Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15573/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 March 2019	**On 15 July 2019**

Before

THE HONOURABLE LORD UIST
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE RINTOUL

Between

MR GLENFORD LEROY WALKER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Pipe instructed by MFI Law Ltd
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who is a citizen of Jamaica, appeals with permission against a decision of First-tier Tribunal Judge Devittie promulgated on 7 January 2019, dismissing his appeal against a decision of the respondent made on 30 November 2017 to deport the appellant on the grounds that he is a foreign criminal who had been convicted of an offence and sentenced to a period of at least twelve months.

2. The appellant arrived in the United Kingdom on 17 April 1999 and was subsequently granted leave as a student until 31 January 2001. He later

applied for and was granted variation of leave as a spouse, and in 2007 was granted indefinite leave to remain.

3. The appellant is married to a British national. They have two biological children, P born in 2004 and S born in 2007. The appellant's wife has three children from a previous relationship who are adults. The stepchildren, N, born in 1982, K, in 1993 and NK, born in 1996 are all British citizens.

4. N suffers from schizophrenia and lives with the appellant and his wife. The appellant had played a supportive role and a stabilising influence to N who has had several episodes of being admitted to hospital. The stepdaughter, K, also suffers from serious mental health problems including schizophrenia. She has attempted suicide on several occasions and has been sectioned under the Mental Health Act in the past. The appellant and his wife care and provide support for her and have care of her children, KM and KN, a situation which came into being when K was in hospital having been sectioned under the Mental Health Act.

5. The other stepdaughter, NK, has two small children. Her partner was killed, and one of the children has severe behavioural and anger issues such that NK cannot care for other children.

6. The appellant's case is that the impact on all of these people, including on his wife who has mental health issues of her own and who had difficulty whilst he was imprisoned, is such that even though the appellant was sentenced to a term of six years' imprisonment, his deportation would not be proportionate as it meets the very compelling circumstances over and above those set out in paragraphs 399 and 399A of the Immigration Rules and/or Section 117C(3) of the 2002 Act and as such, he meets the requirements of section 117C(6) of that Act.

7. The respondent's case as presented to the First-tier Tribunal is that the appellant did not meet either of the exceptions, nor were there very compelling circumstances such that his deportation was not in the public interest.

8. Judge Devittie heard evidence from the appellant, the appellant's wife and the stepdaughter, N, gave evidence. He also took into account a detailed bundle containing a number of psychiatric and social work reports relating to the appellant, his wife, and other members of the family. The judge directed himself in line with NA (Pakistan) v SSHD [2016] EWCA (see paragraph 10 of the decision) and also as to Exceptions 1 and 2 within the Immigration Rules and within Section 117C of the 2002 Act. The judge noted [10(9)] that although there was no "exceptionality" requirement and that it follows from the statutory scheme that cases in which the circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare.

9. The judge also, following MF (Nigeria), noted [10(11)(b)], noted that it was sensible to consider whether the case involves circumstances of the types described in Exceptions 1 and 2 first as that may provide a helpful basis on

which an assessment can be made whether there are very compelling circumstances over and above those.

10. The judge concluded [12] that Exception 2 did apply given the consequences that there would be on his biological children. The judge also found that there would be serious consequences for the stepson N and also for the granddaughter KM. The judge noted also that the appellant's wife is suffering from depression, would have extreme difficulty in coping if he was deported, and those consequences for her would in turn impact on the rest of the family. The judge concluded [13]:-

> "It seems to me therefore that in relation to all his children and grandchildren, and his spouse, the consequences for them of the appellant's deportation would comfortably meet the threshold expressed in Exception 2 if he was deported".

11. The judge then went on to consider whether there were exceptional and compelling circumstances over and above those identified as meeting Exception 2. The judge noted that the minor children had suffered immensely during the appellant's imprisonment; that the appellant's wife would also suffer emotional harm making it difficult for her to cope not just with her own children but her son and granddaughter whose mother has been sectioned; that although they would receive support from Social Services, this could not fully compensate for his absence from their lives; and, that the appellant has shown genuine remorse and the likelihood of reoffending was very low.

