IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01415/2014

<u>THE IMMIGRATION ACTS</u>

Heard at Field House **Decision & Reasons Promulgated**
On 11 January 2016 **On 11 February 2016**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
<u>Appellant</u>
and

MARK ANTHONY REID
(ANONYMITY DIRECTION NOT MADE)
<u>Respondent</u>

<u>Representation</u>:
For the Appellant: Mr D Clarke, Home Office Presenting Officer
For the Respondent: Mr. P. Haywood, counsel, instructed by Owen Stevens Solicitors

<u>DECISION AND REASONS</u>

<u>BASIC FACTS OF THE APPELLANT'S CASE</u>

1. The Appellant, who was born on 16 August 1963, is a national of Jamaica. In the present proceedings he said that he entered the United Kingdom illegally using a cousin's ID in May 1993. His older son [Jo] was born on [-]. His next child, a daughter called [G], was born on [-] and on [-] he married their mother, [K]. A further daughter, [Je], was born [-] and on 14 July 2008 he applied for leave to remain under the seven year policy on

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the basis that he had a child who had been living in the United Kingdom for more than seven years and who was a British citizen.

2. This application was refused but subsequently allowed on appeal and in October 2009 the Appellant was granted discretionary leave until 26 October 2012. Meanwhile a further daughter, [Ka], had been born on [-]. On 25 October 2012 he applied for further leave to remain. However on 8 November 2012 a letter was sent to the Appellant asking him to put forward reasons why he should not be deported. On 2 January 2013 he replied to the questionnaire.

3. The Appellant has a long criminal history. On 15 May 1997 he received a conditional discharge for being in possession of a bladed article and on 4 March 1999 he was given a community service order for being in possession of an offensive weapon.

4. On 30 January 2003 he was found guilty of possession of a Class A drug with intent to supply and sentenced to two years in prison. Then, on 7 October 2008 he was convicted of possession of heroin and sentenced to one year suspended for one year. Subsequently, on 22 October 2011 he received a conditional discharge for obstructing a drug search.

5. Finally, on 14 September 2012 he was convicted of five counts of supplying crack cocaine and one count of supplying heroin with a number of other people. They were supplying these drugs on the streets. He was initially sentenced to six years in prison but this was reduced to four years by the Court of Appeal.

6. It is because of this conviction that his application for further leave was refused and he was asked for reasons why he should not be deported.

7. The Appellant was released on licence on 19 May 2014 and a deportation order was made in relation to him on 9 July 2014. This was an automatic deportation order under Section 32 of the UK Borders Act as he had been sentenced to more than twelve months in prison. He appealed against this decision on 21 July 2014 on the basis of his rights under Article 8 of the European Convention on Human Rights, asserting that he had no family in Jamaica to return to and that his deportation would have an adverse affect on his children.

8. On 16 January 2015 First-tier Tribunal Judge Herbert allowed his appeal. The Secretary of State subsequently appealed against this decision on 22 January 2015 and First-tier Tribunal Judge Baker granted permission to appeal on 6 February 2015.

<u>ERROR OF LAW HEARING</u>

9. At the error of law hearing Mr. Clarke submitted that the Appellant had had to establish that there were very compelling circumstances in his case over and above the exceptions described in paragraphs 399 and 399A of the Immigration Rules and had failed to do so. He also submitted that

there was insufficient evidence to justify some of the findings of fact reached by the First-tier Judge in paragraphs 71 to 80 of his decision. Instead, he erroneously relied on bare assertion or judicial notice. He emphasised that the Appellant needed to do more than show that the effect of his deportation on his family members would be unduly harsh and very compelling.

10. Mr. Haywood then replied and submitted that the First-tier Tribunal Judge had directed himself to sections 117A and C of the Nationality, Immigration and Asylum Act 2002 and relevant case law. He also submitted that the Judge was entitled to reach a decision which was fact sensitive and that his analysis conformed with the relevant case law. He also submitted that read as a whole the decision took into account all relevant factors, including the oral evidence given at the appeal hearing. He then referred me to the evidence relied upon by the First-tier Tribunal Judge in some detail.

11. I accept that First-tier Tribunal Judge Herbert did refer to sections 117A and C of the Nationality, Immigration and Asylum Act 2002 and some relevant case law in paragraphs 56 – 62 of his decision. But in paragraph 61 of his decision he noted that the starting point for his consideration was to ask whether or not the Appellant could bring himself within paragraph 339 and 339A of the new Rules by asking itself whether there were very compelling reasons within the exceptional circumstances rule break in paragraph 339 to outweigh the strong public interest of deportation in the appellant's case.

12. However, as the Appellant had been sentenced to four years imprisonment and he did not fall within sub-paragraphs 398(b) and (c) and paragraphs 399 and 399A of the Immigration Rules, the correct test to be applied was whether the public interest in deportation would be outweighed by very compelling circumstances over and above those described in paragraphs 399 and 399A.

13. In paragraph 63 the First-tier Tribunal Judge did say that

> "The starting point is that a foreign criminal's deportation remaining conducive to the public good notwithstanding his successful reliance on Article 8. In the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who do not satisfy paragraphs 398 and 399A. It is only exceptionally that such foreign criminals would succeed in showing their rights under Article 8(1) trump the public interest in their deportation."

14. First-tier Tribunal Judge Herbert did also give considerable weight to the public interest in deportation but when conducting a balancing exercise, he relied on a passage from *McLarty (Deportation – proportionality balance)* [2014] UKUT 00315 (IAC) which stated that:

> "Where two important countervailing principles collide – the public interest in deportation versus the interests of the individual in having an opportunity to develop a relationship with his children, fairness

requires that the Tribunal provide full and proper reasons in relation to their consideration of both these factors"

15. He failed to remind himself of another passage from *McLarty,* which held that:

> "There can be little doubt that, in enacting the UK Borders Act 2007, Parliament views the object of deporting those with a criminal record as a very strong policy, which is constant in all cases (*SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550). The weight to be attached to that object will, however, include a variable component, which reflects the criminality in issue. Nevertheless, Parliament has tilted the scales strongly in favour of deportation and for them to return to the level and then swing in favour of a criminal opposing deportation there must be compelling reasons, which must be exceptional."

