IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-004595

First-tier Tribunal No: HU/00512/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 7th of January 2025

Before

UPPER TRIBUNAL JUDGE KHAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHAWN RICKFORD MCLEOD
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr M Parvar, Senior Home Office Presenting Officer
For the Respondent: Mr A Stedman, Counsel, instructed by Imperium Chambers

Heard at Field House on 10 December 2024

DECISION AND REASONS

1. I give an oral decision following submissions heard from Mr Parvar and Mr Stedman, respectively.

2. This is an appeal by the Secretary of State against a decision by First-tier Tribunal Judge Brannan ('the judge') which was promulgated on 9 August 2024. For convenience, I am going to refer to the parties as they were designated in the First-tier Tribunal.

3. The appellant is a citizen of Jamaica born in 1985 who arrived in the UK in January 2000 or 2001 although this is unverified. Between October 2011 to March 2018, he was granted discretionary leave and in June 2019 he was granted indefinite leave to remain ('ILR'). Between March 2023 and August 2024, he was convicted of three counts of possession with intent to supply a class A controlled drug and sentenced to a period of imprisonment of three years and four months.

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A deportation order against the appellant was made under Section 32(5) of the UK Borders Act in April 2023. In February 2024 the respondent made a decision to refuse the appellant's human rights claim against deportation.

4. The appellant maintains that he cannot be deported because:

(a) deporting him would violate his Article 8 rights pursuant to the European Convention on Human Rights (ECHR) through the framework provided by Section 117C of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act').

Relevant Law

5. This case turns on whether the judge correctly applied Section 117C of the Nationality, Immigration and Asylum Act 2002. Given the significance of this provision to the appeal, I set it out in full. Section 117C provides:

> 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."

6. Where a foreign criminal has been sentenced to imprisonment for less than four years, which is the case in this appeal, the effect of section 117C(3) is that deportation of that person will not be justified if either of the Exceptions stipulated in subsections (4) and (5) applies. See para. 17 of *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176.

Decision of the First-tier Tribunal

7. Before the First-tier Tribunal, the respondent accepted that the appellant had a genuine and subsisting relationship with his three children and the only disputed question was whether it would be unduly harsh for them to go to Jamaica with him; and, if not, whether there were very compelling circumstances, which required balancing the public interest in the appellant's deportation because of his criminality against the level of interference with his family and private life.

8. The judge considered both of the Exceptions set out in sub-sections (4) and (5) of Section 117C.

9. *Exception 1*: The judge's analysis of Exception 1 is set out in paragraph [13] of the decision. The judge found that sub-section (4)(a) was not met as it was undisputed that the appellant had not been lawfully resident in the UK for over half of his life.

10. Having found that Exception 1 was not satisfied, the judge proceeded to consider Exception 2. In this respect, as the appellant had entered his relationship with Mrs McLeod while he was in the UK unlawfully. The judge observed that little weight was to be given to that relationship under s.117B(4) of the NIAA, so deportation would not be unduly harsh on her. The main focus therefore in relation to the exceptions was whether deportation would be 'unduly harsh' on the three children of the appellant with Mrs McLeod, born respectively in April 2017, May 2020 and June 2023.

11. *Exception 2.* The key findings regarding the test of 'unduly harsh' in Exception 2 are set out in paragraphs [43]-[52], where the judge found that the effect of the appellant's deportation would be unduly harsh on his (British citizen) child.

12. Having found that Exception 2 was met there was no need for the judge to consider very compelling circumstances under Section 117C (6).

Grounds of Appeal

13. The respondent's grounds challenge two aspects of the decision:

    (a) the judge permitted a procedural irregularity by allowing the appellant unsupervised time with his own key witnesses prior to their giving evidence;

    (b) the judge's finding that Exception 2 is satisfied.

14. On 2 October 2024, First-tier Tribunal Judge Shepherd granted permission to appeal on ground 2 (only) stating it was arguable. He said although the judge had analysed the evidence carefully and had cited the correct legal provisions and tests, it was arguably unclear why he then arrived at the overall conclusion in [51]-[52] that the effect on the children would be unduly harsh, given many of the findings prior to that conclusion appeared to have been against the appellant.

Discussion

15. I have not set out the submissions of either party. However, my analysis of the case reflects the submissions they made. I wish to express our gratitude for the high quality of the submissions.

16. The First-tier Judge accepted that Exception 2 applied based on the appellant having a genuine and subsisting relationship with his three children which was not disputed by the respondent before the First-tier Tribunal hearing (see paragraph 6(a) of the decision). The judge's key finding was that the effect of the appellant's deportation would be unduly harsh on his children. Having found that Exception 2 applied, the judge said there was no need to consider very compelling circumstances under Section 117C (6).

17. The grounds of appeal assert that the judge misdirected himself in law as it is arguably unclear how he arrived at the overall conclusion that the effect on the children would be unduly harsh given that many of the findings prior to that conclusion appear to have been against the appellant. In this regard:

At [37] the judge stated "According to the OASys report, the appellant said he intended to continue to use cannabis. He repeated that at the hearing when I asked him";

At [39] the judge found that there is no evidence of any specific harm having come to the children during the appellant's incarceration except the emotional toll of separation;

At [40] the judge stated "I find that (and I say Mrs McLeod, the appellant's wife) she is not a person without support". In that regard the judge was clearly saying there is family support for Mrs McLeod and the children;

At [43] the judge confirmed that there was a genuine and subsisting parental relationship.

