



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/19759/2018

**THE IMMIGRATION ACTS**

Heard at Birmingham  
On 28<sup>th</sup> January 2020

Decision & Reasons Promulgated  
On 20<sup>th</sup> April 2020

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

TE  
(Anonymity Direction Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr V Madanhi; CB Solicitors

For the Respondent: Mr A McVeety; Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. An anonymity direction was not made by the First-tier Tribunal. However, it is appropriate to make an anonymity direction because the case involves minor children. Unless and until a Tribunal or Court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly

identify her or any other member of her family. This direction applies both to the appellant and to the respondent.

### Application for an adjournment

2. At the outset of the hearing, Mr Madanhi renewed the application that had been made on behalf of the appellant on 20<sup>th</sup> January 2020 for an adjournment. The application was refused by the Upper Tribunal Lawyer on 21<sup>st</sup> January 2020, because there was insufficient information about the health of the appellant to support the application. Mr Madanhi submitted the appellant is currently detained and his representatives have been unable to take instructions from her. They last spoke to her on 17<sup>th</sup> January 202 by telephone. She indicated that she is not well and has been receiving treatment from the Mental Health Team. Her representatives have been unable to get any further medical evidence from the appellant or those that are treating her, in support of the application. The application for an adjournment was opposed by Mr McVeety. I refused the application. There is no medical evidence before me to establish the appellant has been unable to provide instructions to her representatives. The overriding objective is to enable the Upper Tribunal to deal with cases fairly and justly, and that includes *inter alia*, ensuring, so far as practicable, that the parties are able to participate fully in the proceedings. The underlying decision of the FtT that is the subject of the appeal before me was promulgated as far back as 14<sup>th</sup> February 2019 and permission to appeal was granted on 13<sup>th</sup> March 2019. As Mr Madanhi confirmed, the appellant's current representatives, CB Solicitors, made the application for permission to appeal to the Upper Tribunal, and settled the grounds of appeal. They no doubt did so upon instructions and identified with their client, the grounds upon which the appellant contends the FtT decision is vitiated by an error of law. The notice of the hearing before me, was sent to the parties on 20<sup>th</sup> November 2019. The appellant and her representatives have had ample opportunity to consider and discuss the appeal and there is no reason in my judgement, why I should not determine whether the decision of the FtT is tainted by a material error of law. The appellant is represented at the hearing before me

and some progress can be made. In the event that I find there is a material error of law in the decision of the FtT, I will consider whether it is necessary to hear from the appellant before I remake the decision.

### The background

3. The appellant is a national of Jamaica. She was previously deported to Jamaica on 31<sup>st</sup> March 2009, following a conviction for drug offences in November 2008 for which she was sentenced to a 3-year term of imprisonment. In March 2010 she attempted to enter the UK using a false passport. On 9<sup>th</sup> April 2010 she was convicted at Lewes Crown Court of being in possession of a false or improperly obtained ID document and was sentenced to 15 months imprisonment. She subsequently made an application to revoke the deportation order. The application was refused by the respondent but following a successful appeal before the Upper Tribunal on human rights grounds, the applicant was granted discretionary leave to remain until 12<sup>th</sup> June 2012.
4. On 24<sup>th</sup> July 2012, the appellant was convicted at Southwark Crown Court of supplying a Class A drug, namely heroin, and on 14<sup>th</sup> September 2012, she was sentenced to 5 years imprisonment. That sentence was reduced on appeal, on 3<sup>rd</sup> November 2013, to a 3-year sentence of imprisonment. As a consequence, on 11<sup>th</sup> December 2015, the respondent made a deportation order in respect of the appellant. The appellant made a human rights claim, contending that her deportation would be contrary to Article 8 of the ECHR as the parent of a child that is a British Citizen. That claim was refused by the respondent on 11<sup>th</sup> December 2015, and an appeal against that decision was dismissed by First-tier Tribunal Judge Bell for reasons set out in a decision promulgated 26<sup>th</sup> September 2016.
5. On 1<sup>st</sup> August 2017, the appellant's representatives made further submissions to the respondent, claiming that the deportation of the appellant would be contrary to Article 8 ECHR. The respondent was invited to revoke the deportation order. The respondent refused the human rights claim and refused to revoke the deportation

order for reasons set out in a decision dated 20<sup>th</sup> September 2018. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Birk for reasons set out in a decision promulgated on 14<sup>th</sup> February 2019. It is the decision of FtT Judge Birk that is the subject of the appeal before me.

