Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12420/2018

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 18 November 2019	**On 27 November 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

AD
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Sood
For the Respondent: Ms Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By decision promulgated on 2 August 2019, I found that the First-tier Tribunal had erred in law such that its decision fell to be set aside. My reasons for reaching that conclusion were as follows:

> "1. I shall refer to the appellant as the 'respondent' and the respondent as the 'appellant', as they appeared respectively before the First-tier Tribunal.
>
> 2. The appellant was born on 1 August 1972 and is as male citizen of Gambia. He entered the United Kingdom as a spouse on 28 March

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2003. On 14 May 2009, he was convicted of two counts of possessing a controlled drug of Class A with intent to supply and possessing a class B controlled drug. On 24 July 2009, he was sentenced to 4 years imprisonment. By a decision dated 12 April 2018, the Secretary of State refused the appellant's human rights claim, having made an order to deport the appellant to Gambia. The appellant appealed to the First-tier Tribunal against the refusal of his human rights claim. The First-tier Tribunal, in a decision promulgated on 15 September 2018, allowed the appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

3. The Secretary of State asserts that the judge failed to follow starred decision of Secretary of State for the Home Department v D (Tamil) [2002] UKIAT 00702 *. As the judge pointed out [2], the appellant has a lengthy immigration history. In particular, on 25 February 2014, a previous decision of the First-tier Tribunal had been set aside and the decision remade dismissing the appeal in the Upper Tribunal (Judge Hanson). At [36], the judge acknowledged this earlier decision:

> "The Upper Tribunal has to be my starting point. However I have to consider the circumstances as at the date of this hearing. This hearing takes place nearly 5 years and and there are now four children aged eight and under. The appellant has been living with his family since his release from prison in 2011 apart from some periods of immigration detention. I accept that I have to carry out a full assessment of the current circumstances."

4. The Secretary of State asserts there was not necessary for the judge to carry out such a 'full assessment.' Rather, she should have sought to distinguish those circumstances which had arisen following the previous decision and to make findings in respect of them but otherwise to take Judge Hanson's analysis as a starting point for her own. Inter alia, Judge Hanson had found that the appellant and his partner had been reckless to have a further child when his immigration status had been so uncertain. The judge made contradictory statements about that finding and also placed significant weight on the fact that, by the date of the First-tier Tribunal hearing, the couple had four children. Moreover, at [45], the judge found that the appellant's partner's mental health problems had not deteriorated significantly since the date of the previous decision. However, at [66], the judge identified the mother's mental health problems as one of a number of very compelling circumstance justifying allowing the appeal. In addition, Judge Hanson had found that social services would assist the family in the absence of the appellant, a factor which the judge appears to have discounted. Judge Hanson also found that the report of Christine Brown had lacked objectivity, another element in the analysis which the judge does not appear to have taken into account.

5. I find that the ground of appeal is made out. The judge fails to explain exactly why having more children will qualitatively affect the inability of either those children or the partner to cope with the deportation of the appellant. Indeed at [58], the judge is critical of the appellant for enlarging his family at time when he was fully aware of the precariousness of his immigration status. She did not, however, attach less weight to the size of the appellant's family on account of

that recklessness. By failing to do so, the judge adopted a significantly different approach from that previously taken by Judge Hanson. Positive factors for the appellant identified by the judge included what she considered to be the appellant's recent rehabilitation, a factor to which the judge should have attached little weight.

6. I am reminded that, given the length of the appellant's prison sentence, he must show that there are very compelling circumstances over and above those matters described in Exceptions 1 and 2 of section 117C of the Nationality Immigration and Asylum Act 2002. It is difficult to see from the judge's analysis that such very compelling circumstances have been established. The appellant's responsibility for enlarging his family has not been properly considered, whilst the partner's mental health problems, although not found to have deteriorated, are given significant weight. Judge also appears to have given weight to the simple lapse of time since the last decision of the Upper Tribunal. She fails to explain exactly what has changed during that lapse of time although she considered it necessary to carry out a completely fresh assessment of all the evidence, including that previously before the Upper Tribunal, a course of action which finds no support in D (Tamil). Considered as a totality, I find the judge's analysis to be unsatisfactory and, in places, contradictory. I set aside her decision. The decision will be remade in the Upper Tribunal at or following a resumed hearing in Birmingham on a date to be fixed. Both parties may adduce fresh evidence provided a copy of documentary evidence is sent to the other party and filed at the Upper Tribunal at least 10 days prior to the resumed hearing.

