Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13610/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18th August 2017	**On 05th September 2017**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR B M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Denholm instructed by Bail for Immigration Detainees
For the Respondent: Mr P Armstrong, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant seeks permission in time to appeal against the decision of First-tier Tribunal Judge Rodger promulgated on 1st June 2016 dismissing

his appeal against the decision of the respondent to deport him pursuant to the provisions of Section 32(5) of the UK Borders Act 2007. The grant of permission was unclear stating that there was some arguable merit in grounds (ii), (vi) and (vii) and also stating "*There is less arguable merit in the other grounds"* and addressed grounds (i), (iv) and (v) but omitted any reference to ground (iii). The grant indicates there was some merit, albeit little in the latter grounds, save for (iii). Nonetheless, I conclude that permission was granted in all grounds save (iii) and for this ground, for completeness, I grant permission.

2. The appellant is a national of Lesotho aged 44 and has been resident in the United Kingdom since the age of 9 and has five children with his long-term British partner C F. The children are all British and range in age from 3 to 19. His eldest daughter So is 7 months pregnant at the time of writing.

Grounds of Permission

3. The appellant faced deportation following his conviction on 17th October 2010 for conspiracy to defraud and seven counts of fraud for which he was sentenced to seven-and-a-half years' imprisonment. His family remained in close contact with him during his imprisonment and he was released on 22nd July 2014 and had been living with his family since that date.

4. Given the length of sentence imposed the appellant must establish that he satisfy the test of "very compelling circumstances" derived from paragraph 398 of the Immigration Rules HC 395 (as amended) and set out in Section 117C(6) of the Nationality, Immigration and Asylum Act 2002, in order to succeed in his appeal.

5. It was contended that the facts of the case met the threshold owing to:-

   (a) the impact of his deportation on his children;

   (b) the impact of his deportation on Ms F;

   (c) his broader family ties in the in the United Kingdom including his mother and his brother;

   (d) his length of residence in the United Kingdom;

   (e) his strong cultural ties to the United Kingdom; and

   (f) the low risk of his reoffending and the assessed low risk of harm.

6. Ground (i) argued that the determination was marred by errors about the family support available to Ms F and which could be derived from the appellant's family who were in the UK in the event of the appellant's deportation, (referred to at paragraph 60).

7. There was reference in paragraph 60 of the decision to:-

> "*Ms F also has the support of the appellant's family who are in the UK. His sister, Claire, was at one stage helping to look after Sa and all of the children are close to their cousins, Claire's children. Ms F and the children see the appellant's mother and brother on a regular basis and did so during the appellant's absence*".

8. At the hearing it was contended that the reference to Ms F having the support of the appellant's sister Claire was incorrect. That was the case when her first statement was prepared in April 2015 but subsequently, as the judge indicated, she was now resident in South Africa and the assumed support did not exist. Similarly, at paragraph 106 the judge reasoned:-

> "*whilst I have considered the circumstances of the family unit and whilst it is without a doubt A will be greatly missed by his partner and children and that they will be likely to be very sad and unhappy about his deportation, I am not satisfied that the effect on them is not something that they cannot be helped through with secondary therapy or with the support of their mother**, aunty,** uncle or grandparents in the UK or that the effect on them would be unduly harsh in all of the circumstances*".

9. Again, Aunt Claire was not in the United Kingdom and this was contrary to the judge's assumption.

10. The judge clearly attached significant weight to the availability of supporters' protective factor in relation to Ms F's ability to cope with caring for her children in the appellant's absence. Her conclusions on that issue were clearly premised on a number of factual errors and inaccurate assumptions which rendered her analysis unsafe.

11. I am not persuaded that the judge erred in her assessment of the support available to Ms F. In paragraph 60(a) the judge is clear that Ms F has family in the UK who provided her and continued to provide her with support and assistance "through visits and regular telephone calls and contact through social media". The judge also identified at 60(b) that Ms F had a supportive relationship with her mother who visited from Spain and assists her with the children when she is visiting and further had regular contact with her mother through telephone calls and social media. At 60(c) the judge recognises that the support from the sister had been limited because it refers to assistance being "***at one stage*** helping to look after Sa".