### The decision of the First-tier Tribunal

6. The background to the appeal is set out at paragraphs [2] to [7] of the decision and I do not repeat it here. The claim made by the appellant is summarised at paragraph [8] of the decision:

“...she has a relationship with her two British children who are under the age of 18, namely [E] and [T]. She states that her relationship with [E]'s father has broken down and he has changed his intentions about providing care for [E] if the appellant was removed from the UK. She claims that [E] is undergoing speech therapy which will be unavailable or disrupted if he moves from her care. There is a psychological report relating to the two children which she would wish to have taken into account. She also has a relationship with her adult daughter [S]. She has a British grandchild in the UK. As for her private life she has been residing in the UK since 2000.”

7. The First-tier Tribunal Judge heard evidence from the appellant as set out at paragraphs [12] to [16] of the decision. The judge noted at paragraph [30] of her decision that the conviction that gave rise to the deportation order, was the conviction in September 2012 for supplying a Class A drug, for which the appellant received a three-year sentence of imprisonment. The judge properly noted the Article 8 claim is therefore to be considered by reference to paragraph 398(b) of the Immigration Rules and s117C(3) Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”). The judge's findings and conclusions are set out at paragraphs [31] to [66] of the decision.
8. The Judge found for the reasons set out at paragraph [31], the appellant cannot benefit from Exception 1 of the 2002 Act because quite apart from anything else, the appellant has not been lawfully resident in the United Kingdom for most of her life.
9. The judge accepted, as had the respondent, the appellant has a genuine and subsisting relationship with both her minor children, [E] and [T]. Insofar as the

appellant relied upon her relationship with her adult daughter and grandchild, the judge referred to the appellant's own evidence that she now has little contact with her eldest daughter and the relationship is strained.

10. The issue in the appeal was whether the effect of the appellant's deportation on her two youngest children would be unduly harsh. In setting out the background, the judge had already noted that [T] resides with his father, [V]. [V] is also the father of [E] and has parental responsibility for [E] although [E] lives with the appellant. The judge found it is in the best interests of [T] to remain in the care of his father who is his primary carer, and who is able to meet all of his physical, emotional, educational and welfare needs. The judge found that it would also be in [T]'s best interests to maintain contact with the appellant.
11. The judge found that it would be in [E]'s best interests for him to remain living with the appellant. She noted the best interests of the children can be outweighed by other factors.
12. First-tier Tribunal Judge Birk referred to the decision of FtT Judge Bell promulgated on 26<sup>th</sup> September 2016, in which the judge had considered whether it would be unduly harsh for the two children to remain in the UK without the appellant if she is deported, or for the two children to live in Jamaica with the appellant. The judge reminded herself that the previous decision is a 'starting point' in respect of matters as they stood in September 2016, but she still had to make her own assessment of the evidence and developments since. The judge noted the previous Tribunal was aware that [E] had been born in prison and has lived with his mother from birth and was also aware that [E] has speech difficulties. The judge noted the more recent evidence regarding the speech and language therapy treatment, and the letter from [E]'s primary school that demonstrates that the language difficulties continue. At paragraph [42], the judge said:

"...[E] is in receipt of additional help and support at school and he is receiving the help of a speech therapist. Since this is being provided by the state authorities in the form of school and the local authority I find there is no reason why this cannot continue in another county as the authorities would be under a statutory obligation to do so. I do

not find therefore that the child's language plan and development would suffer or be altered by the deportation of the appellant."

13. At paragraphs [43] to [49] of her decision, the judge addressed the claim by the appellant that [E]'s father, [V], does not want to know about [E] and is now unwilling to provide care for [E] if the appellant is removed to Jamaica. The judge rejected the claim made by the appellant that [V] is unwilling to, or unable to care for [E]. At paragraph [50], the judge said:

"I take into account that [E] would be in the same position as [T] in that he would be attending school and so this would not interfere with [V]'s work since [V]'s work pattern allows him to work around [T]'s schooling. The appellant accepted the practical reality of this in her oral evidence. Much, if not all, of the work for [E]'s speech difficulties is facilitated by his school and so there is little additional burden for [V] to bear in this regard."

