest child and Ms Douglas. Similarly, Ms Douglas's ability to cope and any deterioration in her mental health would impact on the children.
58. In the light of the evidence regarding ANR and the effect that any change, even small, has on her, I am satisfied that the appellant's removal would have a serious, detrimental and likely permanent impact on her. Given that she tends to lash out and is incapable of dealing with even a small change, that is likely to impact both on her siblings and on Ms Douglas significantly.
59. I bear in mind the definition of undue harshness. I am satisfied that in the circumstances, what is already a difficult situation for the family which is unlikely only to get worse, will become significantly worse and without any real prospect of change for the better. I am satisfied that ANR requires supervision, day and also night, in the sense of an adult being present to stop her from harming herself and others which would place a difficult, if not intolerable strain on a single parent. This would not be temporary, and the reality is that family help would not assist in providing that necessary supervision, nor is there any prospect of the type of support which would ameliorate the situation. The presence of one parent does, as both the appellant and his wife explained, give some respite in that the appellant is able to take his daughter out separately which gives Ms Douglas and the other children time on their own to live a relatively normal life if only for a short period. That would no longer occur and Ms Douglas would be stuck in a small flat with three children under 10 who she could not take out and would have difficulty in taking to and from school. ANR already requires support because of the impact of her sister which I consider is only likely to get significantly worse with a greater impact on her. I have no doubt also given the evidence before me that Ms

Douglas would be extremely distressed at the impact that this would have on the children as well as the separation from her partner.

60. Given that ANR's condition is not going to improve and managing her will become more difficult and she grows older and stronger, I am satisfied that on the particular circumstances of this case that removing the appellant would have unduly harsh consequences for all three children, particularly the older two. It will begin also to impact on NR as she gets older in the same way as it has impacted on INR. I accept that this would be of particular difficulty for ANR given that she cannot cope with even small changes and it would be difficult to explain to her why her father with whom she has a close bond is no longer there. I am satisfied further that the effect would be significantly beyond the threshold necessary to engaged Exception 1.
61. The First-tier Tribunal found that it would not be unduly harsh to expect Ms Douglas to relocate to Jamaica. That is a somewhat unusual finding and is to an extent in isolation. It is also to an extent artificial and inconsistent with the finding that it would be unduly harsh to expect the children to go to live in Jamaica. It is for that reason that Ms Philps submits that I should revisit that finding. I am not, however, satisfied it is necessary to do so to any great extent.
62. I am satisfied by the evidence before me that the appellant is socially and culturally integrated into the United Kingdom. He has lived here for most of his life. I accept his evidence that there would be difficulties of relocating to Jamaica given the length of time he has spent in this country, the age at which he came here, the lack of contact he has with family or friends in Jamaica irrespective of the fact that he would get a grant to leave the United Kingdom. He has little or no familiarity with Jamaica and I accept his evidence that he has not been there for nine years and that was only a holiday.
63. The appellant does not meet Exception 1 because he has not spent more than half of his life here lawfully. I accept, however, that he was not of an age when he would have made an application to obtain indefinite leave to remain which was eventually granted unless some missed observation in Ms Philps's submission that the appellant had had to wait three years for a decision on the application and that had it been granted in a timely fashion, then he would have spent more than half his life in the United Kingdom lawfully. He does not, however, meet Exception 1.

Very Compelling Circumstances

64. Given the appellant has been sentenced to a term of imprisonment of four years, there is a very strong and significant public interest in deportation. On the positive side are the following factors:
 - (1) The appellant has spent 22 of his 33 years in the United Kingdom although some of it has been spent in prison.

- (2) There is no indication that he has committed offences since 2017 but I accept that little weight should be attached to that.
 - (3) The family relationship has endured now for ten years and has been strengthened by three children. I am satisfied that there is a very strong relationship between the appellant and his children and that they form part of a close knit family group.
65. It is clearly in the children's best interest that they have their father here with them. For the reasons set out above I consider that he provides a strong level of support to the children without which their mother would find it difficult, if not impossible to cope.
66. The appellant has some cultural ties with Jamaica and has extended family. He is clearly fit to work as he has been working in the United Kingdom and I consider that he would be able to reintegrate into life in Jamaica.
67. The factors against are the conviction for four years for drugs offences which require special consideration given the pernicious effect of drugs on society and the evils that flow from dealing in class A drugs.
68. The nature of the appellant's offending casts significant doubt against him but equally I consider that that has to be weighed up against the very real risk of a family in effect ceasing to function properly as a family with all the attendant problems that would cause were he be deported. For the reasons set out above, the undue harshness would extend to all the children and to Ms Douglas who would be left in extremely difficult circumstances in trying to bring up her family.
69. Accordingly, for these reasons, and bearing in mind also the preserved facts set out at [2] above, I am satisfied that on the particular, and extreme, circumstances of this case that there are very compelling circumstances over and above Exceptions 1 and 2 such that it would be disproportionate to deport the appellant from the United Kingdom. Accordingly, I allow the appeal on a human rights basis.