12. As the grounds of appeal identify, there are three other aunts in the United Kingdom on Ms F's side, one of whom she is close to and sees six to eight times a year. That Ms F is not close to her father or that the aunt, sister of the appellant, has departed for South Africa does not undermine the overall assessment of the judge's view of the support that Ms F could derive from the family and various members of the family are cited as being able to offer support. It was not necessarily physical presence which

was important and the judge was clear that some of the support derived from the telephone calls and contact through social media which would not be interrupted by Claire's removal to South Africa.

13. As the judge stated at 60(e):-

> "*Whilst Ms F had found it difficult coping with the children in the appellant's absence, there were no safeguarding or welfare issues regarding her care of the children or her ability to cope with the children or to provide care and support for them.*"

The judge clearly assumed that there was a range of support from a variety of sources and the physical absence of one member of the family would not undermine the overall findings. Specifically the judge noted at 60(h) that:-

> "*Ms F was commended by the Head Teacher of Q School for her effort and determination to maintain the family unit and whilst she did encounter problems with the children, I am satisfied that she was not unable to cope*".

The judge was clear in taking into account Ms F's mental health difficulties and a possible significant deterioration, but as the judge pointed out at 60(j) she was not satisfied that:-

> "*Mr Horrocks has considered the availability of support to each of the children, as evidenced by previous involvement of outside agencies, which would be likely to have a positive impact on the mental health and behaviour of the children and on the family unit itself*".

14. As noted these findings do not depend on the sister being available to assist Ms F on a day-to-day basis and she was aware of the contact between Ms F and other family members when she made her findings at 60(k). She specifically found:-

> "*I am satisfied that if Ms F felt a deterioration in her ability to cope and her mental health, that she is aware of the availability of help via her GP or other agencies and that she would be able to seek support or treatment if she were to suffer a deterioration or an inability to cope.*"

15. Ground (ii) asserted that the judge failed to give any or sufficient consideration to the impact of the appellant's removal upon his two youngest children Se and Sa. In the oral submissions Mr Denholm submitted that this was at the heart of the assessment and only very limited consideration had been given. He asserted the judge had failed to give any or adequate reasons for concluding that the impact on the deportation on Se and Sa did not give rise to "very compelling circumstances" and there was extensive evidence before the Tribunal as to the adverse affect. The exercise in which the judge was engaged was necessarily forward looking. He argued that there was considerable

evidence before the judge dealing with the position of Se and Sa, not least from Professor Yule, Emeritus Professor of Applied Child Psychology at the Institute of Psychiatry, King's College London, and from Judith Jones BA CQSW, Independent Social Worker and Peter Horrocks, Independent Social Worker, who identified that Se and Sa would both suffer emotional harm at the separation from their father. The judge failed to take this material properly into account.

16. There is no merit in this ground and I find no error of law in the judge's decision regarding to the two younger children. At paragraph 48 the judge identified there was a wealth of evidence regarding the appellant's children and the effect of the appellant's absence on them during his imprisonment and immigration detention and the judge had carefully considered all of the evidence set out in the bundles. Indeed, the judge proceeds at paragraph 48 to set out all the various aspects of evidence and the reports individually, including those of Professor Yule, Judith Jones and Peter Horrocks. It is not incumbent on the judge further to **Budhathoki (reasons for decision)** [2014] UKUT 00341 to address every single piece of evidence but in this instance the judge has carefully weighed all the key reports.

17. It is quite clear that the judge addressed the difficulties of all of the children, including the youngest, noting specifically at paragraph 48 citing from Professor Yule's report that

> *"The children's psychological problems are very likely to increase should their father again be separated from them, this time by deportation and so at a distance where they cannot visit".*

18. There was specific reference to Se in relation to the report from the Head of Q Infant & Nursery School and how each child had reacted to the absence of the appellant and noted that Se had been more settled, happy and very proud of his new baby brother [Sa] since his father's return. The judge specifically identified that there was no reference as to why the school thought that Ms F would not be able to cope and maintain the family unit as she had done previously when the appellant was in prison. Similarly, the report of Peter Horrocks such that the family unit were treated as suffering emotional harm as a whole was quoted from by the judge and taken into account.

