IAC-AH-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/19140/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 January 2020	**On 16 June 2020**

Before

THE HON. LORD UIST
UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TREVOR [F]

Respondent

Representation:
For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Ms E Daykin, Counsel

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Louise Wolfson ("the judge") promulgated on 28 October 2019 allowing the appeal of Trevor [F] ("Mr [F]") against the decision of the Secretary of State dated 5 September 2018 to deport him as a foreign criminal who had been sentenced to a period of imprisonment of at least 12 months.

2. The immigration history of Mr [F], as narrated by the judge, is as follows. Mr [F], a citizen of Jamaica, was born on 30 June 1971. He entered the UK on 24 August 1997 on a six-month visa valid until 24 February 1998. He applied for leave to remain as a student on 19 August 1998. His application was refused on 12 July 1999. He applied for leave to remain as the spouse of a settled person on 15 June 2005. He was convicted on 3 December 2007 at Highbury Magistrates' Court of (a) driving while disqualified, resulting in a sentence of disqualification from driving for two years, endorsement of his driving licence and a community order of 80 hours unpaid work; and (b) resisting or obstructing a constable in the execution of his duty, resulting in a sentence of a consecutive community order of 40 hours unpaid work. On 18 October 2010 the Secretary of State notified him that it was not proposed to take any deportation action against him at that time and he was given a warning. On 18 March 2011 he was granted discretionary leave to remain until 17 March 2014. He applied for further leave to remain on 15 March 2014. On 8 May 2014 he was granted leave to remain until 8 May 2017. He was convicted on 8 May 2014 at Central London Magistrates' Court of (a) common assault, resulting in the imposition of a community order for unpaid work and orders for £50 compensation and £85 costs, and (b) assaulting a constable, resulting in the imposition of a compensation order of £50. On 20 June 2016 at North London Magistrates' Court he was convicted of assaulting a constable, resulting in the imposition of a community order for unpaid work until 19 June 2017, a compensation order of £50 and a victim surcharge of £60. On 1 June 2017 he applied for leave to remain outside the rules. On 2 and 4 August 2017 at Blackfriars Crown Court he was convicted of possessing cocaine and diamorphine with intent to supply and simple possession of diamorphine, sentenced to four years imprisonment and ordered to pay a victim surcharge of £80. He did not appeal against conviction or sentence. On 18 July 2018 he was served with a deportation order. On 13 August 2018 his legal representatives responded to the effect that deportation would breach his human rights under article 8 of the European Convention on Human Rights (ECHR). On 5 September 2018 the Secretary of State refused his human rights claim.

3. In refusing Mr [F]'s human rights claim the Secretary of State decided that his removal was conducive to the public good and in accordance with section 32(5) of the UK Borders Act 2007 (the 2007 Act). The Secretary of State noted that in order to establish that deportation would breach his human rights under article 8 Mr [F] had first to establish the existence of a private or family life. Interference with his private or family life would not breach his qualified rights under article 8(1) if it could be justified under article 8(2). Mr [F]'s deportation was conducive to the public interest because he had been convicted of an offence for which he had been sentenced to a period of imprisonment of at least four years and the public interest required his deportation under paragraph 398 of the Immigration rules unless there were very compelling circumstances over and above those described in the exceptions to deportation set out in paragraphs 399 and 399A of the Immigration Rules. The Secretary of State considered that Mr [F]'s history of criminality as evidenced by his various convictions meant that he had demonstrated a blatant disregard for the laws of the United Kingdom. He had been granted leave to remain in several occasions