Notice of Decision

- (1) The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
- (2) I re-make the appeal by allowing it on human rights grounds, albeit for different reasons.
- (3) No anonymity direction is made.

Signed

Date: 9 February 2023

Jeremy K H Rintoul

Judge of the Upper Tribunal
Immigration and Asylum Chamber

ANNEX - ERROR OF LAW DECISION



IAC-AH-SAR-V1

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

Appeal Number: HU/23496/2018

THE IMMIGRATION ACTS

**Heard via Skype at Field House
On 10 March 2021**

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**CLEON OMAR REID
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant:

Mr E Tufan, Senior Home Office Presenting Officer

For the Respondent:

Ms E Sanders, instructed by Turpin & Miller Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge O'Malley, promulgated on 10 February 2020 allowing the respondent's appeal against a decision of the Secretary of State made on 7 November 2018 to refuse his human rights claim pursuant to a decision to deport him made pursuant to Section 32(5) of the UK Borders Act 2007. That in turn was based on the appellant's conviction on 21 September 2017 for possession with intent to supply cocaine for which he received a sentence of four years' duration. Between 3 November 2009 and 21 September 2017, the appellant had received nine convictions for sixteen offences.

2. The respondent's case was that he has a family life with his partner and their two children and that there were very compelling reasons such that his deportation is disproportionate.
3. The judge found that:-
 - (i) the respondent is a foreign criminal and having been sentenced to four years' imprisonment, the public interest in deportation would only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 339 and 399A [68];
 - (ii) the respondent had not been lawfully resident in the United Kingdom for most of his life but had been for eleven years, was socially and culturally integrated into the United Kingdom, that he would be an outsider and that there would be very significant obstacles to his reintegration in Jamaica [75];
 - (iii) the respondent has a genuine and subsisting relationship with his partner and two children [76] although they were not living together [78] owing to being "tagged";
 - (iv) life for the respondent's partner would not be harsh and would be far from unduly harsh [82] if he were deported although it would be difficult for her;
 - (v) this was a close and functioning family and that both parents provide support for the children [91];
 - (vi) the respondent's removal would not have consequences which are unduly harsh on the children, that being the anticipated outcome of his choices to become more and more involved in the criminal world of class A drugs [93];
 - (vii) the respondent now has a clear understanding of all his actions which have been classed as dealing in drugs [96]; and that whilst limited weight falls to be given to rehabilitation that this did not mean that *no* weight should be given [99] but that he presents a low risk of reoffending [100]; and,
 - (viii) looking at the situation as a whole taking into account his long period of lawful residence and difficulties of reintegration in Jamaica as well as his close relationship with his children that there were in this case very compelling circumstances such that he should not be deported.
4. The Secretary of State sought permission to appeal on the grounds that the judge had erred in concluding that there were very compelling circumstances beyond those contained in the exceptions as the factors set out in the decision at [192] concerning the length of residence, reintegration in Jamaica and the consequences for his children do not go beyond the exceptions though the judge had failed to explain adequately why there were very compelling circumstances beyond those exceptions such that the public interest is outweighed and failed to have regard to the principles identified in Olarewaju [2018] EWCA Civ 557.
5. On 10 March 2020, Resident Judge J F W Phillips granted permission to appeal.
6. Directions were then issued by the Upper Tribunal on 16 March 2020 indicating that he would like it to be heard by a panel. Further directions from the president followed requiring the Secretary of State to file a statement of case with the

respondent being given permission to respond thereto with a view that the matter was to be dealt with by a remote hearing. Both parties duly complied with these directions but, for reasons which are unclear, the Upper Tribunal proceeded to decide the case without a hearing. That decision was, for the reasons set out in my decision of 30 November 2020, set aside. A copy of that decision is annexed.

7. In approaching this case, I bear in mind that an appellant tribunal should hesitate before overturning the findings of fact reached by a lower tribunal which had the advantage of hearing evidence – see Lowe v SSHD [2021] EWCA Civ 62 at [28] to [31].
8. Also of note is the decision of the Court of Appeal in NA (Pakistan) [2016] EWCA Civ 662 as discussed in HA (Iraq) [2020] EWCA Civ 1176.
9. As noted in HA (Iraq) at [29]:

29. Turning specifically to the case of foreign criminals, the effect of section 117C can be summarised as follows:

(A) In the cases covered by the two Exceptions in sub-sections (4)-(5), which apply only to medium offenders, the public interest question is answered in favour of the foreign criminal, without the need for a full proportionality assessment. Parliament has pre-determined that in the circumstances there specified the public interest in the deportation of medium offenders does not outweigh the article 8 interests of the foreign criminal or his family: they are, given, so to speak, a short cut. The consideration of whether those Exceptions apply is a self-contained exercise governed by their particular terms.

