



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: **UI-2021-000893**
HU/18853/2019

THE IMMIGRATION ACTS

Heard at Field House

On 14 June 2022

Decision and Reasons

Promulgated

On 15 August 2022

Before

THE HON. MRS JUSTICE THORNTON DBE

and

UPPER TRIBUNAL JUDGE BLUNDELL

Between

OMAR PARCHMENT

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Jonathan Metzger, instructed by **Raj Law Solicitors**

For the Respondent: Ms Cunha, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant is a citizen of Jamaica, born on 16 November 1981. He appeals against a decision issued by the First-tier Tribunal dismissing his appeal against the decision of the Respondent, the Secretary of State refusing his human rights claim.
2. The appeal was heard on 14 June 2022. At the end of the hearing, we indicated that our decision was to allow the appeal and that reasons would follow.

Background

3. The Appellant arrived in the UK on 23 March 1993 to join his mother, He was granted indefinite leave to remain on 17 February 1994. On 20 April 2018, he was sentenced to a period of imprisonment of 4 years for possession of Class A drug (cocaine and heroin), with intent to supply. The quantity of drugs was estimated as sufficient for 101 deals.
4. The Respondent issued a notice of intention to deport on 17 April 2019. The Appellant made a human rights claim in response. On 5 November 2019, the Respondent made the deportation order, having refused the human rights claim. In doing so, she concluded that the Appellant had been convicted of criminal offences; his deportation was conducive to the public good; none of the statutory exceptions applied and there were no exceptional circumstances to outweigh the public interest in deportation.

The decision of the First-Tier tribunal

5. The appeal came before the First-tier Tribunal judge on 25 August 2021. The judge heard evidence from the Appellant, his mother, his adult son, and his sister. Documentary evidence before the judge included:
 - i. the report of an independent social worker instructed by the Appellant, dated 30 October 2020;
 - ii. an addendum report from the same social worker, dated 27th of April 2021; and
 - iii. a letter from the GP of the Appellant's mother, with accompanying medical records.
6. The judge found that the Appellant is a single man in good health, then 39 years old. He has two British Citizen children and an adult son living independently.
7. The judge accepted that the Appellant had been lawfully resident in the UK for most of his life. She concluded that, despite the Appellant's criminal behaviour, he is socially and culturally integrated in the UK but there would not be very significant obstacles to his reintegration in Jamaica.
8. The judge rejected the Appellant's evidence that his relationship with his partner (China Gray) had come to an end and that he and his mother had recently been responsible for the care of the children. She made a finding that the Appellant was still in a relationship with his partner, albeit it was an 'on/off' relationship, and it was therefore appropriate to consider whether deportation would be unduly harsh on her. She was not however, satisfied that the Appellant's deportation would be unduly harsh on Ms Gray. Whilst there was evidence that she requires support to raise their children, she had relied on wider family support throughout the children's lives from both her family and the Appellant's family which would

continue to be available. In the context of her consideration in this regard, she said as follows in relation to the Appellant's mother:

"76 The appellant confirmed that social services have not been involved in recent years and I find no evidence to support the conclusion of the ISW that "...for their father to be removed from their lives, in all probability China would not be able to work and the children could possibly end up in the care of the state." The family have supported the children and China and I find no evidence that support will be withdrawn...

...the appellant's mother has an award of PIP, standard daily living, and has adaptations in her home to assist her. I am aware that the children are 13 and 7 and find that, in an age-appropriate way, they are able to take care of their own needs and the assistance, support care they need can be provided without significant physical effort and so would not be outside the ability of the appellant's mother and would not be outside the ability of any of the other family members, including the family members of Ms Gray who can support the children".