Notice of Decision

The decision of the First-tier Tribunal is set aside. None of the findings of fact shall stand. The decision will be remade in the Upper Tribunal (Upper Tribunal Judge Lane) at Birmingham at or following a resumed hearing."

The Oral Evidence

2. At the resumed hearing, the appeal proceeded upon Article 8 ECHR grounds only. The standard of proof is the balance of probabilities. I heard evidence from the appellant and also his partner, SJ. It is agreed by the parties that the appellant has a genuine and subsisting relationship with SJ and also with their four children, A (born 2009), K (born 2013), B (born 2014) and Y (born 2016).

3. The appellant adopted his witness statements as his evidence in chief. He explained that the older children, who are of mixed race, attend a predominantly white school. A, in particular, had been the subject of racist bullying at school following which the appellant had consoled him and sought to bolster his confidence. The appellant also stated that he was taking positive steps to introduce the children to their Gambian cultural heritage. In cross-examination, the appellant explained that he had 'to do everything' at home because of SJ's depressive illness. He became upset when he explained that he 'never had a break. I never stop. If I'm not there, then there is nobody to do it.' He explained that SJ had seen mental

health consultants in the past but she was not now being treated by doctors other than her GP nor is she receiving counselling. The only medical contact at the present time is with the GP, Dr Olding.

4. SJ gave oral evidence and adopted her written statements as her evidence in chief. She stated that she last attended her GP in October this year. Her anti-depressive medication had been increased as a result of that visit. She was having difficulty sleeping at present time. She became upset when she explained that there were mornings when she awoke and did not 'want to face life.'

The Law

5. On account of his criminal offending, the appellant falls to be considered under the provisions of section 117C(6) of the Nationality Immigration and Asylum Act 2002:

> '(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.'

6. Exceptions 1 and 2 provide:

> '(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.'

7. The appellant's partner and the children are British citizens. The children are, therefore, 'qualifying children.'

8. A helpful summary of the jurisprudence concerning section 117C(6) was provided by the Court of Appeal in the recent judgement *JG (Jamaica) [2019]* EWCA Civ 982 at [13-16]:

> "In NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662, [2017] 1 WLR 207, this Court addressed the meaning of the phrase in section 117C (6) "very compelling circumstances, over and above those described in Exceptions 1 and 2". Paras. 29 and 30 of the judgment of the Court, given by Jackson LJ, reads (so far as material):

> "29. …. The phrase used in section 117C (6), in para. 398 of the 2014 … does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that 'there are very compelling circumstances, over and above those described in Exceptions 1 and 2'. … [A] foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paras. 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.
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> 30. In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an Article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute 'very compelling circumstances, over and above those described in Exceptions 1 and 2', whether taken by themselves or in conjunction with other factors relevant to application of Article 8."

Mr Pilgerstorfer, for the Secretary of State, agreed that in practice in most cases which satisfied the requirements of section 117C (6) the matters relied on would be of a character which fell within one or other of the two Exceptions.

In Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803, [2016] 1 WLR 4203, this Court examined the interaction between section 117A (2) and sections 117B and 117C. Rhuppiah was itself a case under section 117B, but it was followed in NE-A (Nigeria) v Secretary of State for the Home Department [2017] EWCA Civ 239, which concerned section 117C. The effect of both decisions is that Part 5A formally changes the position as it was prior to its enactment in that it requires tribunals to adopt a structured approach, applying the statutory steps, rather than simply treating the Secretary of State's policy as regards the public interest as a relevant consideration. In NE-A (Nigeria) Sir Stephen Richards (with whom McFarlane and Flaux LJJ agreed) said, at para. 14 of his judgment:

> "Part 5A of the 2002 Act … is primary legislation directed to tribunals and governing their decision-making in relation to Article 8 claims in the context of appeals under the Immigration Acts. I see no reason to doubt what was common ground in Rhuppiah and was drawn from NA (Pakistan), that sections 117A-117D, taken together, are intended to provide for a structured approach to the application of Article 8 which produces in all cases a final

> result which is compatible with Article 8. In particular, if in working through the structured approach one gets to section 117C(6), the proper application of that provision produces a final result compatible with Article 8 in all cases to which it applies. The provision contains more than a statement of policy to which regard must be had as a relevant consideration. Parliament's assessment that 'the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2' is one to which the tribunal is bound by law to give effect."

He continued, at para. 15:

> "None of this is problematic for the proper application of Article 8. That a requirement of 'very compelling circumstances' in order to outweigh the public interest in the deportation of foreign criminals sentenced to at least four years' imprisonment is compatible with Article 8 was accepted in MF (Nigeria) and in Hesham Ali itself. Of course, the provision to that effect in section 117C(6) must not be applied as if it contained some abstract statutory formula. The context is that of the balancing exercise under Article 8, and the 'very compelling circumstances' required are circumstances sufficient to outweigh the strong public interest in the deportation of the foreign criminals concerned. Provided that a tribunal has that context in mind, however, a finding that 'very compelling circumstances' do not exist in a case to which section 117C(6) applies will produce a final result, compatible with Article 8, that the public interest requires deportation. There is no room for any additional element in the proportionality balancing exercise under Article 8."

In KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53, [2018] 1 WLR 5273, the Supreme Court considered the nature of the exercise required by section 117C (5). Lord Carnwath, with whom the other members of the Court agreed, said, at para. 23 of his judgment (pp. 5286-7):

> "… [T]he 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 … 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."

> The upshot of those decisions, so far as concerns the present case, is that in so far as the Respondent sought to rely on the effect of his deportation on his son (who, being a British citizen, was a qualifying child) it would not be enough to show that that effect would be "unduly harsh", in the sense explained in KO. That would satisfy Exception 1, but because his case fell within section 117C (6) he needed to show something over and above that, which meant showing that the circumstances in his case were, in Jackson LJ's phrase in NA, "especially compelling". In short, at the risk of sounding flippant, he needed to show that the impact on his son was "extra unduly harsh"."

9. It is with the statutory provisions and the guidance provided by the Court of Appeal in mind that I have sought to conduct my analysis in this appeal.

Analysis

10. At the outset, I wish to stress that I have no difficulty in accepting the sincerity with which the appellant and SJ gave their evidence before the Tribunal. I find that what they told me was accurate and true and that the distress which both witnesses exhibited whilst giving evidence was entirely genuine. I have no doubt as to the genuine and subsisting nature of the relationship of the appellant and SJ and their love and concern for the children of that relationship.

11. It is for the appellant to establish the existence of very compelling circumstances over and above the test of undue harshness set out in the exceptions contained in section 117C.

12. The written evidence is substantially the same as that before the First-tier Tribunal with the addition of diary entries, letters from the children and updating school reports. There is an updating medical report from Dr Olding, SJ's GP, which is dated 29 October 2019. Dr Olding writes:

> "I have had regular contact with SJ since I started in the practice in July 2017. I recently saw her with an increase in her mental health symptoms. She was suffering increased anxiety with poor sleep and panic attacks as well as low mood and difficulty sleeping. Her score on the PHQ9 Depression Screening Questionnaire was 25 which indicates severe symptoms of depression and her score on the GAD7 Anxiety Scale was 19 indicating severe anxiety."