14. The Judge found the appellant has exaggerated her evidence that she is the only person who can understand [E], noting that her evidence is not supported by anything in the evidence before the Tribunal from [V], the school, and social services. The judge also rejected the appellant's claim that [E] has the mental capacity or behaviour of a two-year-old. The judge noted [E] attends a mainstream school and not a special needs school.

15. The judge considered the impact of separation upon the two children and the matters set out in the psychological report of Mr Stephen Bland dated 31<sup>st</sup> July 2017. The judge was not satisfied that the Psychologist had been provided with an accurate summary of the arrangements for the care of the children. The judge noted the conclusion reached by the Psychologist is that it is difficult to assess the effect of separation from children and a deported parent. At paragraph [56] of her decision the judge stated:

"I find that his specific conclusions in this case to be no more than what can be described as fairly obvious. The report states that it was likely that they would initially show a shock reaction, followed by angry feelings and mood difficulties (paragraph 5.2). The report did not attempt to conduct any assessment of wishes and feelings of [E] who would have been aged 4½ at the time. I find that the report provides a generalised assessment of impact rather than one which is specific to this case and so I place little weight on this report."

16. The judge rejected the appellant's claim that [E] does not have a close relationship with his father. At paragraphs [58] and [59], the judge concluded:

“58. I find that there is an alternative home for [E] if the appellant does not wish to take him with her, which is with his father. The appellant does not claim that [V] has a history of criminal offending or that he could not accommodate [E]. The evidence is, which is unchallenged by the appellant, is that he has been able to provide [T] with a settled and stable home life. I accept that there would be for [E] a period of adjustment and change but that this would be in the short-term and ameliorated by living with his father and brother to whom he is close. I find that in respect of maintaining his relationship with his mother, that Skype and WhatsApp video calls are available between the two countries and so contact can be maintained daily. I accept that there would be an adverse impact on [E] being separated from his mother but that he would be looked after by his other parent who would be able to assist him with coping with this change.

59. I find that [T] would also experience a change of not having physical contact and that this would upset him. I take into account the expressive letter that he wrote about his mother. However, I find that he would have the support of his primary carer who would be able to provide understanding and stability to help him. I find that [T]'s relationship with his mother can also be maintained by modern means of communication and possibly visits.

17. The judge found there is a very strong public interest in deporting the appellant. She found it would not be unduly harsh on the children to remain UK if the appellant is deported. She concluded that the deportation of the appellant is not disproportionate to the legitimate aim. The judge concluded the deportation of the appellant would not be in breach of Article 8 and the appellant has not demonstrated that there are any compassionate or exceptional circumstances such that the deportation order should be revoked.

### The appeal before me

18. The appellant advances a number of grounds of appeal. First, the appellant claims that in reaching her decision the judge proceeds, at [32], on the basis that [T] sees the appellant “occasionally”, whereas the evidence of the appellant is that she sees [T] regularly and every two weeks. Second, the appellant claims the judge made contradictory findings in relation to the evidence of [V]. The judge cites an extract from the decision of FtT Judge Bell at paragraph [43] of her decision, noting FtT Judge Bell found [V] to be a credible witness who appears to live a stable life, looks

after his son well, cares about his children and is able to work. The judge noted, at [47], that [V] has provided a further letter in which he states he would have difficulties looking after [E] if the appellant is deported. The appellant claims that having accepted [V] had written a letter stating he could not care for [E], the judge did not have good reason for rejecting that evidence. Third, the judge made a number of findings without providing any or any adequate reasons. Fourth, the assistance being provided to [E] by the local authority under s17 Children Act 1989 is based upon their conclusion that it is in the best interests of [E] to live with his mother and the judge failed to have regard to matters such as the need to continue the speech therapy at school, and the difficulty that [E] has in communicating using the telephone or social media. Finally, the judge erred by failing to consider the crucial question as to whether it is unduly harsh for [E] to leave the UK and go to Jamaica with the appellant, or whether it is unduly harsh for him to remain in the UK separated from the appellant, his principal carer, at the age of five.