9. Turning to consider the Appellant's children, the judge concluded that deportation would not be unduly harsh on them. She accepted that the Appellant has a loving relationship with his children and that the minor children currently spend the majority of time at their grandmother's house with their father. The judge then addressed the weight to be placed on the report of the independent social worker as follows:

"87 For the first report, Ms Buckley had one face to face meeting with the appellant and family members on 12 September 2020. The appellant's minor children were present for at least parts of the meeting, as was his solicitor. I am not satisfied that this meeting was an appropriate venue for full and frank disclosure of evidence. I note that the appellant did not clarify that:

- he and Ms Gray the children's mother, had been arrested and charged with shoplifting and he had been charged with assault at the date of that meeting.*
- the relationship with Ms Gray had ended, that the relationship over the years had been on/off and "never smooth". Instead his evidence was that he is engaged to Ms Gray or was married to her*
- there had been difficulties with his relationship with his mother and family members, described in the thinking skills course as "toxic"*

88 Ms Buckley had 2 subsequent telephone calls with the appellant. He did not use the opportunity to give a full and truthful account of his situation.

89 Ms Buckley had one telephone call with Ms Gray and the record of the call sets out evidence of the care given by the appellant to his children but no clarification of the relationship between Ms Gray and the appellant. The report notes that, having work and being at some distance from the tragedy of her mother's death was allowing Ms Gray's mental health to improve.

90 In her first report she set out that she was instructed to "assist the court as to whether Mr Omar Parchment should remain with his partner China Gray and their two children in the UK or be deported to Jamaica". Her conclusion was "...I am of the opinion that there is nothing to be achieved by sending Omar Parchment back to Jamaica. On the contrary I

believe it will have a seriously detrimental effect on his three children, his partner China and his mother... I have come to the conclusion that to deport Omar Parchment to Jamaica would not be in his best interests would cause harm to his children and family”.

91 Despite a discussion with the family approximately 8 months after Ms Foster Lewis returned from a 3-4 week trip to Jamaica to stay with close friends, Ms Buckley concluded “What I do know is that he has no connections in Jamaica who could protect, help or advise him”. I find this conclusion inconsistent with the evidence I heard at the hearing and I prefer the evidence I heard of real links to Jamaica.

92 She does not identify that she understands her duty is to the Court and I am not satisfied that she wrote the report with that purpose uppermost in her mind. I accept her conclusion that to remain in the UK would be in the best interest of Mr Parchment but that is not the test in this court.

93 I am mindful that the information given to the ISW is not accurate or complete about the appellant and his relationship with Ms Gray, his relationship with the rest of his family, links to Jamaica or his recent criminal activity and that her conclusions were reached on that basis. I am satisfied that the conclusions she reaches about the benefit of the appellant spending time with his children bear weight but I find that there is less weight to those conclusions because of the inaccurate evidence on which the conclusions are based.”

10. Turning to consider ‘very compelling circumstances’, the Judge concluded that:

“117 The appellant’s offending is serious and although there were some offences in his youth his sentence of 4 years imprisonment was for serious drug dealing carried out at 35 years old. I accept that the appellant has been in the UK for the majority of his life, however, he has continued to offend throughout his adult life in the UK, with 10 convictions after the age of 18, including one after the offence triggering the deportation decision, offences committed while on bail and offending while in prison. There is also evidence that, in his engagement with his probation team, the evidence given to them about his relationship is different to that given in court today. Conduct which indicates obfuscation or deception is of concern. I accept that he has solid social, cultural and family ties with the UK and that his ties in Jamaica are more tenuous and through family members.

118 The appellant’s offending is described by the sentencing judge as a menace...causing misery to many, many people. The quantity of drugs which the appellant had was significant and his offending, according to his TSP has been for financial gain. I am satisfied that the misery of drug dealing is a very serious reason which justifies deportation.

119 When I stand back to consider the situation as a whole and I consider whether all the elements of his own life and that of his family, cumulatively, meet the threshold for very compelling circumstances, I find that the weight of public interest outweigh the circumstances weighing in favour of the appellant.”