16. The First-tier Tribunal Judge did briefly consider the Appellant's criminal history in paragraphs 6 and 67 of his decision. But, when considering his criminality, the Judge did not explicitly take into account the fact that the Appellant had been convicted on two occasions for possession with intent to supply Class A drugs, once for possessing a Class A drug and once for obstructing a drugs search.

17. Therefore, in my view, he was not following the approach adopted in *Chege (s117D: Article 8: approach: Kenya)* [2015] UKUT 165 (IAC) by the Upper Tribunal where it held that the questions to be asked were whether there are very compelling circumstances over and above those in paragraphs 399 and 399A of the Immigration Rules, such identification to be informed by the seriousness of the criminality and taking into account the factors set out in section 117B.

18. At most the First-tier Tribunal Judge said in paragraph 67 of his decision that the context of the last offence was that he was street dealing to feed his own habit as he was addicted to cocaine and heroin. He did not analyse the seriousness of the Appellant's criminality.

19. He also needed to find compelling factors which were over and above the fact that it may be unduly harsh on his children and wife for him to be deported to Jamaica.

20. What is said by the Appellant's Counsel is that the First-tier Tribunal Judge did look at additional factors between paragraphs 71 and 83 of his decision and that cumulatively those factors were sufficient to amount to very compelling circumstances.

21. I have some difficulties with that submission. Firstly, many of the factors relied on by the First-tier Tribunal are used by him to led to the conclusion at paragraph 81 of his decision that it would be unduly harsh to expect the Appellant's wife and children to join him in Jamaica. Others relate to the fact that the children may have to grow up here without him and his wife may not be able to qualify as a midwife. These may have an unduly harsh

effect on them but they could not be characterised as very compelling. In *AJ (Angola) v Secretary of State for the Home Department* [2014] EWCA Civ 1636 the Court of Appeal held that compelling meant powerful or irresistible and said that the use of “very” imposed a very high threshold.

22. I also note that the evidence suggested that the Appellant’s wife had been able to attend her course on a part-time basis when her children were at nursery and school and that she had been the breadwinner for most of the time during which the Appellant said he had been addicted.

23. In paragraph 71 of his decision the First-tier Tribunal Judge found that the Appellant had shown insight into his offending and that there was evidence of his remorse and progress while in custody. He also noted that the Appellant had the benefit of a loving wife who had stood by him and four children who appeared devoted to him. Again these could not be characterised as very compelling factors.

24. The First-tier Tribunal Judge also relied on generalised assertions, which are not backed up with objective evidence or expert evidence. For example, at paragraph 76 of his decision the First-tier Tribunal Judge said: “I find that there is overwhelming objective evidence that despite an addiction and a previous period of criminality such parents can nevertheless provide good enough parenting”. That may be the case but there was no evidence in this particular case to back up that finding.

25. The First-tier Tribunal Judge also found in paragraph 77 of his decision that the Appellant’s removal “would place all four children in a downward spiral to expose them to varying degrees of emotional harm because single parent families where the father figure is removed are more likely to end in care, or to enter into delinquency and failure at school”. Again that may well be the finding of some research but it was not research that was before the Judge. He also referred in paragraph 78 to statements by the Metropolitan Police about Afro-Caribbean children falling into delinquency but again they were not adduced at the appeal.

26. There was some evidence from their schools that the older two children’s behaviour had deteriorated whilst the father was in prison on the last occasion and that their behaviour had improved when he came out. But there was no evidence about other possible reasons for misbehaviour especially because the documents on file noted there had been periods of domestic violence in the past and also there had been child protection plans in place.

27. At paragraph 81 of his decision the First-tier Tribunal Judge also found that it would be unduly harsh to expect the Appellant's wife to remove herself and children to Jamaica as it would significantly interfere with their education and development and prevent her from qualifying as a midwife and undermine the parents' ability to bring up and care for the children as there was not a level of social services support to the extent there is in the United Kingdom. Again there was no objective evidence to show that the

children would not be able to complete their education in Jamaica. Furthermore, the evidence before the Judge was that there was no longer any social services support in place for the family and that social services had no present concerns about the family. '

28. At paragraph 82 of his decision the First-tier Tribunal Judge also referred to the family being left effectively destitute and reliant upon extended family members that they may not be able to locate, if they joined the Appellant in Jamaica. Instead, the evidence suggested that the Appellant's wife had been born and brought up in Jamaica and that at least her mother was still living there. The Appellant's wife had also been working as a carer and was shortly to qualify as a midwife. The Appellant had also said in evidence that he wished to work as a labourer or hairdresser and he had obtained qualifications whilst in prison on the last occasion which would assist him in getting a job in construction.

29. As a consequence, I find that First-tier Tribunal Judge Herbert did make material errors of law in his decision in the manner in which he applied the relevant legal test to establish whether there were very compelling circumstances over and above the factors referred to in paragraphs 399 and 399A of the Immigration Rules and section 117B of the Nationality, Immigration and Asylum Act 2002.

Notice of Decision

30. The Respondent’s appeal is allowed.

31. The Appellant’s appeal is remitted to the First-tier Tribunal for a *de novo* hearing before a First-tier Tribunal Judge other than First-tier Tribunal Judge Herbert.

Signed

Nadine Finch Date 4 February 2016
Upper Tribunal Judge Finch