19. Not least there was a separate assessment of Se and Sa at paragraph 74 but no diagnosis of mental health conditions or diagnosed condition for either boy related to their father's absence. The judge returned at paragraph 96 identifying no safeguarding issues around the care of the children and that Ms F was able to obtain the support of CAMHS as and when required.

20. Finally, at paragraph 98 the judge recognises that it would be "devastating for the children and Ms F" – and that would include the youngest children - and there would be a lot of emotional upset. I am not persuaded that on

reading the decision as a whole that the judge did not address the interests of the younger children. That is simply not clear from the decision. The judge addressed the reports fully and carefully and the weight to be placed on various aspects of evidence is a matter for the judge **SS (Sri Lanka)** [2012] Civ 155.

21. Ground (iii). It was asserted that the judge's conclusion that the impact of the appellant's deportation of all five of his children was mitigated by the fact that all of the children are now "more mature" than they were when in prison was irrational. I find that was taken out of context as the judge states the report of Professor Yule diagnosing Sie with anxiety was dated 25 February 2015. The hearing was in fact held in May 2017 and the judge noted that there was more up-to-date evidence on the point citing that Sie was "doing well at school and is more mature than during her father's previous absence".

22. Although the judge has stated in respect of all of the children that they are more mature, are doing well at school, the judge was overall clear it was not just that the children had matured and shown awareness and remorse for past behaviour, but that there were avenues of support for the children that Ms F could seek out agencies such as CAMHS, that Ms F had coped during the appellant's previous absence, and was likely to be able to cope again with being a single parent to the children.

23. Not least So had now a partner and was pregnant, although living at home but would have care available to her.

24. The judge repeats that there were no safeguarding issues surrounding the care of the children and Ms F, such that it necessitated intervention on her part or social services (paragraph 96). Indeed, Ms F is drawn as an effective and capable person who was aware of the support systems and modes of support available to her (paragraph 97). Between paragraphs 75 and 80 the judge made an overall assessment of the best interests of the children and indeed all four of the children and accepted that it would be in the best interests of any child to remain in a two parent family. There are safeguarding issues of where there are none "in this appeal".

25. Nevertheless, and this is the key issue, at paragraph 80 the judge found that whilst it was in the best interests of the children and no doubt the partner to have their father and no doubt the partner to have their father remain in the UK, they did not constitute very compelling circumstances against deportation. There is therefore no merit in this ground.

26. Ground (iv). The grounds asserted there was an erroneous approach to 'social and cultural integration'. In considering whether the deportation was "unduly harsh" as a step on the route to considering whether it gave rise to "very compelling circumstances" the judge erroneously concluded that it was borderline as to whether the appellant was socially or culturally integrated in the UK because he had been convicted of a serious offence. This was a misdirection. The appellant was obviously socially and

culturally integrated, not least by virtue of the fact that he has a British partner of twenty years standing and five British children. The respondent's own guidance on the approach to exceptional circumstances makes clear "how long the foreign criminal has lived in the UK". The judge had erred in referring to his integration as being borderline because he had been convicted of a serious offence (paragraph 84).

27. I do not accept this ground as disclosing an error in the decision. As set out in the Secretary of State for the **Home Department v Kamara [2016] EWCA Civ 813** the concept of integration is a broad one and it is open to the judge to find that his integration was borderline. Further, and as set out in **Bossade (ss.117A-D-interrelationship with Rules)** [2015] UKUT 00415 (IAC) with respect to 399A(b) the rule is cast in the present tense: "he *is* socially and culturally integrated in the UK". The case also set out the various factors to take into account on either side of the equation and the exercise should include offending namely '*whether he meets the requirements of paragraph 399A(b) requires us to weigh up all considerations relevant to social and cultural integration into the UK*'.

28. The judge was satisfied that the appellant had been lawfully resident in the UK for most of his life but noted the serious crime that he had committed and the lengthy sentenced imposed which strongly suggested that the appellant was not socially or culturally integrated within the UK, that he chose to break the law. The very serious offence related to two different businesses, the second of which he set up after the first business was stopped in its tracks by the police.