The law

11. Section 32 of the UK Borders Act 2007 sets out the clear proposition that deportation of a foreign criminal, defined as any foreign person whose criminal conduct results in a sentence of 12 months' imprisonment or more, is conducive to the public good. That is a statement of public policy enacted by the legislature, which the courts and tribunal are obliged to respect. The Secretary of State must make a deportation order in respect of a

foreign criminal unless deportation would breach a person's Convention rights (Section 33 of the UK Borders Act).

12. Part 5A of the Nationality, Immigration and Asylum Act 2002 sets out the public interest considerations which apply where a court or tribunal considers a case such as this, in which it is submitted that a decision under appeal is contrary to Article 8 of the European Convention on Human Rights. Section 117B contains public interest considerations which are applicable in all cases. Section 117C contains additional considerations in cases involving foreign criminals. It provides as follows:

117C Article 8: additional considerations in cases involving foreign criminals

- (1) The deportation of foreign criminals is in the public interest.*
- (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.*
- (3) In the case of a foreign criminal (“C”) who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C’s deportation unless Exception 1 or Exception 2 applies.*
- (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.*
- (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.*
- (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.*

13. This statutory scheme, and the parallel provisions in Part 13 of the Immigration Rules, were considered in detail in NA (Pakistan) [2016] EWCA Civ 662; [2017] 1 WLR 207. The court explained that s117C divides offenders into two groups. “Medium offenders” are those who received a sentence of between one year and four years’ imprisonment. They can escape deportation if they come within the safety net of Exception 1 or Exception 2. Serious offenders are those who received a sentence of four or more years’ imprisonment. They cannot make use of those safety nets, but section 117C(6) provides that they can resist

deportation if ‘there are very compelling circumstances, over and above those described in Exceptions 1 and 2’. The intention was to provide a structure for deciding whether a foreign criminal can resist deportation on Article 8 ECHR grounds. In relation to a medium offender, the correct approach was to consider first whether either of the exceptions apply. In the event that they do, the appeal succeeds. In the event that they do not, the next stage was to consider whether there were circumstances which engaged s117C(6). The court then said this about the proper approach to the cases of serious offenders:

“[37] In relation to a serious offender, it will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are “very compelling circumstances, over and above those described in Exceptions 1 and 2” as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6).”

14. It inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The common place incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient. The best interests of children are an integral part of the proportionality assessment under Article 8 ECHR and carry great weight. Nevertheless, it is a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals (NA (Pakistan) at §33 &34)

Grounds of Appeal to the Upper Tribunal

15. The Appellant advances two grounds of appeal; namely that the First-tier Tribunal judge materially erred in:
- i. failing properly to consider the Appellant’s relationship with his mother in the UK
 - ii. failing properly to consider the evidence in the addendum report of the independent social worker

Submissions

16. On behalf of the Appellant, Mr Metzger submitted that the evidence before the First-tier Tribunal demonstrated evidence of real, committed and effective support provided by the Appellant to his mother who suffers from a number of health conditions. The evidence was sufficient to demonstrate the existence of family ties beyond the normal emotional ties. Had the Appellant’s relationship with his mother been properly considered it may well have been found that they share family life within the meaning of Article 8 and that this would suffer a significant interference in the event of the Appellant’s deportation. In turn it may well have led to a different conclusion on whether there were ‘very compelling circumstances’ sufficient to render the deportation disproportionate (Ground 1). On Ground 2, Mr Metzger

submitted that the judge failed properly to consider the evidence contained in an addendum report of the independent social worker when making findings as to the weight to be given to the evidence she had provided. Paragraph 93 of the judge's decision is not borne out by what is said in the addendum report, which suggests the judge had not read the addendum. The error is material because had the judge properly considered the addendum, it may well have altered the weight placed on the social worker's conclusions on the interference with family life that would arise from the Appellant's deportation.

17. On behalf of the Respondent, Ms Cunha conceded at the start of the hearing, in relation to Ground 1, that the judge failed to consider the impact of deportation on the Appellant's mother. However she submitted that the error was not material because the evidence did not demonstrate a relationship beyond normal emotional ties. On Ground 2, she submitted that it was apparent from paragraphs 89 and 93 of the judge's decision that account had been taken of the addendum report of the social worker. In any event, the judge was entitled to attach little weight to the report as a whole because the child's welfare was paramount within the context of family proceedings which was not the case in deportation. The social worker had not been given the correct picture. The judge was entitled as the fact finder to decide that the social worker lacked an understanding of both her role and the relevant test for the Court.