The doctor considered that SJ's symptoms were 'significantly affected by prevailing events relating to [the appellant's] application to stay in the United Kingdom' and he expected her symptoms to 'worsen significantly were [the appellant] be obliged to leave.' He also observed that the relationship between the children and the appellant seems a close one. He noted the suggestion in previous Tribunal decisions that SJ can obtain help from social services if the appellant were to be removed from the family. He acknowledged that 'this may be the case but I think it would be fair to observe that in most instances social service support is not in any way able to replicate or replace the role of an effective and caring parent.' He

concluded by observing that the 'current position of the family as a whole will be severely adversely affected should the appellant leave the country.'

13. I find that SJ is, as Dr Olding states, suffering from an increase in her anxiety and with problems sleeping. I accept that she is at present suffering severe symptoms of depression. She is, however, not at present receiving medical care above the level of a GP nor is she receiving counselling. I accept that the appellant does virtually all the work at home in caring for the children and that SJ has problems in particular with assisting with their care in the mornings following a poor night's sleep. I find also that SJ's family in the United Kingdom have largely abandoned her as a result of her mixed race relationship. However, I find that social services and other agencies would assist this family in the appellant's absence, as Dr Olding agrees would be the case. Significantly, when considering the substitution of social services for the presence in the family's life of the appellant, Dr Olding, whilst stating that the whole family would be severely affected by the deportation, refers to the impossibility of support agencies 'replicating or replacing the role of an effective and caring parent.' That observation must be true for almost every family where one parent is removed for whatever reason and third parties are called in to assist. The doctor, therefore, is describing a commonplace consequence of deportation for a family; neither he nor any of the other witnesses have identified likely consequences of the deportation affecting any member of the family which would go beyond what may be described as 'duly harsh' (see *KO (Nigeria) 2018 UKSC 53*).

14. I stress that I am not seeking to understate the severity of SJ's depression and anxiety but there is no evidence to show that she is likely to self-harm in the event of the appellant's deportation. Moreover, as the doctor observed, the children have been well raised and cared for by the appellant and SJ with the result that they are not suffering from mental or physical health problems which might be exacerbated by separation from the appellant.

15. A matter raised by previous judges has been the 'recklessness' exhibited by the appellant and SJ in choosing to have several children at a time when the appellant's immigration status has been so precarious. I do not seek to criticise the judges who drew attention to this but I do not consider that it is significant in applying the relevant test under section 117C(6). In my view, whilst the application of the test should take place within the context of a proportionality assessment, it cannot be right that when very compelling circumstances may adversely affect the welfare of children, such circumstances should be diluted or outweighed because the children had been born in the first instance.

16. I find that the effect of the deportation of the appellant upon SJ and the children will be harsh. The close relationship between the children and the appellant will be irrevocably altered, notwithstanding that they may remain in contact over the internet or by telephone. I find that the children will be deprived of the appellant's guidance regarding their Gambian

culture although I find that SJ is likely to take steps to educate the children in respect of all aspects of their cultural heritage. I find that SJ is likely to suffer a further deterioration in her anxiety and depression levels but there is no evidence to show that she will self-harm. I find that SJ will, on account of her illness, need the support of agencies, including social services, but that such support will be forthcoming. I accept Dr Olding's view that such services cannot replicate the appellant's role as an effective and caring parent but that is not, in my opinion, a very compelling circumstance which carries the effects of deportation beyond the 'duly harsh.' All the children are in good health and appear to be developing emotionally and intellectually. Again, there is no evidence that their education or emotional development will be so derailed as a consequence of the appellant's deportation as to constitute a very compelling circumstance over and above the unduly harsh. In conclusion, whilst I accept that the consequences of deportation for the family may be harsh and may even be properly described as unduly harsh, this is not a case where the evidence shows that the higher threshold of very compelling circumstances over and above unduly harsh will be crossed. The proper application of the statutory test and adherence to the guidance of the Court of Appeal lead me to dismiss the appellant's appeal against the refusal of his human rights claim.

Notice of Decision

I have remade the decision. The appellant's appeal against the decision of the Secretary of State dated 12 April 2018 is dismissed.

Signed Date 20 November 2019

Upper Tribunal Judge Lane

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.