Neutral Citation Number: [2016] EWCA Civ 357

Case No: C5/2014/2060

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
UPPER TRIBUNAL
(Immigration and Asylum Chamber)
Mr Justice McCloskey and Upper Tribunal Judge Perkins
DA001512013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/04/2016

Before :

LADY JUSTICE ARDEN
LORD JUSTICE MCFARLANE
and
LADY JUSTICE MACUR

- -

Between :

BL (Jamaica)	**Respondent**
- and -	
The Secretary of State for the Home Department	**Appellant**

- -
- -

Alan Payne (instructed by **Government Legal Department**) for the **Appellant**
Michael Rudd (instructed by **J McCarthy Solicitors**) for the **Respondent**

Hearing date: 3 February 2016

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Approved Judgment

Judgment Approved by the court for handing down. BL (Jamaica)

LADY JUSTICE ARDEN:

1. The central issue on this appeal is whether in its decision dated 6 February 2014 the Upper Tribunal (McCloskey J and UTJ Perkins) ("the UT") made an error of law in allowing an appeal by BL, a foreign convicted offender aged 31 years and a national of Jamaica, against the order of the First-tier Tribunal dismissing BL's appeal against the deportation order dated 16 January 2013 made by the Secretary of State under section 32 of the Borders Act 2007.

2. The issue for the UT was whether the deportation was a proportionate interference with BL's right to family life under Article 8 of the European Convention on Human Rights ("the Convention") and thus one of balancing the competing considerations arising in this case. The UT considered that the balance came down firmly against deportation. The key issue, in the view of the UT, was the contribution which BL was making and was likely to make in the future as partner, biological father and father figure in his family unit. In the UT's judgment, BL's deportation would:

> impact disproportionately on the best interests of his children, giving rise to an acute imbalance which the public interest favouring deportation cannot, in this intensely fact-sensitive case, outweigh. (UT Decision [1])

3. The Secretary of State contends that, in the light of *SS (Nigeria) v Secretary of State* [2014] 1 WLR 908 and *MF (Nigeria) v Secretary of State* [2014] 1 WLR 544, the facts could not amount to an acute imbalance. In my judgment, despite the thorough arguments to the contrary presented on BL's behalf, this contention is correct in law. I consider that this appeal must be allowed. The UT did not follow the holdings of this Court, in the two authorities to which I have referred at the start of this paragraph, as to the weight to be given to the public interest in deportation cases, and focused instead of what outcome would be likely to be in the children's best interests.

4. I start by setting out the background as to the reasons for deportation, the UT's evaluation of the facts, the key provisions of the Immigration Rules, the UT's directions on the law, the submissions and my conclusions.

WHY THE SECRETARY OF STATE MADE AN ORDER FOR BL TO BE DEPORTED

5. On 16/17 January 2013 the Secretary of State ordered that BL be deported, rejected BL's application for leave to remain and decided that BL's rights to family life were outweighed by the public interest in his deportation. The decision letter stated that the offence of which he had been convicted was serious and that accordingly significant weight had to be given to the question of protecting society against crime. The right to a private life had to give way to this public interest.

6. The Secretary of State's decision was based on an examination of BL's immigration history, his criminal record and the circumstances of his family unit.

7. *Immigration history*: BL has had no permission to be in the UK for about the last 15 years. He first entered the UK on 18 December 1999 and was given 6 months leave to

enter as a visitor. Before the expiry of his leave he applied for indefinite leave to remain. This was refused but BL failed to leave the UK. On 14 May 2002 BL was removed from the UK. Three months later he re-entered the UK using a false passport under a different name. BL has been in the UK since that date without leave.

8. *Criminal record*: BL has been arrested on several occasions and he has been cautioned. He has also been convicted of a serious criminal offence. He was arrested on 25 July 2001 and 26 March 2002 on suspicion of having committed drug offences and failed to observe his reporting conditions (after being granted temporary release in August 2001). On 8 October 2003 BL was cautioned for possessing crack cocaine. At some point in 2010, BL was arrested and charged with possessing a controlled Class A drug (crack cocaine) with intent to supply. He was remanded in custody. On 1 November 2010 BL pleaded guilty to this offence. He was sentenced to four years' imprisonment on 10 December 2010. This put him in the category of most serious offender for the purposes of the deportation rules, though at the very bottom end of it.