19. Permission to appeal was granted by First-tier Tribunal Judge O'Keefe and the matter comes before me to determine whether the decision of the First-tier Tribunal is vitiated by a material error of law, and if so, to remake the decision.
20. Before me, Mr Madanhi adopts the grounds of appeal. He submits the judge erred in her consideration of the impact of the appellant's deportation upon the minor children, and in particular, the impact upon [E]. Mr Madanhi submits the best interests of the child were not adequately considered and although the decision of the Supreme Court in KO (Nigeria) was cited but the judge, she erred by failing to give adequate consideration to the best interests of the children. Mr Madanhi submits there had been a change in circumstances since the matter was considered by FtT Judge Bell. [V] had provided a letter that is at page 17 of the appellant's bundle, in which he confirms that he is unable to take care of [E] and asks that the appellant be allowed to remain in the UK so that she can continue to look after [E]. Mr Madanhi submits the focus of the judge throughout has been upon the appellant's offending rather than the best interests of the children and the impact upon the children as set out in paragraph 5.2 of the report of Steven Bland.



21. Mr Madanhi informed the Tribunal the appellant is now detained and has been in detention for about a month. [E] is currently being cared for by his elder sister, the appellant's daughter and is having ongoing contact with his father.
  
22. In reply, Mr McVeety submits the best interests of the children are a paramount consideration but are capable of being outweighed by the public interest in deportation of foreign criminals. He submits the issue here, is regarding the arrangements for [E] in particular. Mr McVeety submits it was open to the judge to reject the claim made by the appellant that [V] is now unwilling or unable to care for his son [E], and it was open to the judge to conclude that there is an alternative home for [E] in the UK. The judge had noted that [V] was found to be a credible witness by FtT Judge Bell when he had expressed a willingness to look after [E] previously. There was no oral evidence from [V] at the hearing before FtT Judge Birk and the judge clearly considered what had been said by [V] in the undated and unsigned letter that was before the FtT. The weight the judge attached to the evidence was a matter for the judge. Mr McVeety submits the judge considered the report of the Psychologist and the evidence before the Tribunal regarding the impact upon the children, was fairly general. He refers to the decision of the Court of Appeal in SSHD v PG (Jamaica) [2019] EWCA Civ 1213 and submits there has to be something above and beyond the normal consequences of deportation. Here, [V] is capable of stepping into the breach if the appellant is deported and the judge found that in the end, although there would be some difficulty, it is not unduly harsh for the children to remain in the UK without the appellant. It was therefore open to the judge to conclude that the decision to deport the appellant is not disproportionate to the legitimate aim and would not be in breach of Article 8.

### Discussion

23. It is uncontroversial that the deportation of criminals is in the public interest. Section 117C(2) of the 2002 Act confirms that the more serious the offence committed by the foreign criminal, the greater is the public interest in deportation of the criminal. Applying s117C(3) of the 2002 Act, the public interest required the

appellant's deportation unless Exception 2 set out in s.117C(5) applies. That is, the appellant has a genuine and subsisting parental relationship with a qualifying child and the effect of her deportation on the child would be unduly harsh.

24. With specific reference to Exception 2 in S.117C(5) , Lord Carnwath in KO (Nigeria) observed, 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 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 [2017] 1 WLR 240, paras 55 and 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. In SSHD v PG (Jamaica), Holroyde LJ said, 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. Pursuant to Rule 399, the tribunal or court must consider both whether it would be unduly harsh for the child and/or partner to live in the country to which the foreign criminal is to be deported and whether it would be unduly harsh for the child and/or partner to remain in the UK without him."

26. At paragraph 38, Holroyde LJ further observed:

"In the circumstances of this appeal, I do not think it necessary to refer to decisions predating KO (Nigeria), because it is no longer appropriate, when considering section 117C(5) of the 2002 Act, to balance the severity of the consequences for SAT and the children of PG's deportation against the seriousness of his offending. The issue is whether there was evidence on which it was properly open to Judge Griffith to find that deportation of PG would result for SAT and/or the children in a degree of

harshness going beyond what would necessarily be involved for any partner or child of a foreign criminal facing deportation."

