Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/21670/2018 (V)

THE IMMIGRATION ACTS

Heard remotely at Field House	**Decision & Reasons Promulgated**
On 29 January 2021	**On 19 March 2021**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MALLANDO MICHAEL BLAKE
(AKA MALLANDO MICHAEL WRAY)
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Lindsay, Home Office Presenting Officer
For the Respondent: Mr M Khan, Nationwide Law Associates

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in the bundles on the court file, the contents of which I have recorded. The order made is described at the end of these reasons.

DECISION AND REASONS

The appeal proceedings to date

1. Although this is an appeal by the Secretary of State, I shall refer to the parties as in the in the First-tier Tribunal. The Appellant is a citizen of Jamaica born on 14 September 1981. In a decision promulgated on 26 August 2020, I set aside the decision of the First-tier Tribunal allowing the Appellant's appeal.

2. The appeal was adjourned for re-hearing with a direction that the parties file skeleton arguments 14 days before the new hearing date. Notice of hearing was sent on 14 September 2020. Neither party complied with that direction and there was no request for further time within which to comply.

3. The hearing on the 5 October 2020 was adjourned with a direction that the Appellant and the Respondent file skeleton arguments by 4pm on 19 October 2020 addressing the following issues:

    (i) Whether paragraphs 399 and 390A apply;
    (ii) Whether section 117C applies;
    (iii) Whether Smith is correctly decided, and if so, the Respondent to identify strong public policy reasons to justify continuing the deportation order;
    (iv) Whether the refusal to revoke the deportation order breaches the Appellant's rights under Article 8.

4. In response to these directions, Mr Melvin, on behalf of the Respondent, submitted a skeleton argument on 7 October 2020 relying on EYF (Turkey) v SSHD [2019] EWCA Civ 592. Mr Lindsay relied on his own skeleton argument which he submitted on the morning of the hearing which took place at 2.30pm. Mr Lindsay's skeleton argument expanded on that submitted by Mr Melvin and specifically addressed the issues set out at paragraph 3 above.

5. The Appellant submitted a skeleton argument on 20 October 2020 relying on SSHD v ZP (India) [2015] EWCA Civ 1197. Mr Khan complained about the late submission of Mr Lindsay's skeleton argument but he did not seek to exclude it. He did not make an application for an adjournment and confirmed he did not require any further time to consider it.

Appellant's immigration history

6. The Appellant came to the UK on 4 April 2002 and was apprehended at Heathrow airport in connection with the importation of 10.7g of cocaine. On 7 June 2002, he was convicted at Isleworth Crown Court and sentenced to 18 months' detention in a Young Offenders Institution [YOI]. He was made the subject of a deportation order in the name of Mallando Michael Wray on 17 September 2002. He did not appeal and

was deported to Jamaica on 3 January 2003. The Appellant has remained outside the UK since that date.

7. On 1 March 2013, the Appellant married a British citizen [JPH]. On 30 July 2014, he was refused a visit visa because he failed to disclose his past history. On 20 October 2015, he applied for entry clearance as a spouse. His application was refused because the Entry Clearance Officer was not satisfied the relationship was genuine and the Appellant was subject to a deportation order. The Entry Clearance Manager, on review, conceded the financial requirements were met. The Appellant withdrew his appeal against this decision on 25 July 2017 having applied for revocation of the deportation order on 23 June 2017.

8. The Respondent refused to revoke the deportation order and refused the Appellant's human rights claim on 25 June 2018. The Appellant appealed and his appeal was allowed by First-tier Tribunal Judge Bibi on 31 December 2019. I set aside this decision because the judge failed to demonstrate she had considered whether it would be unduly harsh for JPH to relocate to Jamaica or for her to remain in the UK without the Appellant. The judge failed to identify evidence upon which she could conclude that JPH had suffered undue hardship since the marriage and she failed to give reasons for her finding that the Appellant satisfied paragraph 399(b). The following finding of fact was preserved: The Appellant is in a genuine and subsisting relationship with JPH.

Relevant rules and law

9. The following immigration rules apply to applications for revocation of deportation orders:

> 390A
> Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining a deportation order will be outweighed by other factors.
>
> 391
> In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order will be the proper course:
>
> (a) In the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order when, if an application for revocation is received, consideration will be given on a case by case basis to whether the deportation order should be maintained, or

(b) In the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least 4 years, at any time,

Unless, in either case, the continuation would be contrary to the Human Rights Convention or the Convention Relating to the Status of Refugees, or there are some other exceptional circumstances that mean the continuation is outweighed by compelling factors.
391A
In other cases, revocation or the order will not normally be authorised unless the situation has been materially altered, either by change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities of the Secretary of State. The passage of time since the person was deported may also of itself amount to such a change of circumstances as to warrant revocation of the order.