9. BL did not offer any mitigation. The offence was committed in Birmingham, not in London where BL lived. He had gone there to commit the offence. The sentencing judge stated in his sentencing remarks:

> There is one thing to say in your favour and that is that you pleaded guilty. You are entitled to a third discount of the sentence with that and that I shall give you, and the 39 days spent on remand awaiting to be sentenced will count towards the half of the sentence you have to serve before, inevitably, you will be deported. I am not adding to the sentence because you smuggled yourself into this country illegally. I am dealing with you, quite simply, for being in possession of something over 19 grams of that lethal drug, crack cocaine. The Court of Appeal has said that after a trial for an offence like this, very rarely would a sentence of less than six years be imposed. You, however, get credit for your plea. The sentence is four years in custody.

10. The view of the Secretary of State was that, by "the very nature" of the offence for which BL was convicted, BL had "shown no regard for the impact that these drugs have on the fundamental interests in society…offences involving drugs are offences which have a wide impact on the health and morals of the community at large- both in terms of the deleterious effect on the health of those who take the drugs imported, and in terms of the associated effects of crime and anti-social behaviour that are fostered by such activities." BL's offences were "representative of [his] willingness to gain profit from the source of such a negative impact on the community" of the UK.

11. *BL's family unit*: The family unit consists of BL, his partner, KS, and four minor children. BL's relationship with KS started in 2004 when he was about 18 years old. He has had three children with her (twins, aged 7 years at the date of the deportation decision and another child aged 5 years at the date of the deportation decision).

12. KS has two other children from a previous relationship (aged 17 and 13 years respectively at the date of the deportation decision).

13. BL also has a child from a previous partner who was 8 years old at the date of the deportation decision. The Secretary of State did not accept that BL had any family life with her. KS and all the children of BL are British citizens.

14. BL's relationship with KS cannot have been continuous, but it was current at the date of the UT's decision. Moreover, BL's cohabitation with KS was clearly not continuous. BL was remanded in custody or was in prison or was detained in an immigration centre from about autumn 2010 to October 2013 and between those dates BL did not enjoy family life and his family unit did not enjoy family life with him. This was because, after his release from prison on 31 October 2012, BL was detained under immigration powers. On 18 October 2013, he was released from immigration detention on bail. BL then went to live with the family unit. Between arrest in about October 2010 and release in October 2013, BL did not enjoy any family life.

15. The Secretary of State took the view that, in view of BL's conviction to 4 years' imprisonment, BL had to show exceptional circumstances if he were not to be deported. BL had not done this. The Secretary of State noted that the children were under the care of their mothers and that they were not financially dependent on BL. There was no evidence to suggest that BL's presence in the UK was required to provide them with safe and effective care or to protect them from maltreatment. Moreover there were no grounds to suggest that the mothers were exceptionally reliant on BL

BL appeals the Secretary of State's decision to the First-tier Tribunal

16. BL appealed against the Secretary of State's decision to the First-tier Tribunal ("FTT") but on 16 April 2013 FTT dismissed his appeal. BL appealed to the UT. At a separate hearing the UT set aside the FTT's decision on the grounds of an error of law identified in its handling of this case: we are not concerned with this decision of the UT. On 6 February 2014, following a two-day hearing with evidence, the UT decided to allow the appeal on the grounds summarised above and that decision is the subject of this appeal.

UT'S DECISION

(1) UT's evaluation of the evidence concerning BL's children

17. The UT found credible the evidence given by BL, KS and KS's eldest son. The eldest son spoke of the difference between the home with BL and in his absence. In particular the son noted that KS could not manage her money and drank more than was good for her. The UT inferred that without BL the family would descend into poverty and require the support of social services.

18. The UT held that BL was a responsible father figure prior to his arrest in 2010, making a contribution to the family's finances. According to BL he had borrowed £2,000 to pay for his mother's funeral in the US in 2008. Even though BL had not put this explanation for the offence forward to the sentencing judge, the UT accepted this evidence. The Secretary of State has not argued on this appeal that the UT's acceptance of BL's evidence on this point was an error of law and so we have not heard BL's submissions on this point, but I note that that the UT did not set out the remarks of the sentencing judge, that their assessment of BL's explanation is arguably

inconsistent with their finding that BL was using the proceeds of his illegal activity to help finance the family unit (UT Decision 9(v)), and that on this appeal BL did not rely on the explanation in the Pre-Sentence Report beyond informing us that it was before the UT.

