



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

Appeal Number: DA/00914/2012

THE IMMIGRATION ACTS

Heard at Field House

On 13 June 2013

Determination

Promulgated

On 29 July 2013

Before

**LORD BURNS (SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE RINTOUL**

Between

DUSHAINÉ JERMAINE GRUBER

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Shah, Legal Representative

For the Respondent: Mr Melvin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, who is a national of Jamaica, was born on 17 January 1990. He appeals with permission against the decision of the First-tier Tribunal promulgated on 15 March 2013 upholding the respondent's decision of 16

October 2012 to make a deportation order pursuant to Section 32(5) of the UK Borders Act 2007 (the 2007 Act).

2. The appellant was born and brought up in Jamaica. On 6 September 2007 when he was 17 he was granted indefinite leave to enter the United Kingdom as a dependant of his mother. Between May 2010 and July 2011 he was convicted for eight offences, including possession of a controlled drug (Class B - cannabis resin), possession of a controlled drug Class A (crack cocaine), assaulting a police officer and obstructing the powers of search for drugs. On 28 July 2009 he was issued with a penalty notice relating to possession of a controlled drug (Class B - cannabis/cannabis resin).
3. On 22 July 2011 at London Crown Court, the appellant was convicted of assault occasioning actual bodily harm and sentenced to two years' imprisonment. It is plain from the sentencing judge's remarks, which were set out in some detail in paragraph 6 of the First-tier Tribunal's determination, that the appellant and his co-defendant had assaulted the victim by punching him whereupon the victim fled and the appellant pursued him. Thereafter the victim was hit on the head by one of the assailants and while being held by the other, was subjected to a further assault with a bottle. The victim was then pushed on to the road into the direction of oncoming traffic, fell to the ground and was attacked by being punched and stamped upon the stomach and head. All this was recorded on CCTV which was viewed by the sentencing judge. The sentencing judge found that it fell under category 1 of the sentencing guidelines. He viewed the culpability of the appellant and his co-defendant as extremely serious since they had perpetrated a sustained assault. The sentence of the court was one two years' imprisonment. That sentence came to an end in July 2012 but the appellant remained in detention having regard to the deportation order made on 16 October 2012.
4. The presentencing report in respect of the appellant found him to be of medium risk of harm to members of the public and that harm was said to be likely to be physical and emotional, resulting from assault. Following a request for Offender Management Information on a Foreign National Prisoner, dated 23 May 2012, the appellant was assessed at medium risk of serious harm.
5. As at the time of decision of the Secretary of State appealed against, namely February 2013, the appellant had two children who were resident in the United Kingdom with their mother in Manchester. Those children were twins aged 2 years of age and were United Kingdom citizens. The mother of those children had made written representations that she was in a relationship with the appellant and had visited the appellant while he was in prison together with the children. In the supplementary reasons for deportation letter dated 26 February 2013 it was stated that the appellant had been in custody and later detention since his children were approximately 8 months old and had not played any physical role in the life of the children since his conviction. It was not considered, in the light

of that, that removal from the United Kingdom would be likely to affect his children's day-to-day life or emotional wellbeing. He could maintain contact with them from Jamaica by telephone and other means. Their primary carer was their mother. It was considered that the appellant did not meet the requirements of paragraph 399A of the new Immigration Rules. In respect of paragraph 399B of those Rules it was accepted by the respondent was in a genuine and subsisting relationship with his partner but he had not lived in the United Kingdom with valid leave continuously for fifteen years and thus could not meet the requirements of that paragraph. The respondent also concluded that the decision to deport did not amount to a breach of Article 8 of the European Convention on Human Rights (the Convention) and there were no exceptional circumstances which outweighed the public interest in the appellant's deportation.

6. The appellant appealed against that decision to the First-tier Tribunal and his case was heard at Kingston Crown Court on 4 March 2013 before a panel consisting of First-tier Tribunal Judge Carroll and Dr de Barros. In a preliminary ruling at the instance of the appellant in connection with certain police evidence contained in a separate respondent's bundle, the First-tier Tribunal decided that information enclosed with a letter of 25 February 2013 from the respondent would not be considered as evidence in the appeal. It related to the appellant's association with gangs linked to drugs supply and violence and was based on intelligence information to which the appellant's representative had taken objection. Despite that objection, much of it was included within the appellant's bundle, as the panel noted [44]
7. The appellant gave evidence as did his partner. It was recognised that the appellant was liable to automatic deportation in terms of Section 32 of the 2007 Act. However it was argued that he fell within the exception under Section 33 of that Act, namely that the appellant's deportation would be in breach of Article 8 of the Convention. The Tribunal recognised in its approach to its determination that, in terms of the paragraph 397 of the Immigration Rules, a deportation could not be made if the person's removal would be contrary to the Convention and it considered the content of paragraphs 398 and 399 of those Rules. It was not disputed that the appellant was unable to satisfy the requirements of those Rules but the Tribunal went on to consider whether the decision to deport would contravene Article 8 and addressed its mind to that question under reference to relevant case law which is set out in paragraphs 20 to 23 of the decision.
8. The Tribunal then analyses what it describes as a very lengthy and troubling history of offending and makes findings adverse to the appellant in respect of his credibility. Having heard evidence from both the appellant and his partner, the Tribunal did not accept, unlike the respondent in the decision of February 2012, that the appellant and his partner were in a genuine and subsisting relationship. It accepted that the appellant and his partner met in 2008 and formed a relationship but found little or no documentary evidence to show that they actually cohabited.