10. Paragraph A398(b) states: These rules apply where a foreign criminal applies for a deportation order made against him to be revoked. Paragraph 398(b) states: the deportation of the person from the UK is conducive to the public good and in the public interest because the 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.

11. Where paragraph 398(b) is applicable, paragraph 399(b) applies if:

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and who 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.

12. Section 117A of the 2002 Act states that [Part V] applies where the Tribunal is required to determine whether a decision breaches a person's right to respect for private and family life under Article 8.

13. Section 117C states that the deportation of foreign criminals is in the public interest and the more serious the offence, the greater the public interest. In the case of a foreign criminal who has been sentenced to a period of imprisonment of less than 4 years (including detention in a YOI), the public interest requires his deportation unless exception 1 or 2 applies. Exception 1 is not relevant in this case. Exception 2 states that the person has a genuine and subsisting relationship with a qualifying

partner and the effect of deportation would be unduly harsh [the 'unduly harsh test'].

14. In SSHD v ZP (India) [2015] EWCA Civ 1197, Underhill LJ at [24] concluded that paragraph 391 of the Immigration Rules did not require a fundamental difference in approach when considering post-deportation revocation applications to that which is followed when considering pre-deportation application. The difference in drafting structure did not require a different approach as a matter of substance, since following MF (Nigeria) v SSHD [2013] EWCA Civ 1192 the exercise required by paragraph 398 is the same as that required by Article 8. He stated:

> "The exercise required in a case falling under paragraph 391 is thus broadly the same as that required in a case falling under paragraph 390A or paragraph 398. Decision makers will have to conduct an assessment of the proportionality of maintaining the order in place for the prescribed period, balancing the public interest in continuing it against the interference with the appellant's private and family life; but in striking that balance they should take as a starting point the Secretary of State's assessment of the public interest reflected in the prescribed periods and should only order revocation after a lesser period if there are compelling reasons to do so."

15. In Smith (paragraph 391(a) – revocation of deportation order) [2017] UKUT 166 (IAC), the Upper Tribunal held:

(i) In cases involving convictions for an offence for which the person was sentenced to a period of imprisonment of less than four years, the Secretary of State's policy, as expressed in paragraph 391(a) of the Immigration Rules, is that the public interest does not require continuation of a deportation order after a period of ten years has elapsed.

(ii) However, paragraph 391(a) allows the Secretary of State to consider on a case by case basis whether a deportation order should be maintained. The mere fact of past convictions is unlikely to be sufficient to maintain an order if the 'prescribed period' has elapsed. Strong public policy reasons would be needed to justify continuing an order in such circumstances.

(iii) Paragraph 391(a) will only be engaged in a 'post-deportation' case if the person is applying for revocation of the order from outside the UK. Nothing in the strict wording of the rule requires the ten-year period to be spent outside the UK. However, the main purpose of deportation is to exclude a person from the UK. Any breach of the deportation order is likely to be a strong public policy ground for maintaining the order even though a period of ten years has elapsed since it was made.

(iv) In 'post-deportation' applications involving sentences of less than four years made before the end of the ten-year period, and 'post-deportation' applications involving sentences of four years or more, appropriate

weight should be given to the Secretary of State's policy as expressed in the 'Conventions exception' and 'sweep-up exception' with reference to paragraphs 398-399A and 390A of the Immigration Rules.

16. In EYF (Turkey) v SSHD [2019] EWCA Civ 592, the Court of Appeal held that within the ten year period, it will be very difficult for other factors to counterbalance the presumptive effect of the Secretary of State's policy. That was consistent with the decision in ZP (India). Once the ten year period had elapsed it became easier to argue that the balance had shifted in favour of revocation on the facts of a particular case because the presumption had fallen away; but that did not mean that revocation thereafter is automatic or presumed. The question of revocation of a deportation order depends on the circumstances of the individual case. That was consistent with the scheme described by the Supreme Court in Heshim Ali v SSHD [2016] UKSC 60 at [46].