Analysis

Ground 1 failure properly to consider the Appellant's relationship with his mother in the UK

18. There was no dispute between the parties as to the relevant legal principles.
19. The relevant test for whether Article 8 ECHR is engaged in its family life aspect between parent and adult child is whether "something more exists than normal emotional ties". This would be indicated by "real", "committed" or "effective" support and this would include "if the appellant were dependent on his family or vice versa". This will be a question of fact in each individual case. It is not the case that there is a rebuttable presumption against such relationship existing between an adult child and a parent. Cohabitation between an adult child and a parent 'will be suggestive of ongoing real, effective or committed support which is the hallmark of family life' (Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 Para 14, 17 and 25; PT (Sri Lanka) v Entry Clearance Officer; Chennai [2016] EWCA Civ 612, para 23; Uddin v Secretary of State for the Home Department [2020] EWCA Civ 338 para 40, 33 and 36).
20. Ms Cunha's concession that the judge failed to consider the impact of deportation on the mother was pragmatic and well made. We agree that there is no analysis by the judge as to the Appellant's relationship with, and support for, his mother.
21. We do not accept Ms Cunha's submission that the evidence does not potentially demonstrate a relationship beyond the normal emotional ties. In this context, Mr Metzger pointed us to the following evidence before the judge:
- *"As I suffer from medical conditions, Omar aids me by taking me to hospital appointments, helping me sometimes get in and out of bed and with the cooking. I cannot imagine a life without him."* (Mother's statement para 16)
 - *"My mother is diagnosed with a number of illnesses, namely Fibromyalgia and severe pain. Her illness makes her very tired, and I support her daily with her chores*

and everyday errand and she heavily depends on me, especially now. I have to help her because she finds day to day tasks hard (Paragraph 15 of the Appellant's statement)

- *My mother herself has illnesses and pain, and cannot look after Rahiem and Aaliyah alone. There are days when she can't even help herself and can't bathe herself. (Paragraph 14 of the Appellant's statement)*
- *In the past Mrs Maureen Foster Lewis has been able to do much of the caring [for the children] but is now increasingly unable to undertake all the caring tasks she used to as her health is not good, and she herself relies on support from Omar. She has told me she will do all she can but her condition deteriorates frequently and without warning.*

... It is essential to consider the effect of his being returned to Jamaica on his partner and his children, and also his mother Maureen Foster Lewis, who suffers poor health. Can they manage without him as he plays such an important part in their lives? (The independent social worker report paragraphs 45 and 46)

- *Ms Maureen Foster Lewis's...health has deteriorated in the last year, since I last met her in September 2020, when preparing my main report. The effect of the challenges of the pandemic restrictions on her health problems have meant that Maureen has had to rely much more on support and help from Omar, in his taking her to appointments, if necessary, and he is the main carer for the children. (paragraph 5 of the social worker's addendum report)*

22. Whilst the issue may not have been at the forefront of the case presented by the Appellant, it was nonetheless articulated in the witness evidence, as set out above, as well as the statement of case at § 12, as follows:

"In the present case, the interests of the mother require particular consideration. The Appellant looks after her, but she will have to look after the Appellant's two younger children on her own if he is deported. In her state of health, that is not a reasonable expectation."

23. In addition, the point was addressed by the Secretary of State in her decision:

"You state that your mother, Maureen Lewis, is a British citizen and suffers from Fibromyalgia and you helped her to manage her pains prior to your imprisonment. She also suffers from depression and anxiety due to your incarceration. It is noted that as a British citizen, your mother has access to support and medical care for her conditions from the authorities and that she has been managing with support from other sources or on her own whilst you have been in prison. There is no evidence that she could not continue to live and manage her condition with the arrangement currently available to her. Therefore, your mother's medical and physical conditions could not preclude you from deportation."