The appellant was recorded as stating in the pre-sentence report that he was not currently in a relationship and informed the author that he resided in council house accommodation with his mother and younger brother, and had resided there since coming to the United Kingdom in 2007. In the circumstances, the Tribunal was not satisfied that the appellant had ever lived with his partner on a permanent or even semi-permanent basis. His evidence before the Tribunal to the effect that he had been present at the hospital at the birth of the twins was contradicted by the evidence of the mother. It concluded that the evidence demonstrated that the appellant had left his partner in March 2010, had not lived with her since that date and had never lived with the twins (see paragraph 32). The Tribunal acknowledged in the same paragraph that his partner had visited him in prison and had before them the full list of prison visits. However, all those visits had taken place after the appellant had been notified of his liability to deportation by letter dated 12 July 2012. Whilst the appellant attempted to rely on his relationship as a "stepfather" with his partner's daughter who had been born on 22 February 2001, he did not mention the existence of that child to the author of the pre-sentence report or to the questionnaire submitted to the Home Office when notified of liability to deportation. There was no credible evidence to show that he had played any role in her life. The child suffered from certain serious medical conditions.

9. The Tribunal considered the family ties that the appellant retained in Jamaica and found that, having been bought up by his grandmother in Jamaica until 2007, he had meaningful cultural, social and familial ties there. He had close family members living there.
10. In relation to his children, the Tribunal acknowledged that he enjoyed a family life with those children and that the decision to deport him amounted to an interference with that family life. However, the evidence as to his very poor parenting coupled with his offending history and propensity to violence did not support the argument that it was in the best interests of his children for him to remain in the United Kingdom.
11. The Tribunal found that the decision to deport did not amount to a disproportionate interference with the appellant's right to respect for family life in the context of his relationship with those children. It was not satisfied that the appellant was in a genuine and subsisting relationship with his partner since they had not lived together for at least three years and concluded that the decision to deport did not amount to a disproportionate interference with his right to respect for his family life in the context of his relationship with his partner, his sons and his stepdaughter. The Tribunal also considered the appellant's right to respect for his private life and for reasons set out at paragraph 42 considered that, if deported, his private life would continue in respect of all its essential elements.
12. On 8 April 2013 First-Tier Tribunal Judge Nicholson granted the appellant permission to appeal against that decision.

13. The appeal was then heard by the Upper Tribunal on 13 June 2013. The appellant was again represented by Mr Shah. He spoke to the grounds of appeal which were before us. Mr Shah submitted that the First-tier Tribunal failed to deal adequately with a preliminary argument that the respondent had not taken into account the factors that she was required to by virtue of Section 55 of the Borders, Citizenship and Immigration Act 2009 (the 2009 Act). It was submitted that that section required the Secretary of State to treat the welfare of the twins and stepdaughter as a paramount consideration and, in the context of this case, the Secretary of State had failed in her duty in that respect. He accepted that the UKBA had written a letter to the appellant's partner dated 23 May 2012 asking for detailed information in respect of the children. That letter was written pursuant to the duty under Section 55. However, no reply had been received to that letter which, apparently, although sent by recorded delivery, was returned as "not called for".
14. The Tribunal dealt with this matter at paragraphs 16 to 18. They were satisfied that the respondent wrote to the appellant's partner at the correct address and used her best endeavours to obtain further information about the appellant's children. It was contended both at the First-tier Tribunal and by Mr Shah before us that further steps ought to have been taken by the respondent, for example by writing to the appellant's legal representatives. However there was no evidence to show that those representatives were also acting for the appellant's partner.
15. The First-tier Tribunal was satisfied that in the circumstances, the Secretary of State fulfilled the duty upon her under section 55 of the 2009 Act. The Secretary of State made attempts to obtain information from the partner of the appellant in good faith. In the context of considering the reasons for deportation in the letter of 26 February 2013, the best interests of the children are carefully considered. Reference is made to paragraphs 43 to 45 of that letter. In any event, the appellant's partner gave evidence before the Tribunal and had a full opportunity to address the specific matters which were raised in the letter of 23 May 2012. We do not consider that the First-tier Tribunal erred in its consideration of this matter. Although Mr Shah pointed out that various points were made within that letter which sought additional information, he was not able to point to any information which, if provided to the Secretary of State, would have made any material difference to the consideration of this matter.
16. Mr Shah had made an application to the First-tier Tribunal to adjourn so that the matter could be remitted back to the Secretary of State which was refused. No ground of appeal is taken against the refusal of that application.. In paragraph 17, it is clear that in doing so, the Tribunal was satisfied that the appeal could be justly determined without such a remit. In view of the careful way in which the Tribunal then proceeded to examine the interests of the children in the context of the Article 8 assessment, we endorse that approach and find no error of law therein.