19. The family visited BL in prison. BL had taught the youngest to read and write.

20. The family's morale had improved since his BL's release from prison. The UT considered that BL's presence had significantly contributed to KS's ability to obtain care qualifications and her eldest son's academic success.

(2) UT's evaluation of risk of harm posed by BL

21. Although BL did not offer any mitigation when he was sentenced, his Probation Service Pre-Sentence Report ("Pre-Sentence Report") stated that BL had committed the offence "in circumstances where he was vulnerable in the wake of the death of his mother and needed to both settle certain debts and provide for his family" (UT Decision, [9(i)]).

22. The UT considered that BL had made "significant strides" in self-rehabilitation and that he presented as a "maturing, increasingly responsible member of society."

23. The UT held that "the relevant evidence clearly supports the finding that the risk of [BL] causing serious harm in the future is low" unless there were a change in circumstances (UT Decision, [9(iii)]). This had also been the view in the pre-sentence report

RELEVANT PROVISIONS OF THE IMMIGRATION RULES

24. Paras 396 to 399A are the relevant provisions of the Immigration Rules in this case. They provide:

> 396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007.
>
> 397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.
>
> 398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention , and

> (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
>
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they 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; or
>
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,
>
> the Secretary of State in assessing that claim 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 deportation will be outweighed by other factors.

25. Paras 399 and 399A do not apply in BL's case. However, those paras are relevant as showing what circumstances do not of themselves amount to exceptional circumstances in the case of an offender who, as in BL's case, falls within para 398(a).

26. Paras 399 and 399A provide:

> 399. This paragraph applies where paragraph 398 (b) or (c) applies… if –
>
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British Citizen; or
>
> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision;
>
> and in either case (a) it would not be reasonable to expect the child to leave the UK; and (b) there

is no other family member who is able to care for the child in the UK; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, or in the UK with refugee leave or humanitarian protection, and

(i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment); and

(ii) there are insurmountable obstacles to family life with that partner outside the UK.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or

(b) the person is aged 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social , cultural or fail) with the country to which he would have to go if required to leave the UK.

SUMMARY OF UT'S DIRECTIONS ON THE LAW

(i) ***on the weight to be given to the public interest in relation to the deportation of foreign criminals***

27. In deciding whether deportation is a proportionate interference with family life for the purposes of Article 8(2), great weight is to be given to the public interest. This is a

single stage exercise unless the case in not within paras 399 or 399A, when there is a two-stage approach and the court has to find exceptional circumstances to outweigh the public interest in deportation: *MF (Nigeria) v SSHD*. Paras 398 to 399A were a complete code and the exceptional circumstances to be considered in the balancing exercise between the private life of the person to be deported and the public interest involved the application of a proportionality test as required by the jurisprudence of the European Court of Human Rights.

28. Under sections 32 and 33 of the Borders Act 2007, the Secretary of State had to make a deportation order against a foreign criminal where the Secretary of State deemed the deportation to be conducive to the public good, but this did not apply where the removal would breach a person's Convention rights.

29. Powerful weight was to be attributed to the Parliamentary intervention in the field of deportation. The 2007 Act attaches great weight to the deportation of foreign criminals: see per Laws LJ, with whom Black LJ and Mann J agreed, in *SS (Nigeria) v SSHD.*

(ii) on the relationship between Article 8 and section 55 of the 2009 Act

30. Section 55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act") requires the Secretary of State when making immigration decisions to have regard to the need to safeguard and promote the welfare of children in the UK. Therefore the Secretary of State has to have regard to the best interests of the child when making her proportionality assessment under Article 8(2).

31. However, while the best interests of the child must be a primary consideration, it need not always be the only primary consideration: *Zoumbas v Secretary of State for the Home Department* [2013] 1 WLR 3690.

UT'S APPLICATION OF THE LAW TO THE FACTS OF THE CASE

32. The UT stated on more than one occasion that they found this a difficult case.

33. The deportation of the Appellant would inevitably interfere with the right to respect for the private and family lives of all members of the family concerned. This interference would be most acute in relation to the Appellant, his partner and their three biological children. The UT considered that the disruption to and destabilisation of the family unit would be immense.

> [A]ny contact thereafter would be of a limited inadequate and progressively intermittent kind [24].

34. This profound interference with family life and the infringement of the best interests of the three children had to be balanced against the potent public interest in play. The two main factors which point in favour of deportation were: (1) BL's flouting of the immigration laws and (2) his criminal record. On paper BL was therefore a strong candidate for deportation [25].