27. It was uncontroversial that the appellant has a genuine and subsisting parental relationship with her children who are all British citizens. I reject the claim that in reaching her decision, the judge failed to have regard to the best interests of the children and erred in her assessment of the evidence regarding the arrangements for contact between [T] and the appellant. At paragraph [8] of her witness statement dated 25<sup>th</sup> January 2019, the appellant confirmed that [T] lives with his father "*.. but spends time during vacations with me.*". The precise arrangements for contact were not set out, but undoubtedly there was some contact. The judge referred to the evidence of the appellant regarding her contact with [T] at paragraph [14] of the decision. Whether the contact between the appellant and [T] is described as 'occasional' or in some other way, is immaterial. It is quite clear that the judge was aware that [T] lives with his father and has contact with the appellant. At paragraph [36], the judge expressly found that it would be in [T]'s best interests to maintain contact with the appellant.
28. I also reject the claim that the judge made contradictory findings in relation to the evidence of [V] and erred in her assessment of the evidence. I have carefully read the unsigned and undated letter from [V] that is to be found at page 17 of the appellant's bundle. [V] states he would "*.. have difficulties*" in looking after his son [E] if the appellant is deported to Jamaica. He asks the authorities to allow the appellant to remain in the UK for the well-being of [E]. He confirms that he currently looks after [T] who is much older than [E], and he states "*... It would be difficult for me to look after [E] as he is still young and needing the motherly attention all the time. I am now working, and I would have serious difficulties to look [E] (sic) as the mother is currently doing ...*". The judge carefully addressed the evidence of [V] at paragraphs [43] to [51] of the decision. [V] did not give evidence before the FtT, and the judge carefully considered the claim made by the appellant that [V] does not want to know anything at all regarding [E] and is not now prepared to take responsibility for his care. The judge found appellant to be exaggerating her evidence and rejected the claim that the relationship has broken down and [V]

wants nothing to do with the appellant and [E]. The judge noted, rightly in my judgment, that [V] does not categorically say that he is unwilling to care for his son, and there is nothing that prevents him from doing so. It was in my judgement open to the judge to conclude that there is an alternative home for [E] with his father and brother in the event that the appellant is deported, for the reasons given in the decision.

29. I also reject the claim made by the appellant that the judge has failed to give adequate reasons for the findings made. The judge carefully considered the evidence in the round having regard to the best interests of the children and the public interest in deportation of the appellant. As the Court of Appeal said at [18] of Herrera v SSHD [2018] EWCA Civ 412, it is necessary to guard against the temptation to characterise as errors of law what are in truth no more than disagreements about the weight to be given to different factors, particularly if the judge who decided the appeal had the advantage of hearing oral evidence. The assessment of such a claim is always a highly fact sensitive task. The FtT judge was required to consider the evidence as a whole and she plainly did so, giving adequate reasons so that the reader of the decision is left in no doubt as to the reasons for the decision reached.
30. Looking at the evidence before the First-tier Tribunal, it is difficult to identify anything which distinguishes this case from other cases where a parent who is subject to deportation as a foreign criminal, is separated from a child. The First-tier Tribunal judge considered the report of the Psychologist and accepted that there will be an impact upon the two youngest children. It goes without saying that all children should, where possible, be brought up with a close relationship with both parents. All children deprived of a parent's company during their formative years will be at risk of suffering harm. It is necessary to look for consequences characterised by a degree of harshness over and beyond what every child would experience in such circumstances. It is important to bear in mind the observations of Hickinbottom LJ in PG (Jamaica) 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 the 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 ECHR . It is important that decision-makers and, when the decisions are challenged, tribunals and courts honour that expression of Parliamentary will."

31. In my judgment it was neither irrational nor unreasonable for the First-tier Tribunal judge to conclude that it would not be unduly harsh for [E] and [T] to remain in the UK without the appellant. The loss that they will feel is unfortunately, without more, an unfortunate consequence of the separation of a parent and child, when a parent is deported.
32. Although the public interest in the deportation of a foreign criminal is not set in stone and must be approached flexibly, in my judgement, the judge had proper regard *inter alia* to the appellant's length of residence in the UK, the ties that he retains with her children, her immigration and offending history, and the family circumstances described in the evidence and in the report of Mr Bland. It was in my judgment open to the judge to conclude there are no compelling circumstances which make the appellant's claim based on Article 8, especially strong. It follows that in my judgement, it was open to the judge to conclude the deportation of the appellant is in the public interest and not disproportionate to the legitimate aim for the reasons given by her.

Decision:

33. The appeal is dismissed and the decision of First-tier Tribunal Judge Birk, stands.

Signed

Date

18<sup>th</sup> March 2020

**Upper Tribunal Judge Mandalia**