29. However, even if that were an error, which I do not accept, the judge was quite clear that she went on in the alternative by stating:-

> "*However, 399A is a three pronged test so even if 399A(b) were made out, I am not able to accept for the reasons set out above, that there would be any significant obstacles to his integration into Lesotho. He is a national of Lesotho, he speaks the language, he has some family connections in Lesotho (through his brother Magnus) and he is likely to have retained social, cultural ties with his home country due to being educated there until age 9 years and his subsequent stays and visits to his home country.*"

30. I note that **LW (Jamaica) [2016] EWCA Civ 369** at paragraph 35 confirms that:-

> "*I would not gainsay that the fact of **LW's** residence in this country for approximately 40 years, is a point of importance. But to found 'compelling reason' for not deporting him, considerably more is required than that provided by the FTT (or the UT). The 'passage of time' point was indeed well addressed by UT Judge Jordan when granting permission to appeal to the UT; he said this:*

> *'This raises a question as to whether the passage of time alone is exceptional and if so, at what point does it become exceptional – 20 years, 25 years, 30 years, 40 years? If so, does that render removal disproportionate whatever the offending or is it only exceptional if you are sentenced to 6 years but not if it is 10 years or 15 years?'"*

31. The court proceeded to confirm, and I note **LW (Jamaica)** was a private life case but its rationale can be extended to family life cases, that what matters to public confidence is that:-

> "*any such decision is reached appropriately, after due regard is had to the great weight to be attached to the public interest in the deportation of foreign criminals and with 'exceptional circumstances' properly understood as meaning 'compelling reasons'*."

There is no doubt that the judge found that the appellant, *even if* he were integrated, had not shown compelling circumstances overall. I find no error of law in the determination disclosed by this ground

32. Ground (v). The judge erred in her approach to very compelling circumstances by first considering whether the provisions applicable to those sentenced to less than four years' imprisonment would but for the length of sentence apply to A. The judge devoted a significant part of her determination to the question of whether but for his length of sentence he would have satisfied the requirements of Rule 399 or 399A or exception (1) or (2) in Section 117C did so on the basis that this was a "*staging post*" to the question of whether very compelling circumstances over and above those in Rule 399/339A/exception (1), exception (2) arose.

33. It was argued that this was incorrect and represented a more onerous construction of the relevant provisions that had been endorsed by senior courts as per **Akinyemi v SSHD [2017] EWCA Civ 236**. In that case it was found that going through those provisions first was an over-literal approach and that the thrust of the provisions as a whole was that the very compelling circumstances which the criminal must show must be more compelling that those covered by the specific exceptions:-

> "*It is convenient to record at this point that there was some discussion before us as to the correct construction of section 117C (6). At first sight a possible reading of the phrase 'over and above those described in Exceptions 1 and 2' is that the foreign criminal is obliged to show, first, that he fell within the terms of one or other (or possibly even both) of the exceptions, and then to demonstrate,* ***additionally****, 'very compelling circumstances'. But Mr Drabble submitted that this was an over-literal approach and that the thrust of the provisions as a whole was that the very compelling circumstances which the criminal must show must be more compelling than those covered by the specified exceptions. No doubt in the paradigm case falling within sub-section (6) one or other of the exceptions would be*

> *satisfied, but that might not always be so, and a more flexible approach was preferable so as to avoid a mismatch between the approach adopted under the legislation and that required by article 8. He also pointed out that the issue was not in any event of substantial importance since section 117A only requires the decision-taker to 'have regard to' the considerations in sections 117B and 117C, so that even if the stricter construction of sub-section (6) were adopted the Respondent would not be compelled to act in breach of article 8 (contrary to section 33 of the 2007 Act) if that is what deportation would entail in any given case. Mr Dunlop did not advance any argument in rebuttal on either point. In my view the better approach is to adopt the more flexible construction advanced by Mr Drabble.*"

34. It was argued that the judge engaged in a very detailed analysis of whether the impact of his arrival on the children or his partner would be unduly harsh before considering the very compelling circumstances and the staged approach was wrong in principle as it was more inflexible.