Appellant's submissions

17. In his skeleton argument, Mr Khan submitted that paragraphs 398, 399 and 399A of the immigration rules and sections 117A to 117C of the 2002 Act applied. He submitted the refusal to revoke the deportation order breached the Appellant's Article 8 rights. The Appellant and his wife [JPH] were married in Jamaica seven years ago and have been living apart since 2013. JPH has lived in the UK all her life and was in full time employment. She was limited in terms of annual leave and had family in the UK. It was submitted JPH was emotionally dependant on the Appellant and she had suffered hardship.

18. Mr Khan submitted that paragraphs 390 and 391 of the immigration rules applied and the Tribunal should consider all relevant facts. The Appellant had committed the offence 18 years ago when he was a teenager. He was sentenced to 18 months' detention in a YOI for importing 10g of class A drugs. The Appellant was not a persistent offender and had not breached any immigration rules. It was unfair that the Appellant should be punished twice for an offence he committed as a juvenile. There was no public interest in denying the Appellant entry into the UK. There were compassionate and exceptional grounds in the Appellant's case. It had been well over ten years since the Appellant was deported and his conviction alone was insufficient to refuse revocation of the deportation order. After ten years have elapsed the burden shifted to the Respondent and very strong reasons were required to justify the refusal to revoke the deportation order. The Respondent had failed to discharge that burden.

19. In his skeleton argument, Mr Khan submitted that, in assessing whether the decision strikes a fair balance, the Tribunal should give appropriate weight to the strength of the public interest in the deportation of foreign offenders as expressed in the relevant rules and statues: Heshim Ali. It was submitted that ZP (India) made clear that differences in the wording of the provisions do not require a different approach as a matter of substance. Following Smith, the public interest did not require the

Appellant's deportation after a period of ten years had elapsed. The Appellant's case could be distinguished from Smith on its facts.

20. In oral submissions, Mr Khan submitted the Appellant would succeed on an application for settlement. He was convicted 18 years ago and he married more than ten years after the deportation order was made. Mr Khan submitted Smith was authority for reversing the burden of proof. EYF was not relevant because there was no presumption. The Respondent had to assess the Appellant's application on a case by case basis and the refusal to revoke the deportation order was unfair. Mr Khan submitted the Appellant's relationship with JPH was formed when he was not in the UK and therefore he did not have to establish hardship. Section 117C did not apply. If the 'unduly harsh test' was applicable, no one would be able to succeed on a revocation appeal.

21. Mr Khan submitted paragraph 391 was the starting point. The Appellant was in a genuine and subsisting relationship and without deportation his settlement application would succeed. There was no public interest in refusing revocation because of the genuine relationship and the passage of time. The Appellant was a juvenile when he committed the offence. The principles in Smith should be followed because it supported a case by case analysis.

Respondent's submissions

22. In his skeleton argument, Mr Lindsay submitted the Appellant was a foreign criminal at the date of decision and section 117C applied notwithstanding the Appellant was deported to Jamaica under a deportation order: Williams (scope of 'liable to deportation') [2018] UKUT 116 (IAC). The Appellant's deportation was in the public interest unless one of the exceptions applied or there were very compelling circumstances.

23. Paragraph A398 governed each of the rules which followed (SC (paras A398-339D; foreign criminal; procedure) Albania [2020] UKUT 187 (IAC) and paragraph 399 and 390A applied. However, it should generally be unnecessary for the Tribunal to refer to paragraphs 398-399A: CI (Nigeria) v SSHD [2019] EWCA Civ 2027 at [20] and [21].

24. Mr Lindsay submitted Smith was an incorrect statement of law because the Court of Appeal in EYF confirmed the conclusions reached were unsupported by authority. Mr Lindsay submitted paragraph (ii) of the headnote in Smith had been overturned. Alternatively, the references in Smith to 'the mere fact of past convictions' and 'strong public policy reasons' were misleading. Article 8 requires the Appellant's rights to be balanced against the public interest which amounted to a combination of factors including risk or reoffending, deterrence, maintenance of immigration control and promotion of public confidence. Where these factors indicate an ongoing public interest in deportation being maintained the decision will only be disproportionate if it is outweighed by the individual's rights. A weak Article 8 claim would not require 'strong public policy reasons' to outweigh the individual's rights.