35. However, the public interest had to yield to the best interests of the children (protected by s.55 of the 2009 Act) and rights enjoyed by the whole family under Article 8 of the Convention. The core reasoning of the UT was as follows:

> The best interests of the affected children will undeniably be served, promoted and fortified if [BL] is not deported. …[W]e conclude that there are particularly compelling reasons sufficient to outweigh the public interest in deportation. ...[w]e are mindful of the central importance of the family in British society. Strong and stable families make important contributions to the maintenance of a prosperous and law abiding society. …The effect of our main conclusion is that the family unit under scrutiny in this case will be fortified and stabilised. The alternative conclusion would result in the family unit being severely weakened and destabilised… [26].

WHY THE SECRETARY OF STATE CONTENDS THAT THE UT ERRED

36. Mr Alan Payne, for the Secretary of State, submits that the UT failed to have regard to the fact that Parliament, through para 398(a) of the Immigration Rules, has identified a particularly weighty public interest in deporting alien criminals who have committed serious crimes, namely crimes attracting a sentence of at least 4 years.

37. Moreover, Parliament also attached weight to the need to deter others and the need to express society's revulsion at the kind of criminality in question, which the UT had failed to address. These matters had to be taken into account in any proportionality assessment under Article 8 in a deportation case: *SE (Zimbabwe) v SSHD* [2014] EWCA Civ 256, where this court agreed with the analysis of Mr Raza Husain QC that weighing up the offence of a person to be deported as part of the proportionality assessment under Article 8, the court had to consider (i) the risk of re-offending, (ii) the need to deter others and (iii) the need to express society's revulsion at the criminality.

38. The UT also, on Mr Payne's submission, failed to weigh in the balance either BL's immigration history or the precarious nature of BL's family life. Mr Payne submits that the UT did not make adequate findings about BL's family life.

39. Moreover, on Mr Payne's submission, the UT failed to afford a sufficient margin of appreciation to the Secretary of State's assessment of the public interest (*SS (Nigeria) v SSHD* at [47]) or reached a conclusion that was in all the circumstances perverse.

40. Mr Payne contends that BL did not even meet the criteria for those who have committed less serious crimes, since some of the children were under 7 years and there was no investigation into whether there was another carer who could look after the children if BL was deported. It followed that the UT therefore attached inadequate weight to the public interest in deportation. Alternatively, the UT applied an overly generous threshold in assessing exceptional circumstances.

41. Mr Payne submits that the UT did not properly apply *SS (Nigeria)* or *MF (Nigeria).* The structure of the decision should have been to ask: are there any exceptional circumstances leading to another outcome?

SUBMISSIONS MADE ON BL'S BEHALF

42. Mr Michael Rudd, for BL, sums up the various grounds of appeal as no more than a disagreement with the conclusions of the UT.

43. Mr Rudd submits that, contrary to the Secretary of State's submissions, the UT treated the public interest in deporting criminals convicted of offences that fall under para 398 as particularly weighty. He points to the fact that numerous references to the public interest in deportation are found throughout the UT decision. The UT's detailed exposition of the law relating to Article 8 and exceptionality shows that the UT were fully aware that paras 399 and 399A did not apply and that they were considering the exceptionality test under para 398. The UT did not have to explicitly refer to the need for exceptionality.

44. Furthermore, submits Mr Rudd, the UT were fully aware of BL's immigration history and had referred to it; as such the UT gave this factor appropriate weight. The UT considered the appeal extremely carefully, describing the appeal as "challenging and acutely fact sensitive."

45. There was, submits Mr Rudd, no need for the UT to refer to the need to deter or reflect public revulsion at the crime committed by BL. That was inherent in the public interest in deportation.

46. On the question of the adequacy of the UT's findings, Mr Rudd submits that the UT was aware of the legal tests to be applied in respect of family life. They made full findings and apply the law correctly. They were aware that BL's relationship with KS had begun when BL's immigration status was precarious.

47. As to the Secretary of State's complaint that the UT did not address the treatment of the children whilst BL was in custody and why social services could not adequately address the situation, Mr. Rudd submits that the Secretary of State did not raise these matters before the UT and could not now rely on the failure to deal with these matters as criticisms of the UT. In any event, "matters of unruly children and children growing up without a father or father figure" were not matters "for the already overstretched social services."

48. Mr Rudd contends that the UT recognised that BL was a strong candidate for deportation and the decision as a whole disclosed no error of law.