12. The judge concluded [15]:-

> "Looking at all the circumstances of the case, I have taken into account the physical and emotional needs of all the appellant's family and their interdependence upon him; all other members of the family are lawfully settled in the UK and there could be no question of them relocating to Jamaica; the fact that the appellant is not a burden on the state, but rather by his dedication to care for other family members is likely to be relieving the state of what otherwise might be an expensive financial burden".

13. The judge then observed that the best interests of the minor children were not in themselves an exceptional situation [16] and that:-

> "The strong public interest in the appellant's deportation flows from the gravity of the offence he committed. It is sadly the case that the deportation of one who plays such a central role in the cohesive family unit will have devastating and lifelong consequences for the family member, more particularly for the children. These are the sad consequences of deportation. The harm that the children will suffer is of considerable concern but I am not satisfied on consideration of the totality of the evidence, this is a case in which it can be stated that there are *exceptional circumstances* [our emphasis added], over and above those described in Exception 2, that would render the deportation of this appellant disproportionate".

14. The appellant sought permission to appeal on the grounds that the judge had erred:-

(i) in making a material misdirection in that having found that the appellant comfortably satisfies Exception 2 found that there were "no exceptional circumstances" which was the incorrect legal test. Further, and in the alternative, that the assessment was irrational given the significant positive factors which amounted to very compelling circumstances;

(ii) in failing to give adequate reasons for finding that the circumstances he had accepted did not amount to very compelling circumstances;

(iii) in misdirecting himself by balancing compelling circumstances against criminality, contrary to KO (Nigeria) v SSHD [2018] UKSC 53;

(iv) in making an error of fact in that he failed to take into account that the appellant's son had threatened suicide which, contrary to what he had stated, there was evidence in what the expert witnesses had said.

15. On 30 January 2019 First-tier Tribunal Judge Andrew granted permission to appeal.

16. We heard submissions from both representatives.

17. We are satisfied that there was an error in law on the part of the First-tier Tribunal Judge in this case. He applied the wrong test of exceptional circumstances instead of the correct test of very compelling circumstances. That in itself is sufficient to vitiate his decision but in addition, when carrying out the test, he re-imported, as Mr Pipe put it, the issue of public interest, which had already been taken into account in the statutory scheme itself.

18. Furthermore, he made an error in fact in relation to the mental health of the child and an additional error in fact in stating that there was only one grandchild when in fact there were two. These errors of fact would not in themselves necessarily result in the decision being set aside but the failure to apply the correct statutory test and the re-importing of the public interest consideration amount to an error of law which requires the decision to be set aside.

19. We then, as it was accepted that there was no need for further oral evidence, agreed to the parties making written submissions, the Home Office within three weeks with a further week for the appellant to reply.

20. Subsequent to that, on 15 April 2019, we issued further directions. That is because the Upper Tribunal had, since the hearing before us, handed down two relevant decisions. We considered that it would be in the interests of justice to allow the parties to make submissions on those decisions. Our directions provided:

> In the light of the Upper Tribunal reporting MS (s.117C(6): "very compelling circumstances") Philippines [2019] UKUT 122 (IAC) and RA (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 123 (IAC), it is my view that the Upper Tribunal would be assisted by submissions on these decisions prior to a decision being handed down in this case.

21. We have since received submissions from both representatives on these issues.

The Law

22. Section 117C of the 2002 Act 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."

23. The immigration rules provide:-

> “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.

399. 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

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported."

24. At paragraph 23 of KO (Nigeria) the Supreme Court said this:-

"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. Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) can it be equated with a requirement to show “very compelling reasons”. That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more.”

25. Also of note is what is said in MS (Philippines):-

“(1) In determining pursuant to section 117C(6) of the Nationality, Immigration and Asylum Act 2002 whether there are very compelling circumstances, over and above those described in Exceptions 1 and 2 in subsections (4) and (5), such as to outweigh the public interest in the deportation of a foreign criminal, a court or tribunal must take into account, together with any other relevant public interest considerations, the seriousness of the particular offence of which the foreign criminal was convicted; not merely whether the foreign criminal was or was not sentenced to imprisonment of more than 4 years. Nothing in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 demands a contrary conclusion.

(2) There is nothing in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60 that requires a court or tribunal to eschew the principle of public deterrence, as an element of the public interest, in determining a deportation appeal by reference to section 117C(6).”

26. In a parallel case, RA (Iraq) the Tribunal said this:-

“(1) In KO (Nigeria) & Others v Secretary of State for the Home Department [2018] UKSC 53, the approval by the Supreme Court of the test of "unduly harsh" in section 117C(5) of the Nationality, Immigration and Asylum Act 2002, formulated by the Upper Tribunal in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC), does not mean that the test includes the way in which the Upper Tribunal applied its formulation to the facts of the case before it.

(2) The way in which a court or tribunal should approach section 117C remains as set out in the judgment of Jackson LJ in NA (Pakistan) & Another v Secretary of State [2016] EWCA Civ 662.

(3) Section 117C(6) applies to both categories of foreign criminals described by Lord Carnwath in paragraph 20 of KO (Nigeria); namely, those who have not been sentenced to imprisonment of 4 years or more, and those who have. Determining the seriousness of the particular offence will normally be by reference to the length of sentence imposed and what the sentencing judge had to say about seriousness and mitigation; but the ultimate decision is for the court or tribunal deciding the deportation case.

(4) Rehabilitation will not ordinarily bear material weight in favour of a foreign criminal."

27. The starting point in remaking the decision is the findings made by the First-tier Tribunal which we have preserved and which are summarised above.

28. In addition, we have taken into account more recent, additional material relating to the appellant's wife, their children, and in respect of the stepdaughter K. We summarise this below.

29. It appears from the evidence that the position regarding K has deteriorated. She was detained under Section 2 of the Mental Health Act on 7 September 2018 and released eight days later with further care to be provided by a health treatment team. She did not engage with this and her behaviour and moods became more erratic and odd. This caused considerable difficulty for the family and eventually on 2 January 2019 she was sectioned again and she is being looked after alternately by the appellant and his wife who also look after her children, trying to protect them from her mental illness and erratic behaviour.

30. The stepson N does not engage with mental health services and is cared for primarily at home by the appellant and his wife. The appellant's biological son has been referred to CAMHS owing to suicidal ideation.

31. We accept on the basis of the evidence before us that the appellant's wife would not be able to cope with looking after her son N or her daughter K; or, for that matter, K's two children KM and KN who are now 13 and 4. In addition, there appear to be significant behavioural problems arising with the appellant's biological children. His daughter, P, has been showing signs of erratic behaviour including an accidental overdose. His son is greatly distressed at the thought of his father being deported and as a result started to have suicidal thoughts in addition to the self-harming behaviour which has resulted in him being referred to CAMHS.

32. We are satisfied from the evidence that in the absence of the appellant, his wife will be unable to cope and offer the same level of care to her children, both the adults N and K, and the minor children P and S as before. We accept that she was on her own while the appellant was in prison, and that she had found it difficult to cope. We accept also that she got into debt. We consider that this" just coping" scenario would be different were the appellant removed from the United Kingdom

permanently. That is because the wife's mental health has deteriorated since he was in prison. In addition, K's situation has deteriorated since then and there are the added complications of the suicidal ideations of the son. We accept, as Mr Melvin submitted, that this is under some degree of monitoring. The children are also older.

33. We remind ourselves that Exception 2 which is met in this case (an issue no longer challenged by the respondent), relates to the qualifying children, that is the appellant's biological children, and also to his wife. As the step-children are over 18, they cannot be qualifying children, nor does it appear that the step-grandchildren fall within that category either. The effect on them of the appellant's deportation must be seen as circumstances potentially falling into section 117C(6).

34. We are satisfied by the psychiatric and other evidence that because the appellant provides a stabilising influence in the lives of both two adult stepchildren whose mental health is fragile, and in the case of NK, subject to regular and serious changes, that his removal will cause them to deteriorate, resulting in them suffering. This may, in the case of K, result in her further detention in hospital. This has happened on several occasions in the past.

35. We accept also from the expert evidence that it is the appellant's position in the United Kingdom which has provided the stabilising influence both for K and N, his stepson. We are satisfied that it is more likely than not that the position of both of these will deteriorate significantly if the appellant is deported. This is likely to result in K's re-detention under the Mental Health Act and similar deterioration in respect of the stepson, N, who has already failed to engage with mental health services.

36. Given the unchallenged finding that Exception 2 was met by a substantial margin, we consider that these other effects resulting from the appellant's deportation are over and above those. Whilst there is no formal grant of parental responsibility to the appellant's wife, she has in effect been regarded as being having joint responsibility by Social Services. Given the extent of the involvement in their life and the care she shows for them including trying to protect them from the effects of their mother's behaviour, this would appear to show that there is a parental relationship at least between the appellant's wife and her grandchildren. Given that in the absence of the appellant the wife would be left to look after her adult son who suffers from schizophrenia, her two children, one of whom who has significant mental health difficulties already and has shown a degree of suicidal ideation, we consider there is a realistic prospect that on the basis of the evidence of K's regular detention under the Mental Health Act that this was a recurrent feature and on this occasion the children would need to be taken into care as the appellant's mother would not be in a position to look after them.

37. We bear in mind what was set out in **NA** at [30]and [34]. We consider that on the facts as found here that the impact on the appellant's step-grandchildren, if not also his step daughter and stepson, are matters

which go well beyond what would necessarily be seen as unduly harsh. The prospect of continued and deterioration in mental health in the case of K and her prospects of being taken into care in respect of the two step-grandchildren are we consider bleak. This is a case in which not only is Exception 2 met but there are equally if not harsher effects on other members of the extended family which meet the same threshold, albeit that they do not necessarily fall within the criteria of Exception 2 as they are not qualifying children.

38. We must consider the public interest in removal. That is clearly a significant and major concern given the length of sentence imposed in this case, albeit that it was for a first offence.

39. The offence which the appellant has committed is extremely serious. There is a public interest in the need to protect society against crime, a wider impact of the offending conduct on the community at large, its consequential effects and the need to operate a deterrent policy. We acknowledge the very great weight to be given to this in this case as is consistent with section 117C, clearly expressing the view of Parliament. That weight is, we consider, in line with MS (Philippines) and RA(Iraq) capable of being increased where, as here, a sentence of more than 4 years imprisonment has been passed.

40. We turn therefore to the sentencing remarks set out in the decision of the First-tier Tribunal at [2(2)]. It is of note that as a result of the guilty plea that the sentencing in this case was reduced to six years. Otherwise the starting point would have been eight years' imprisonment. Significant weight is to be attached to deterrence.

41. We consider also that there is no indication of serious criminality before the index offence. The sentencing judge did note that it was an isolated event. The appellant has been here lawfully for a number of years and has a good track record of employment and being a stable force for his extended family.

42. We note, also, that the index offence must have been traumatic for the victim, as the sentencing judge noted. He was left with serious scarring and a lifelong injury.

43. Drawing these strands together, we do find that the public interest in deporting the appellant is increased, the sentence imposed being a full 50% greater than the 4 years triggering section 117C (6).

44. Against that, we balance the effect of deporting the appellant on him and on his family. We note that he has no serious health problems and has transferable skills. He has been here lawfully for a significant period. These factors are, however, not ones to which any real weight can be attached.

45. We do, however, consider that there are in this case, very compelling circumstances, those being the effects on not just the appellant's minor children and his wife, but on two other vulnerable adults and two other vulnerable children who face the bleak prospect of being taken into care.

In effect, this appellant is a lynch pin holding together an extended family which, if he is removed, will collapse, resulting in significant suffering for four children and two vulnerable adults, both of whom suffer from serious mental ill-health.

46. Accordingly, on the particular facts of this appeal which are unusual and where the effect of deportation would extend well beyond the appellant's nuclear family, we are satisfied that deportation would be disproportionate. We therefore allow the appeal

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and we set is aside. We remake the decision by allowing the appeal

Signed Date 9 July 2019

Upper Tribunal Judge Rintoul