but had shown a blatant disregard for the hospitality afforded to him and for immigration control. The secretary of State accepted that it was proved that Mr [F] and his wife [N] had lived at the same address since 2014 and had two children aged respectively 20 and 17 who are British citizens. It was considered that his wife and children could remain in the UK when he was deported to Jamaica and maintain contact with him by visits and modern means of communication. The children had been cared for by their mother while Mr [F] was in custody. As British citizens the children and their mother could access support in the UK and would be able to lead a normal life if Mr [F] were deported. The Secretary of State considered that Mr [F]'s ability to conduct a genuine and subsisting relationship with his children and spouse had been compromised by his criminality and the substantial sentence he had received for his offence. Alternatively, the Secretary of State considered that the whole family could relocate to Jamaica. There would be no undue hardship for the children due to a language barrier as English is widely used in Jamaica, including in schools. There were educational facilities in Jamaica. They would also be able to return to the UK when they were able to live independently. His wife would be able to adjust and settle into the way of life in Jamaica with his support. No evidence of insurmountable obstacles to the family relocating to Jamaica had been provided. It was not therefore accepted that having a British citizen spouse and children in the UK would prevent deportation or amount to a breach of article 8 of the ECHR. In relation to Mr [F]'s private life, it was accepted that he had lived in the UK since 24 August 1997 apart from brief absences for travel, making 21 years of stay. He had been in various employments and established private life with friends and acquaintances. The Secretary of State considered that any such relationships could be maintained by the use of modern communications and visits. It was not accepted that there would be very significant obstacles to his integration into Jamaica because there was no language barrier and he had relations and an initial social network there. There was no evidence to show that he was now estranged from Jamaica to the extent that there would be very significant obstacles to his reintegration there. The knowledge, skills, employment, and business experiences gained in the UK could be used to re-establish his private life in Jamaica. The Secretary of State considered that, due to the nature of the offences and the sentence imposed, Mr [F]'s right to private life did not outweigh the public interest in his being deported.

4. Having heard and considered evidence from the Mr [F] and his wife, the judge made the following findings of fact (in which we substitute "Mr [F]" for "the appellant"):

   a. Mr [F] is a 48-year-old Jamaican man.

   b. I accept the summary of Mr [F]'s immigration history and convictions as set out under "Immigration History" above.

   c. He has been in a relationship with [N] (a British citizen) since at least 1999, when they started living together. They married on 4 February 2004.

   d. Mr [F] has two children with [N] – [Tn] (now 20 years old) and [Ta] (now 17 years old). They are both British citizens.

e. Mr [F] has had little education and left home at a young age. His father has died and he is estranged from his mother and brother. He has no other family in Jamaica.

f. Mr [F] was the principal carer for the children prior to being sent to prison. He looked after the children whilst [N] was studying and working, enabling her to progress her career.

g. [N] is an aesthetic therapist and currently works for a company in Harley Street. She previously ran her own business called [IDC]. All her extended family are in the UK.

h. [Tn] studied sports and exercise science at college. He wanted to continue this at university but dropped out of his course.

i. [Ta] has just done her GCSEs and has had to retake her English exam in order to continue with A Levels. She is doing a BTEC in the meantime. She would like to be a doctor or scientist.

j. Whilst he was in prison Mr [F] undertook various rehabilitation courses and worked as a cleaner / peer mentor. Since release from prison he has reported to probation on a weekly basis and has not been in breach of his licence conditions.

5. The judge proceeded to consider section 117C(4) (5) and (6) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). She declined to find that there were very significant obstacles to Mr [F]'s integration into Jamaican society and therefore concluded that Exception 1 in section 117C(4) of the 2002 Act was not satisfied. She then went on to find that the requirements of Exception 2 were satisfied because Mr [F]'s deportation would be unduly harsh on his wife and children and that there were very compelling circumstances over and above Exception 2 such that the decision to deport him was a disproportionate interference with his article 8 rights. She therefore allowed the appeal.