25. In his skeleton argument, Mr Lindsay submitted Smith did not reflect the correct legal approach. It followed that the passage of time would not generally be capable of constituting a compelling reason justifying revocation of a deportation order. The public interest of maintaining a deportation order would generally diminish with the passage of time ZP (India). The strength of the public interest and the strength of countervailing individual's rights will depend on the particular facts.

26. The matter before the Tribunal was not an appeal against the refusal to revoke a deportation order. It was an assessment of Article 8 in line with relevant statute and the immigration rules. The Appellant's appeal can only succeed if he can show that an exception applies or there are very compelling circumstances.

27. It was submitted, the 'unduly harsh test' is to be determined without reference to the severity of relevant offences. It is an elevated test involving more than what is merely uncomfortable, inconvenient or difficult. The Appellant established his relationship with JPH in full knowledge that he was subject to a deportation order and he might not be able to enter or establish a life in the UK. It would not be unduly harsh for JPH to relocate to Jamaica or for her to remain in the UK without the Appellant.

28. In addition to the Appellant's previous convictions, he had a poor immigration history. He was refused a visa in 2014 because he failed to disclose his past history. This undermined the Appellant's contention that the public interest had diminished with time. There were no very compelling circumstances and the decision refusing the Appellant's human rights claim was proportionate.

29. In oral submissions, Mr Lindsay accepted that the Appellant's marriage engaged Article 8 and the public interest diminishes as time passes. However, he submitted the passage of time in itself was not enough and there had to be a change in circumstances. All the factors relevant to the public interest had to be weighed against the Appellant's Article 8 rights. There was no evidence of further criminal offending but the Appellant had a poor immigration history and had applied for a visa six years ago without disclosing his deportation order. The Appellant had been convicted of importing cocaine and the Respondent was of the view that maintaining the deportation order was in the public interest.

30. Mr Lindsay submitted that section 117C applied. The Article 8 balancing exercise was important and the rules on deportation were Article 8 compliant. There was no injustice in the way the scheme operated and all relevant matters had to be considered. The Appellant's previous convictions inform the public interest. Confidence in the system of immigration control would be diminished where there had been a failure to declare relevant matters and family life could continue in Jamaica. The Appellant and JPH had established their family life whilst living in different countries in the knowledge of the Appellant's deportation order. They had never actually lived together. The decision maintained the status quo. There was insufficient evidence to meet the unduly harsh threshold.

Appellant's response

31. Mr Khan submitted there was no public interest in maintaining the deportation order. The Appellant applied for a visit visa without legal assistance and most of the questions related to the past ten years. It should not be assumed he had sought to mislead. The Appellant had served his sentence and had been punished. It was unduly harsh to punish him further. If the Appellant applied again the same argument would apply. The passage of time would not make a difference if the Appellant had no right to be in the UK because he had never lived with JPH. Ten years was significant and only an adverse immigration history could justify a refusal. In the Appellant's case the refusal was unreasonable.

32. Mr Khan submitted the marriage was accepted and the appeal process was linked with Article 8. The rules in relation to deportation did not apply to revocation. The Appellant was not a terrorist and the offence was committed nearly 20 years ago. The refusal to revoke the deportation order was unfair and unreasonable. A case by case basis did not mean the Appellant had to show hardship. The only adverse matter was the conviction over 18 years ago. There was no adverse immigration history. The burden switched to the Respondent after ten years had elapsed. The Respondent had not shown that there was a public interest in maintaining the deportation order.

Conclusions and reasons

33. Paragraph 392 of the Immigration Rules states that revocation of a deportation order does not entitle the person concerned to re-enter the UK, it renders him eligible to apply for admission. This is not an appeal against the refusal of entry clearance as a spouse. Nor is it an appeal against the refusal to revoke a deportation order. It is an appeal against the refusal of a human rights claim. The Appellant has to show that the refusal interferes with his Article 8 rights. The Respondent has to show that the interference was justified and proportionate.

34. Paragraph 391(a) of the Immigration Rules applies. The Appellant made an application for revocation more than ten years after his deportation order was signed. It is for the Secretary of State to consider on a case by case basis whether the deportation order should be maintained. Following Smith and EYF, the public interest does not require continuation of a deportation order after a period of ten years has elapsed.

35. I am not persuaded by Mr Khan's argument that, after ten years have elapsed, the burden is on the Respondent to show strong public interest reasons for maintaining the deportation order. The Court of Appeal confirmed in EYF that, after ten years have elapsed, the presumption in favour of deportation falls away. It did not follow that revocation was automatic or presumed. I find that there was no presumption either way after ten years have elapsed and each case has to be decided on its merits.