35. I am not persuaded that the judge took the incorrect approach in this instance. Having set out **Chege (Section 117D – Article 8 – approach) [2015] UKUT 00165 (IAC)** and having explored the various exceptions which she was obliged to do the judge nevertheless did consider the wider compelling circumstances and indeed cited at paragraph 17 of **AJ (Zimbabwe)** where Lord Justice Elias said:-

> "*In order to establish a very compelling justification overriding the high public interest in deportation, there must be some additional feature or features affecting the nature or quality of the relationship which take the case out of the ordinary.*"

36. The judge was clear that the exercise of striking a balance between the competing interest at play needed to be done through the lens of the Immigration Rules and was clearly aware at paragraph 104 that the broader issues needed to be taken into consideration. What is clear at paragraph 105 is that the judge considered *all of the evidence* including the matters raised by the appellant including the effect on his partner and children his length of stay in the UK and his likely circumstances on return to Lesotho in arriving at her conclusion and states:-

> "*on assessing all the circumstances individually and also assessing them cumulatively I find that there are no very compelling circumstances in terms of the case law I have considered which would outweigh the significant public interest in the appellant's deportation*".

Therefore, the judge did not err in approaching the matter via 'the staging post' but correctly looked at the compelling circumstances through the lens of the Immigration Rules which she was obliged to do.

37. Ground (vi). It was argued that the judge failed to consider the financial obstacles to visits taking place, that contact could be maintained by way of visits by the children to Lesotho and other countries and in doing so the judge failed to consider whether regular visits, or indeed any visits at all to foreign countries would be affordable.

38. I do not accept this contention. In a narrow reading of the decision of the judge the judge was clear at paragraph 98 that the family could maintain contact with the appellant *also* via modern forms of communication not just visits. That conclusion, if it were in doubt at paragraph 98 is further underlined at paragraph 99 where the judge separately considers the possibility of the children travelling to meet their father, but also in a separate sentence stating:-

> "*They can also maintain regular contact via modern forms of communication. Accordingly, whilst it will be upsetting for the children and Ms F, it would not be unduly harsh on any of them and Exception 1 and paragraph 399 has not been made out.*"

39. The judge therefore considered the possibility of the appellant and the children maintaining contact through more than one medium when arriving at her final conclusion. That was open to her.

40. Ground (vii). It was asserted that the conclusion on very compelling circumstances was not open to the judge on her own findings, for example the judge quoted at paragraph 65 that So would be "*likely to be devastated and very upset if her father were to be deported*" and at paragraph 98 the appellant's removal "*would undoubtedly be devastating for the children and Ms F and there will be likely to be a lot of emotional upset suffered by them all*".

41. The course of action which on the judge's views is likely to be devastating for this family regardless of factors which may mitigate the harm led inevitably to the conclusion on the facts of this case that very compelling circumstances existed and therefore it was argued that the judge's conclusion was irrational.

42. That assertion is not made out. The judge, at paragraph 112, clearly took into account the very long residence of the appellant in the UK, the facts of the appellant's family, that he had been educated and worked in the UK, the adverse reactions of his children and that of his partner including the diagnoses made by Professor Yule, that it was not in the interests of his children for him to leave the UK and that he has not committed further offences since his serious conviction and that he was a good prisoner.

43. By way of contrast the judge also found that the appellant was convicted of a very serious crime and had a prominent role in the business which conducted transactions over a period of time, such that it could not be said that he only participated in offending behaviour on one occasion. The appellant had received a lengthy sentence of imprisonment for fraud for

seven-and-a-half years. The crime was committed when he was an adult and despite the presence of a family unit and Ms F and that the children had been born. The sentencing judge clearly took the view that the appellant had a vital role in illicit business and his offending behaviour was not due to his ignorance.

44. Overall the judge did not accept that there was a very low risk that he would reoffend. That was an important factor. Further, that the appellant had continued ties to the Lesotho culture and balancing all of the factors in the appeal and taking into account the public interest the judge found the deportation decision was proportionate.

45. As set out in **Kamara** paragraph 18:-

> *"There is no special rule regarding the reasons to be given by a tribunal deciding an immigration appeal. The conventional approach applies. The Upper Tribunal's decision is to be read looking at the substance of its reasoning and not with a fine-tooth comb or like a statute in an effort to identify errors. In giving its reasons, a tribunal is entitled to focus on the principal issues in dispute between the parties, whilst also making it clear that it has considered other matters set out in the legislative regime being applied."*

Notice of Decision

46. I find no error of law and the decision shall stand.

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 his 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. I make this direction because minors are involved.

Signed Helen Rimington Date 31st August 2017

Upper Tribunal Judge Rimington