6. The Secretary of State has appealed against the judge's decision on the ground that Mr [F]'s four year prison sentence made him liable for automatic deportation under section 32(5) of the 2007 Act and that to avoid deportation he had to show that there were very compelling circumstances, over and above those in Exceptions 1 and 2 in section 117C of the 2002 Act, as repeated in Immigration Rule 398. No unduly harsh consequences nor any very compelling circumstances had been identified and the judge had made an error of law in allowing the appeal. Leave to appeal was granted by First-tier Tribunal Judge Landes on 28 November 2019. In amplification of the grounds of appeal the secretary of State submitted that the judge had erred by not identifying sufficient reasons why the separation would be unduly harsh on Mr [F]'s wife and/or minor child. The judge had made various speculative points about the impact of separation on the child's education on the basis that it was possible that the minor child might give up her ambition to start tertiary education and that his wife was not sure whether their relationship would continue at a distance. The stresses and strains of deportation on a family had been properly considered in *Secretary of State for the Home Department v PG (Jamaica)* [2019] EWCA Civ 1213. Lives being made

more difficult in several ways without the presence of the deportee were the likely consequences of deportation of any foreign criminal. It was natural that the family would wish Mr [F] to remain in the UK but their preferences were not sufficient to outweigh the very significant public interest in his deportation. It was also natural for the family to magnify the possible effects of Mr [F]'s absence on their lives even though they continued to function as a family unit when he was serving his prison sentence. In the context of criminal deportation and the approach taken in *PG* no unduly harsh consequences or very compelling circumstances had been identified. The judge had made a material error in law by allowing Mr [F]'s appeal.

7. It was submitted in response by counsel for Mr [F] that the judge had properly directed herself at all times to the correct legal principles and that there was no suggestion otherwise. On the face of them the Secretary of State's grounds of appeal amounted to a reasons challenge but on analysis were actually a perversity challenge since the reasons for the findings of unduly harsh and very compelling circumstances were given, although the Secretary of state did not accept that these met the threshold. The only matter specifically dealt with in the grounds of appeal was the conclusion that it would be unduly harsh for his wife and minor child to remain in the UK without him: no error was identified in the finding that it would be unduly harsh for the family to relocate to Jamaica, only a restatement of the Secretary of State's position. The reasons given by the judge at para 38 for finding that it would be unduly harsh for Mr [F]'s wife and minor child to remain in the UK without him were as follows:

   (1) His absence while in prison had placed a huge strain on his wife and deportation would aggravate that.

   (2) His absence had already had a negative impact on his daughter's educational attainment and future prospects.

   (3) His deportation would impact his daughter's further education. He has been her primary carer and his return home has been positive for her.

   (4) It is in his daughter's best interests that he should remain in the UK.

   (5) If he were to be deported his marriage was likely to break down, causing the negative impact on his daughter to be more significant.

   (6) His daughter would then have to maintain a long-distance relationship with him when her relationship with him had already been negatively affected by his period of imprisonment.

8. The above reasons justified the finding that it would be unduly harsh for his daughter to remain in the UK without him. She was at a critical stage of her education and development, which had already suffered because of his period of imprisonment. As his relationship with his wife was unlikely to withstand deportation that necessarily made the position worse for his daughter. These matters were all properly taken into account by the judge. Although a different judge might have reached a different decision the grounds of appeal amounted to a disagreement

with the judge's decision. It could not be said that her decision was devoid of sufficient reasons or that it was perverse for the reasons given.

9. It was further submitted on behalf of Mr [F] that so far as very compelling circumstances were concerned it could not be said that the judge had not given reasons for her conclusion. In reality what the Secretary of State was submitting was that the conclusion was perverse for the reasons given. The reasons given by the judge at para 41, which were explicitly stated as being "over and above" Exceptions 1 and 2, were as follows:

   (a) Exception 2 was robustly met.

   (b) Mr [F] showed remorse and regret.

   (c) He had engaged in rehabilitation and adhered to the terms of his licence.

   (d) He had been an asset in the classroom and a valued and respected mentor.

   (e) He had had a troubled childhood and little education.

   (f) He was estranged from his family in Jamaica and reliant on family and friends in the UK.