At [44] the judge turned to the precariousness of the family finances and observed that a single parent in debt makes that even worse. At paragraph 5 of the OASys Report, where questions had been asked about the offender's financial situation, it is marked as 'significant problems', observing some problems in financial management and some problems on illegal earnings. The text further stated, "Prior to custody, Mr McLeod's main source of income was through drug dealing and his full-time employment". It goes on to say:

> "I would assess that the prime motivation for the committal of this offence was for financial gain. Mr McLeod reports no debts and indicates no issues managing money. He also states in interview that he has no savings of any kind. Mr McLeod's wife has stated that she is happy to support Mr McLeod financially upon his release from custody".

18. Mr Stedman said to the Tribunal that when one talked about 'support' that could take many forms. I find that must be right in principle, but it is clear that the form of support that Mrs McLeod appears to be suggesting she can offer was financial support. This is because the OASys Report stated that Mr McLeod's wife was happy to support Mr McLeod financially upon his release from custody.

19. The offer of financial support is obviously at odds with the evidence found by the judge that there is debt in the family. The OASys Report also stated that the appellant's main source of income was through drug dealing and his full-time

employment and that his prime motivation for the committal of the offence was financial gain.

20. At [46] the judge does not pull any punches about the appellant's drug dealing or the drug habit. He says:

> "Put bluntly, you cannot look after your children properly or do a job properly if you are stoned. It is also illegal, and the rule of law overrides any contention that it is legitimate because it is part of the Appellant's culture. Its illegality inevitably means that users end up in contact with drug dealers and connected to their criminal world. Its use opens doors to more serious drugs and criminality. The Appellant steps down a slippery slope to using heroin and dealing again if he uses cannabis. But it is he who has the power to decide what to do and I accept that he genuinely wants to avoid reoffending (except for cannabis use) so he can care for his children".

21. Here lies another contradiction in the evidence. It is said that the appellant genuinely wants to avoid reoffending, yet he has accepted that he will continue to use cannabis, and the judge has noted that.

22. At [48] the judge talks about the danger of drugs. He says:

> "Most fathers manage to avoid drug addiction, drug dealing and imprisonment. I cannot ignore that the Appellant did put the children in danger by having drugs at home. Children die from accidentally ingesting drugs. Drug dealing begets violence. It is fortunate that no such harm actually occurred. I accept that social services have decided to take no action".

23. At [50] the judge turns to the key question. "The question for me is whether the Appellant's deportation is unduly harsh on the children".

He says:

> "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 antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher".

24. The judge next turns to the relevant test which he has set out. Therefore, this is not a case where the judge has misdirected himself as to the law. The question is whether he has misdirected himself as to the application of the law in his reasoning. His application of the law is at [51] and [52]. He says:

> "51. This is not a clearcut case. Some might say that leaving children in the care of only one parent is what deportation does. That would be wrong, because in many cases there is a less harsh option of the children leaving the UK with the deportee. In this case, the Respondent accepts that going together to Jamaica would be unduly harsh. I agree with that, and need say no more about it as it is not in dispute. The breakup of the Appellant from his children will, I find on balance, make a bad situation worse. For the reasons I have given it reaches the elevated threshold of being unduly harsh.

52. If the Appellant refrains from offending, including use of drugs, in all probability the prospects of the children will be considerably improved. On the other hand, he will provide little help if he returns to his old habits. The decision is his, but only if the Appellant is not deported".

25. Mr Stedman says the Secretary of State has not discharged the burden of showing that there is an arguable error of law in the judge's reasoning. With respect, I find there is a material error of law as a result of the judge's inadequate and confused reasoning. The judge was well aware, that the appellant intended to continue to use cannabis. Despite this clear evidence, the judge goes on to find that if he refrains from offending, including from the use of drugs that the prospects of the children will be considerably improved. He then says the break-up of the family will make a bad situation worse, and reaches the conclusion based on his stated reasons that the elevated threshold for unduly harsh is met.

26. The judge fails to provide any adequate or persuasive reasoning for why the limited reasons he has stated at [51] and [52] meets the 'highly elevated threshold or standard' of unduly harsh or how his conclusion can be reconciled with the several findings made prior to this conclusion which strongly weigh in favour of deportation. Overall, the judge's reasoning lacks clarity and constitutes a material error of law. He reaches a conclusion which is clearly unsupported by the limited reasons provided.

27. For the reasons mentioned, I find there is a material error of law in respect of Ground 2. Having heard submissions from the parties, I am satisfied this matter should be remitted to the First -tier Tribunal to be heard afresh. No findings are preserved.

Notice of the decision

28. The decision of the First-tier Tribunal Judge involved the making of a material error of law and is set aside. The case is remitted to the first-tier Tribunal to be heard afresh.

K.A.Khan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 December 2024