CONCLUSIONS ON THE SUBMISSIONS ON THIS APPEAL

49. The key issue that the UT had to resolve was how to balance BL's Article 8 rights, where children are involved, with the public interest in deportation. On this issue, the UT were unquestionably right that the two crucial authorities were *MF (Nigeria)* and *SS (Nigeria)*. The UT correctly recognised that, while the children's best interests are a primary consideration, they need not be the, or the sole, primary consideration.

50. But in their analysis of *SS (Nigeria)*, the UT failed to refer to an important holding of this Court on balancing the best interests of the children with the public interest in deportation. As this Court put it in *SS (Nigeria)*, the interests of the children are a

substantial consideration. But this Court went on to give further valuable guidance as to how the competing interests of the children and the public interest in deportation were to be balanced. This Court held that the children's interests will have to be stronger the more pressing the nature of the public interest in the parent's removal. The public interest will be greater the more serious the offence: see *SS (Nigeria)* at [47]. Moreover, the courts have to respect the view of the legislature on the pressing nature of the offence particularly since it reflected policy in the area of moral and political judgment: see *SS (Nigeria)* at [52]. The children's best interests have to be weighed against other relevant considerations on that basis. In short, as applied to this case, it is not the function of the balancing exercise to "promote" or "fortify" their interests (see [35] above), but to weigh them appropriately in the balance.

51. Failure to have regard to the holdings in *SS(Nigeria)* led the UT into error because, having established what the children's best interests required, they failed to go on and explain why their interests were strong enough to displace the public interest in deportation. The public interest is particularly pressing in this case because BL, with his four year sentence, cannot not bring himself within paras 399 and 399A. Moreover, since such a person cannot claim under those paras, it is clear that he must be able to show something over and above the requirements of those paras.

52. The UT did not consider whether BL could meet the requirements of para 399, let alone meet a higher case. Leaving aside the fact that only three of his children were of the requisite age, the UT made no sufficient inquiry into whether there was any other family member who could be able to care for his children. The obvious candidate was KS in the case of the children in the family unit.

53. What the UT did in the course of their detailed and no doubt conscientious decision was to accept KS's son's evidence that KS could not manage her money and drank more that was good for her and made the inference that without BL the family would descend into poverty and require the support of social services. As against this, however, KS had looked after the family while BL was in prison or immigration detention and the UT had not made any findings that the family had then descended into poverty or required the support of social services, or that if that were to happen, there would not be adequate support services for these children. The UT were entitled to work on the basis that the social services would perform their duties under the law and, contrary to the submission of Mr Rudd, the UT was not bound in these circumstances to regard the role of the social services as irrelevant. The Secretary of State had made the point in the decision letter that there was no satisfactory evidence that KS had not coped with the children's upbringing in BL's absence and so the UT were aware that this point was in issue. KS's son's evidence was an insufficient evidential basis for the UT's conclusion on this point. His evidence was in reality uncorroborated and self-serving hearsay on this issue.

54. I accept Mr Payne's submission that the starting point for the UT should have been to ask: are there any exceptional circumstances in this case which should lead to the conclusion that BL should not be deported? This is what paras 398 to 399A of the Immigration Rules require, and *MF (Nigeria)* makes it clear that these provisions are a complete code. I accept also as Mr Rudd submits that the UT made the point when directing themselves as to the law in their decision that the test was one of exceptionality, but there is no trace of the test of exceptionality – or anything equivalent - in the reasoning of the UT on the case.

55. Not having started with the relevant question, the UT gave no weight to the evaluation of the Secretary of State on the question of deportation or to the fact that Parliament considered that exceptional circumstances had to be shown. Moreover, the circumstances of BL's family are not exceptional as is clear from the fact that they would not have been enough if BL had committed a less serious offence.

56. Mr Rudd is of course correct to say that the UT had a detailed knowledge of all the relevant facts. Their decision is very detailed. But that is not enough to save their decision in the light of the errors of law referred to above. The Secretary of State's challenge goes beyond a mere disagreement with the UT's conclusions.

57. In the circumstances it is not necessary for me to deal with Mr Payne's submissions on deterrence, public revulsion or the fact that BL's relationship with KS was formed and existed at a time when BL had no legitimate immigration status in the UK.

58. For these reasons, I would allow this appeal.

Lord Justice McFarlane

59. I agree.

Lady Justice Macur

60. I also agree.