   (g) He had dissociated himself from criminal peers.

   (h) He had made a positive contribution to his family in the UK.

   (i) His wife wished him to re-join the family unit.

   (j) He had played an active role in the upbringing of his children and wished to continue to do so.

   (k) Prospects for the children achieving their potential would be significantly diminished if he were to be deported.

   The Secretary of State had failed to identify a material error of law in the judge's decision and the appeal should be dismissed.

10. In MK (section 55 – tribunal Options) Sierra Leone [2015] UKUT 223 the Tribunal stated as follows at paragraph 46:

> "'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context denotes something severe or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

11. In KO (Nigeria) v Secretary of State for the Home Department Lord Carnwath, giving the judgment of the Supreme Court, said at paragraph 23:

> "… 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 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 the 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."

12. In Secretary of State for the Home Department v PG (Jamaica) [2019] EWCA Civ 1213 Holroyde LJ stated at paragraph [34]:

> "It is therefore now clear that a tribunal or court considering section 117C(5) of the 2002 Act must focus, not on the comparative seriousness of the offence or offences committed by the foreign criminal who faces deportation, but rather on whether the effects of his deportation on a child or partner would go beyond the degree of harshness which would necessarily be involved for any child or partner of a foreign criminal faced with deportation."

Hickinbottom LJ stated at paragraph 46:

> "When a parent is deported one can only have great sympathy for the entirely innocent children involved. Even in circumstances in which they can remain in the United Kingdom with their other parent, they will inevitably be distressed. However, in section 117C(5) of the 2002 Act Parliament has made clear its will that, for foreign offenders who are sentenced to one to four years, only where the consequences for the children are 'unduly harsh' will deportation be constrained. That is entirely consistent with article 8 of the ECHR. It is important that decision-makers and, where their decisions are challenged, tribunals and courts honour that expression of Parliamentary will."

13. We refer also to the decision of the Court of Appeal in Secretary of State for the Home Department v KF (Nigeria) [2019] EWCA Civ 2051. The Court of Appeal held the Tribunal had erred in holding that the effect of a foreign criminal's deportation on his partner and child would, within the meaning of s117C(5) of the 2002 Act and paragraph 399 of the Immigration Rules, be unduly harsh, based on its conclusions that the risk of reoffending was low and the child was likely to find being deprived of his father traumatic. Those conclusions impermissibly involved a balancing of the relative level of severity of the offence and did not identify a degree of harshness going beyond what would necessarily be involved for the family of a foreign criminal being deported.

14. In our judgment the judge made material errors in law when she reached her conclusions on "unduly harsh" and "very compelling circumstances". The facts of this case could not on any conceivable view support those conclusions. There is nothing in the facts of this case which go beyond the degree of harshness which would necessarily be involved for the child or spouse of a foreign criminal faced with

deportation. In our view it does not matter whether the judge's errors are classified as absence of reasons or perversity as on any view they not in accordance with binding judicial decisions explanatory of the two phrases. We are satisfied that the submissions on behalf of the Secretary of State are well founded and must be sustained. We therefore set aside the judge's decision. It was not suggested on behalf of Mr [F] that, if we were to do so, it would not be appropriate for us to remake the decision ourselves. In those circumstances, and in light of our conclusion above, we proceed to re-make the decision by dismissing the appeal.

Notice of Decision

15. The decision of the First-tier Tribunal involved the making of material errors on points of law. Its decision is set aside and we re-make the decision by dismissing Mr [F]'s appeal.

No anonymity direction is made.

Signed *R. Uist* Date 9th June 2020

Lord Uist sitting as an Upper Tribunal Judge.

TO THE RESPONDENT
FEE AWARD

We have dismissed the appeal and therefore there can be no fee award.

Signed *R. Uist* Date 9th June 2020

The Hon. Mr Justice Uist sitting as an Upper Tribunal Judge