17. Mr Shah further argued that the Tribunal did not specifically address itself to all the steps set out in Razgar [2004] UKHL 27. However, since the Tribunal carried out an assessment of the proportionality of the decision to deport at paragraph 40, it follows that it must have addressed the prior questions and answered them in the affirmative. In any event, the Tribunal expressly recognises that it considered “Lord Bingham’s step by step approach” at paragraph 21. Under reference to Maslov v Austria, it was suggested that the Tribunal failed to address the effect of deportation on his family and children but the terms of paragraph 40 of the Tribunal’s determination contradicts that assertion. Mr Shah submitted that the Tribunal had fallen into error by failing to accept that the appellant had a genuine relationship with his partner, contrary to the position adopted by the respondent. However, the Tribunal was not bound by the respondent’s conclusion on this matter which, along with all questions of fact, was at large before it. It has set out cogent reasons, based upon the evidence it heard, for its conclusion at paragraphs 29 to 33 and these disclose no error of law.
18. The fifth ground of appeal contends that the Tribunal erred in failing to have proper regard to the circumstances surrounding the daughter of the appellant’s partner. However, from paragraph 35 of its determination it is clear that the Tribunal carefully considered the salient features of that child’s circumstances and it quotes from medical records before it which emphasised the importance of the appellant’s partner having support in looking after her daughter. The finding, which the Tribunal was entitled to make, that there was no genuine and subsisting relationship legitimately led to the conclusion at paragraph 41 that the decision to deport did not amount to a disproportionate interference with his right to a family life with his partner and her daughter.
19. Mr Shah also argued that the Tribunal erred in law in failing to comply with its own ruling not to consider police evidence enclosed with the letter of 25 February 2013. The Tribunal narrate their ruling at paragraph 15. However, Tribunal say this [44]:

“We have not taken into account the police intelligence evidence submitted under cover of the letter of 25 February 2012 from the respondent. There have, however, been included in the appellant’s bundle two police witness statements – pages 28 and following. The second of these statements by a PC Lisa Ryal provides background and context to the complexity of that gang offending has on communities in Lambeth and London as a whole. It is well known that the Metropolitan Police have been given greater priority and devoted substantial resources to tackling gang crime.”
20. It was accepted by Mr Melvin that the reference to the statement by PC Lisa Ryal was “police intelligence evidence submitted under cover the letter of 25 February 2012 from the respondent”. However, he submitted that in its assessment of public interest and the appellant’s criminal

offending, there was no finding that such activity was in any way aggravated by the appellant's membership of gangs.

21. We are satisfied that the Tribunal did not materially err in law in making the reference it did at paragraph 44 to the content of the statement. As is clear, the only reference in that paragraph is to the “background and context of the impact that gang offending has had on communities in Lambeth and London as a whole.” It is not evident from its determination that Tribunal placed this matter in the balance when assessing the proportionality of the decision to deport. The Tribunal restricted itself to a careful consideration of the particular circumstances of the history of offending and, in particular, to the assault occasioning actual bodily harm for which he was sentenced in July 2011 as we have narrated above. There is no suggestion in the sentencing judge’s remarks or in the reasoning of the Tribunal that that offence was gang related.
22. We consider that the reference to the statement of PC Lisa Ryal and the other material which, in any event, had been placed in the appellant’s bundle, a bundle served on the Tribunal after objection to it had been made, is not indicative that was not taken into account in the Tribunal's consideration of the issues upon which it required to decide. It is, we consider, simply a reference to the existence of the excluded material and a description of it.
23. In the circumstances we consider that the decision of the First-tier Tribunal did not involve the making of an error of law and we uphold it.

SUMMARY OF CONCLUSIONS

1. The determination of the First-tier tribunal did not involve the making of an error of law and we uphold it.

Signed

Date

Lord Burns
(Sitting as a Judge of the Upper Tribunal)