36. I find that section 117C of the 2002 Act and paragraphs 399 and 390A of the immigration rules apply to refusals of human rights claims on applications for revocation of deportation orders. Mr Khan's oral argument was contradicted by his skeleton argument. I am satisfied following ZP India and EYF that the 'unduly harsh test' applies in this case.

37. The evidence before me was insufficient to satisfy the 'unduly harsh test'. Mr Khan referred to undue hardship, but there was insufficient evidence to support that assertion. JPH is a British citizen who has lived in the UK all her life. She is employed and has sufficient resources to support herself and the Appellant. She will be separated from her family in the UK if she relocates to Jamaica and she will lose her job. If she remains in the UK, she will continue to live separately from the Appellant maintaining the relationship by visits, voice calls and messages as she has done since 2013. Either scenario does not give rise to unduly harsh consequences.

38. I find the Appellant is unable to satisfy exception 2 under section 117C(5) of the 2002 Act and paragraph 399(b) of the immigration rules. Where the exceptions do not apply, it will only be in exceptional circumstances that the public interest in maintaining a deportation order will be outweighed by other factors (paragraph 390A). There were no exceptional circumstances identified in this case.

39. Mr Khan submitted the refusal to revoke the deportation order was unfair because the Appellant satisfied the requirements of Appendix FM for entry clearance as a spouse. I appreciate the Appellant's frustration in having to meet the 'unduly harsh test' when there is no weight to be attached to the public interest in deportation after a period of ten years has elapsed. Unfortunately, the authorities are against him and it is the will of Parliament that part V of the 2002 Act applies to human rights claims and section 117C applies to foreign criminals.

40. The Appellant is a foreign criminal because he has committed a criminal offence and has been sentenced to a term of imprisonment of 18 months. Detention in a YOI is by definition a term of imprisonment. Neither the Appellant's youth at the time the offence was committed over 18 years ago nor the passage of time exempts the Appellant from the application of section 117C. The Appellant is not in the same position as someone who has no criminal convictions.

41. The weight to be attached to the public interest is informed by an assessment of whether the Appellant can satisfy the immigration rules. Following ZP (India), decision makers have to conduct an assessment of the proportionality of maintaining the order in place for the prescribed period, balancing the public interest in continuing it against the interference with the Appellant's private and family life.

42. The Appellant established his family life with JPH when he was subject to a deportation order, notwithstanding more than ten years had elapsed. That family life has been maintained by JPH visiting Jamaica and WhatsApp voice calls and messages. The nature and quality of the Appellant's family and private life has not

changed. The decision to refuse to revoke the deportation order did not interfere with the Appellant's family or private life giving rise to consequences of such gravity so as to potentially engage Article 8.

43. In the alternative, if I accept that preventing the Appellant and JPH from living together as a married couple amounts to an interference sufficient to engage Article 8, the refusal to revoke the deportation order was in accordance with the law and necessary in a democratic society. I find that the refusal was proportionate to the legitimate public end sought to be achieved for the following reasons. The Respondent indicates that ten years is an appropriate starting point for consideration whether to revoke the deportation order in circumstances where the sentence is under four years. The application for revocation was made 15 years after the deportation was made and paragraph 391(a) of the immigration rules applies.

44. In striking the balance, the following matters weigh against the Appellant. He is a foreign criminal who is unable to satisfy the exceptions to deportation. He has been convicted of the importation of cocaine which is a serious offence reflected in the sentence of 18 months' detention in a YOI. He married JPH whilst the deportation order was still in force and, the following year, he applied for a visa to visit the UK without disclosing the deportation order.

45. Matters weighing in the Appellant's favour are that he was 21 years old when he committed the offence and he was convicted 18 years ago. The Appellant has remained outside the UK since January 2003. The Appellant married in 2013 and the relationship is genuine and subsisting. JPH supports the Appellant financially.

46. The Appellant cannot satisfy the exceptions to deportation and there are no exceptional circumstances or very compelling circumstances over and above those exceptions. On balance, I find the public interest outweighs the Appellant's right to family and private life. I dismiss the Appellant's appeal on human rights grounds.

Notice of decision

The Appellant's appeal is dismissed.

J Frances

Signed Date: 11 March 2021
Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

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

J Frances

Signed Date: 11 March 2021
Upper Tribunal Judge Frances

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.