24. We are of the view that the judge's error is material. Whilst the scales of proportionality are weighted heavily against such a serious offender, the care needs of the Appellant's mother were a necessary part of the 'balance sheet' in the assessment of proportionality. It cannot be said that consideration of the evidence would inevitably have made no difference to the judge's assessment of very compelling circumstances under s117C(6). In coming to this view we take account of the medical evidence before the Tribunal; the comments of the

independent social worker and other findings by the judge in favour of the Appellant including that:

- i. the Appellant has spent more than a third of his life lawfully in the UK and lived here for more than two thirds of his life,
- ii. the birth of his children occurred when he had indefinite leave to remain.
- iii. He has been in the UK since the age of eleven, with a significant period of time with leave.
- iv. He is close to his family and children in the UK.
- v. He has solid cultural and family ties in the UK.

25. We also note that the judge concluded that the Appellant's mother would be able to assist China Gray with childcare in the event of the Appellant's deportation. The absence of a finding about the extent of the Appellant's mother's dependency on her son was therefore of a dual significance. If there was a relationship which engaged Article 8 ECHR in its family life aspect, that was a material consideration in the proportionality assessment under s117C(6) of the 2002 Act. And if there was such a family life, founded in the Appellant's mother's dependency upon him, the corollary of that finding was that she would be less able (by reason of her disability) to assist with childcare in the event of the Appellant's deportation. In the circumstances, the evidence before the Judge required evaluation and assessment which did not occur.

Ground 2 Failure properly to consider the evidence in the addendum report of the Social Worker

26. At paragraph 93 of his decision, the judge explained her reasons for giving less weight to the conclusions of the social worker about the relationship between the Appellant and his children, namely that the social worker was given inaccurate evidence by the Appellant. It is, however, apparent from a review of the addendum report that the Appellant explained the relevant matters to her during the preparation of the addendum report and the matters in question are addressed in the addendum (detail on the Appellant's shoplifting conviction (§11); the Appellant's explanation that his relationship with his partner had ended §6).
27. Ms Cunha sought to submit that there were other, legitimate reasons for the judge's decision to attach less weight to the report, including application of the wrong test by the social worker and a failure to understand the nature of her role. We are not however persuaded by these submissions. It is not for the social worker to apply the correct legal test. That is a matter for the judge. The judge accepted that the social worker had relevant qualifications. Moreover, it is apparent from a review of the decision that the driving conclusion for the judge's view was the analysis in paragraph 93 addressed above.
28. We are satisfied that the judge's error is material. As mentioned, the judge accepted that the social worker has appropriate qualifications for assessing the interests of the children. Her report provides material evidence in favour of the Appellant, in particular her assessment that:

"I first met this family in September 2020 and had face to face discussions with them all. During the course of my investigations both the children's schools and Omar's Offender Manager from the London Rehabilitation Company were very positive in their view of

Omar, and were impressed with the major role he played in his children's, lives. He was the parent who attended their schools and took them and fetched them back from school.

...it is my view there is nothing to be achieved by sending Omar back to Jamaica, as it would totally destroy the family, as his mother would not be able to care on her own for the children, and it would break the very close bond the children have with their father. It would devastate the two children [...] and impair their future development. I am particular concerned about [...] as he told his grandmother Maureen that he would not want to live if his father was sent away.”

Decision

29. We allow the appeal on both grounds. We are satisfied that the errors identified had a significant effect on the judge's factual findings. There is factual evidence in relation to the nature of the relationship between the Appellant and his mother and the impact of his deportation upon her which was not considered. In addition, the social worker's report is material evidence in relation to the impact on the children (and his mother) of any deportation. In the circumstances we set aside the Tribunal's decision and direct that the appeal is remitted to the First-tier Tribunal for determination de novo.

Signed

Date: 27/06/2022

Mrs Justice **Thornton DBE**