(B) In cases where the two Exceptions do not apply – that is, in the case of a serious offender or in the case of a medium offender who cannot satisfy their requirements – a full proportionality assessment is required, weighing the interference with the article 8 rights of the potential deportee and his family against the public interest in his deportation. In conducting that assessment the decision-maker is required by section 117C (6) (and paragraph 398 of the Rules) to proceed on the basis that "the public interest requires deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2".

10. And also at [33]

33. Secondly, the Court's explanation of the effect of the phrase "over and above those described in Exceptions 1 and 2", at para. 29, reads as follows:

"The phrase used in section 117C (6), in para. 398 of [the Immigration Rules] and which we have held is to be read into section 117C (3) does not mean that a foreign criminal facing deportation is 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'. ... [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 paras. 399 or 399A of [the Rules]), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong."

That passage is expressed to cover the case of both serious and medium offenders. At para. 32 the Court specifically addresses the case of medium offenders, as follows:

"... [I]n the case of a medium offender, if all [the potential deportee] 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."

Those two passages make clear that, in carrying out the full proportionality assessment which is necessary where the Exceptions do not apply, facts and matters that were relevant to the assessment of whether either Exception applied are not "exhausted" if the conclusion is that they do not. They remain relevant to the overall assessment, and could be sufficient to outweigh the public interest in deportation either, if specially strong, by themselves^[3] or in combination with other factors

11. I am satisfied also that in assessing whether there are any particular very compelling circumstances the assessment is cumulative. I accept also that the judge was entitled to attach some, if little, weight to rehabilitation.
12. Whilst the appellant had sought to elaborate on her grounds, I am not satisfied that it would be appropriate to permit this given they are raised at a late stage. Further, in my view they do not add to the grounds, nor for that matter do they meet the threshold of arguable merit. As submitted by the respondent, the reference to the facilitated return scheme is erroneous given it does not apply when somebody is given a custodial sentence of four years or more. In effect, what the Secretary of State seeks to do in the proposed amended grounds is to make a perversity challenge but the grounds cited come nowhere near that high threshold.
13. In reaching my decision I have taken into account the submissions made before me and also the statements of case put by both representatives. I bear in mind

following Hesham Ali [2014] EWCA Civ 1304 at [38] and the cases cited above, that very compelling circumstances means a very strong claim indeed.

14. In that context, and in the context of the passages cited above, I bear in mind the finding that the judge reached that the appellant's partner being separated from him would not be unduly harsh and also the finding that it would not be unduly harsh on the children. That said, it is arguable that the judge did not apply an individual consideration to the effect on the children as would now as referred to in HA (Iraq).
15. It is evident in this case that the judge found that none of the factors individually amounted to very compelling circumstances but she does list factors such as period of lawful residence, difficulties in reintegration, relationship with the children, difficulty of separation on a current commitment to rehabilitation observing that the case is marginal.
16. Despite Ms Sanders' submissions, I consider that the judge has in this case failed properly to explain why given the very high threshold involved and given the findings that Exceptions 1 and 2 were not made out albeit that there were findings that the appellant, his partner and children would face difficulties that, nonetheless there were very compelling circumstances over and above those such that removal would be disproportionate.
17. I consider that despite Ms Sanders' best efforts this reasoning is not sustainable. In reaching that conclusion I consider that it cannot be argued that the judge would, had she directed herself in line with HA (Iraq), have concluded that the exception was met; and in any event, that would not have been sufficient. I consider that there is, on the findings of fact made, no proper basis for the finding that there would be very compelling circumstances which, importantly outweigh the public interest in this case which is high given the offending.
18. I bear in mind also the submissions made by Ms Sanders in respect of Unane of which note must be taken but it cannot be said that there had not been a balancing exercise nor that the Rules prevent this. To that extent it is of little assistance. I note also the decision of the Court of Appeal in AA (Nigeria) but the factors in that case are different.
19. For all these reasons, I consider that the decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. The decision will be remade in the Upper Tribunal on a date to be fixed.
3. The findings of the First-tier Tribunal with respect to Exceptions 1 and 2 are preserved, with the exception of the finding that it would not be unduly harsh for the children to be separated from their father; in the light of HA (Iraq) I consider those findings need to be made afresh.
4. Any party wishing to rely on additional evidence must serve it on the Upper Tribunal and on the other party at least 14 days before the next hearing,

accompanied by a statement pursuant to rule 15 (2A) explaining why it should be admitted.

Signed

Date 1 June 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul