Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00090/2018

THE IMMIGRATION ACTS

Heard at Field House
On 12th March 2019

Decision and Promulgated
On 29th April 2019

Before

UPPER TRIBUNAL JUDGE COKER

Between

FITZROY DUCRAM
(anonymity direction not made)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Franco, instructed by SLK Immigration Services
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a Jamaican citizen, born in 1965. He arrived in the UK as a visitor in April 1993, was subsequently granted leave to remain as a working holiday maker, then as a student, then as a spouse of a person settled in the UK. He was granted indefinite leave to remain in the UK on 27 August 1998. He has two birth children with his wife, one of whom is now aged over 18 and the other (born 2002) lives with his wife from whom he is separated. Both children are British Citizens. He, his former wife and their children have not lived as a family unit for many years. The First-tier Tribunal judge found that he had

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played a significant role in the children's upbringing and in their lives. He has known his current partner for the past 14 years or more and they decided to marry in 2014. She has a daughter, born about 2008, who has contact with her biological father. The appellant has not lived with his current partner and her daughter although the First-tier Tribunal judge accepted that he had played a role in her life, albeit not as a father.

2. By a decision promulgated on 15th June 2018, First-tier Tribunal judge M A Hall dismissed the appellant's human rights appeal against the decision of the respondent dated 8 August 2017. On 12 May 2017 a deportation order was signed against the appellant. He has the following convictions:

   - 18 months imprisonment on 7th June 2006 for assisting an offender and failing to answer bail (he successfully appealed a deportation decision made after this conviction);
   - Financial penalty on 9th June 2011 for having a knife in a public place
   - 7years and 4 months imprisonment on 5th June 2015 for transferring prohibited ammunition and firearms.

3. The First-tier Tribunal judge found, inter alia:

   - The best interests of the appellant's son would be to remain living with his mother and to continue having contact with the appellant;
   - The best interests of his partner's daughter would be to remain living with her mother and to continue having contact with the appellant;
   - The appellant can speak English and was financially independent prior to going into custody;
   - The appellant has not been lawfully present in the UK for most of his life (at the date of the First-tier Tribunal decision he had been lawfully present for 24 years. He arrived in the UK aged 27);
   - The appellant's convictions "proved" he was not socially and culturally integrated in the UK;
   - There would not be very significant obstacles to his reintegration into Jamaica;
   - There is a subsisting parental relationship between him and his son;
   - He has a genuine and subsisting relationship with his current partner, who is a British Citizen;
   - There is no parental relationship between him and his partner's daughter;
   - The appellant, his partner and her daughter have not lived together as a family unit.

4. The First-tier Tribunal judge noted that he was impressed by the witnesses who gave evidence on behalf of the appellant, and who believed that the appellant would not re-offend. He referred to the appellant's partner's elderly mother who his partner cares for and to the partner's daughter's diabetes.

5. In [53] the judge self-directed himself in his assessment of the evidence that

> "the case law indicates that the more pressing the public interest in removal, the harder it will be to show that the effect on a partner and child would be unduly harsh".

6. He went on to state

> "59. My conclusion is that the effect of the appellant's deportation upon his partner and his son would not be unduly harsh, having attached very significant weight to the public interest int his case.
>
> 60. Therefore I find that Exceptions 1 and 2 do not apply in this case. Even if the Exceptions had applied, because the appellant has received a sentence in excess of 4 years, in order to succeed in his appeal, he would need to show very compelling circumstances over and above those contained in Exceptions 1 and 2. The evidence fails to demonstrate any very compelling circumstances over and above those contained in Exceptions 1 and 2."

7. Permission to appeal was sought, and granted by me, on grounds that the First-tier Tribunal judge had applied the incorrect test in assessing "unduly harsh". Permission was also sought on the grounds that the First-tier Tribunal judge had failed to consider and make findings on the issue of rehabilitation, had failed to place adequate weight on the length of time the appellant had been in the UK and had failed to give any or any adequate reasons why the evidence of his difficulties on returning to Jamaica had not been accepted.

8. The respondent did not seek to cross appeal any of the judge's findings.

9. Both parties confirmed that they were content with me hearing the appeal.

10. No issue was taken with the findings of the First-tier Tribunal judge, a summary of which I have set out in [3] above.

11. The respondent in the Rule 24 response accepted that there was an error of law in the decision of the First-tier Tribunal decision such that the decision should be set aside to be remade.

12. The First-tier Tribunal judge did not make specific findings on the issues that I have referred to in [4] above. I however take the view that the judge accepted that the evidence before him supported a finding that the appellant's partner cared for her mother and that her daughter suffered from diabetes. I also take the view that the judge accepted that the witnesses were of the genuine view that the appellant would not re-offend.

13. The judge refers, under the sub-heading 'Oral submissions', to the OASys report. It is incorrect that the judge has not formed a view on rehabilitation. In [57] he states

> "I have taken into account and given weight to the evidence of the witnesses who all wish the appellant to remain in the UK and who believe he will not reoffend. I take into account that the appellant's behaviour in prison has been exemplary. I also take into account the OASys assessment

> that there is a lower risk of the appellant reoffending although he poses a medium risk of causing serious harm to the public."

14. Mr Franco submitted that had the judge not placed weight upon the criminality in reaching a decision that it was not unduly harsh for the partner and his son to be left in the UK on the deportation of the appellant, he would have reached a decision that it was unduly harsh. This in turn would have fed into the decision on whether there were very compelling circumstances given that the sentence of imprisonment was in excess of four years. A factor that needed to be considered in reaching that assessment, was the very lengthy period of lawful residence the appellant had whilst in the UK and rehabilitation.

15. The nature and extent of criminality is not a factor to be considered in assessing whether a person meets Exception 1 and/or 2. It is a threshold test – does the appellant meet the criteria for Exception 1; is or is not the threshold test of unduly harsh met. Mr Ducram does not meet Exception 1. There is no 'sliding scale' or 'near miss'. He simply does not have the requisite period of lawful residence and the finding that he is not socially and culturally integrated has not been challenged.

16. The findings to be factored into an assessment whether the unduly harsh test is met are summarised in [3] above. Mr Franco did not refer me to any other significant or material evidence that had not been considered by the judge. The First-tier Tribunal judge refers to the relationship the appellant has with his son and with his partner and finds these to be significant. But there was inadequate evidence to support a finding that the appellant's departure would be unduly harsh. Yes, it would be distressing and upsetting; the ability to visit the appellant whilst in prison would be lost and it may well be that the number of telephone/skype/facetime calls would have to reduce. But evidence that this reduction in contact following the deportation of the appellant would amount to anything approaching undue harshness, was not there. Although the First-tier Tribunal judge took into account the appellant's criminality, it is inconceivable, on the evidence that was before him, that he would have reached any different conclusion if he had applied the correct test.

17. The appellant has been sentenced to more than four years imprisonment for serious crimes. In his evidence to the First-tier Tribunal he denied responsibility for the offence to which he pleaded guilty. As stated in *RA (s117C: unduly harsh; offence: seriousness) Iraq* [2019] UKUT 00123 (IAC), rehabilitation will not normally bear material weight in favour of a foreign criminal. In this case, the appellant is remorseful but denied he had committed the offence. He had already successfully appealed a deportation decision in 2006 yet had gone on to commit a very serious crime. He has undertaken various courses whilst in prison. Even taken at its highest and accepted wholeheartedly, the evidence from his witnesses that he will not commit further crimes, the fact remains that he has committed serious crimes and the intention not to commit further crimes carries little weight.

18. *MS (s.117C (6): "very compelling circumstances") Philippines* [2019] UKUT 00122 (IAC) makes clear that, unlike the assessment undertaken in reaching a decision on Exception 1 or 2, criminality is relevant. The sentencing remarks of

the judge in this case paid tribute to the positive impact the appellant has had on the upbringing of his children, to the early guilty plea, that his involvement was limited to two days, that he is not a dangerous offender as defined in the Act, but it was the appellant's responsibility within the crime group as a whole to deliver the firearms and the ammunition. The submissions made by Mr Franco do not identify any factor that could be considered to be factors over and above the distress that would be caused to his children and his partner at his deportation. Mr Franco submitted that the cumulative impact of the factors to be found within Exceptions 1 and 2, could contribute to a finding of very compelling circumstances. That may of course be correct but in this case the appellant does not reach either threshold.

19. Mr Franco submitted that the appellant would have difficulties re-integrating into Jamaica. He does not have family or friends there and owns no land or property. The First-tier Tribunal judge considered the evidence before him. He reached the conclusion that the appellant had not proved he would be unable to find employment; there would be no language or cultural difficulties. The judge bore in mind in reaching his findings that an individual must have the capacity to participate in the life in the country, have a reasonable opportunity to be accepted and be able to operate on a day to day basis. The judge reached a conclusion that was clearly open to him: that there were no very significant obstacles to reintegration. That conclusion was not perverse, was adequately reasoned and was taken on the basis of the evidence that was before him.

20. The factors relied upon to support the submission that there were very compelling circumstances over and above the Exceptions including his partner's mother, her daughter's diabetes, the evidence of witnesses that he would not reoffend, the OASys report, the length of time he has been in the UK, the length of time he has been away from Jamaica do not come anywhere close to amounting to very compelling circumstances.

21. Taking all these matters into account I am satisfied there are no very compelling circumstances. There were no other significant matters brought to my attention. It follows that I dismiss the appeal.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I re-make the decision in the appeal by dismissing it.

Date 24th April 2019

Upper Tribunal Judge Coker