Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/08707/2012

THE IMMIGRATION ACTS

Heard at Field House **Determination Promulgated**
On 19 July 2012 **On 1 August 2013**

Before

UPPER TRIBUNAL JUDGE PETER LANE

Between

MICHAEL MCDONALD

Appellant

and

ENTRY CLEARANCE OFFICER, KINGSTON

Respondent

Representation:

For the Appellant: Mr N Ahmed, Counsel, instructed by Aston Law Practice
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Jamaica, born on 14 November 1975. The First-tier Tribunal made an anonymity order, intended to prohibit any report of the proceedings from identifying the appellant. I see no reason to continue that order.

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2. On 7 November 2011 the appellant applied from Jamaica for entry clearance as the spouse of a British citizen residing in the United Kingdom. On 14 March 2012, the respondent refused that application. The reasons for that decision were as follows:

> "You have applied to settle in the UK as the spouse of [CB]. Record held in the UK have revealed that you have previously used the names Baron Johnson born 10/9/76, Henry Donovan born 17/9/69 and John Edwards born 10/5/75. You first arrived in the UK in 2001 in the name of Baron Johnson, were refused entry and absconded from temporary admission. You then attempted to enter the UK in 2003 using a false British passport in the name of John Edwards. You were refused entry and removed back to Jamaica.
>
> On 15/1/04 you applied for entry clearance as the spouse of Ms Baptiste, in the name of Michael McDonald. This application was refused and you withdrew your appeal on 16/9/04.
>
> On 12/6/06 you were encountered by UK police and gave your name as Henry Donovan. You were interviewed and stated that your real name was Baron Johnson. You stated that you had entered the UK on a passenger ferry and did not obtain leave from an Immigration Officer on arrival. You were served with an IS151A for illegal entry without leave and absconded from temporary admission. On 15/2/10 you were re-encountered by UK police, detained by Immigration and were removed at public expense.
>
> I am satisfied that this conduct is consistent with that described in Entry Clearance Guidance Chapter 26.18 (found at http://www.ukvisas.gov.uk/en/ecg/chapter26#point eighteen) as having contrived in a significant way to frustrate the intentions of the Immigration Rules because you have used a number of identities to obtain entry to the UK, including a forged British passport .
>
> Your application is therefore one that according to Paragraph 320(11) of the Immigration Rules, should normally be refused. I have considered the circumstances of your application, that you are married and state that you are the father of three children in the UK. I note that you have provided no evidence that you are their father, as you are not named on their birth certificates. However, on balance I am not satisfied that your particular circumstances are of a sufficiently compelling nature to justify my granting your application, having regard to the fact that it should normally be refused.
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> Records held in Jamaica indicate that you were prosecuted for forgery and uttering forgery on XXXX. You were fined JMD$50,000 or sentenced to 6 months' imprisonment for uttering of forgery. I am satisfied that this could have carried a custodial sentence of more than 12 months if that offence had occurred in the United Kingdom. I have also considered the compassionate circumstances of your application, that you are married and state that you are the father of three children in the UK. I note that you have provided no evidence that you are their father, as you are not named on their birth certificates. However, on balance I am not satisfied that your particular circumstances are of a sufficiently compelling nature for me to exercise the powers of discretion granted to me by paragraph 320(18) of the Immigration Rules.

> I have therefore refused your application because I am not satisfied, on the balance of probabilities, that you meet all of the requirements of the relevant Paragraph of the United Kingdom Immigration Rules."

3. The appellant appealed against that decision and on 3 January 2013 his appeal was heard at Birmingham by First-tier Tribunal Judge Broe. The judge heard evidence from Ms CB, as well as considering documentary evidence. In a determination promulgated on 17 January 2013, the judge dismissed the appellant's appeal, both under the Immigration Rules and as regards Article 8 of the ECHR. Permission to appeal against that decision was refused by the First-tier Tribunal but granted by the Upper Tribunal on 15 May 2013. The main matter which concerned the judge who granted permission was that arguably "the First-tier Tribunal Judge should have found that the respondent had exercised his discretion unlawfully because he had, understandably on the evidence before him, made erroneous findings of fact and he should have been ordered to make the decision again on the facts as found by the Tribunal."

4. The judge who granted permission appears to have been referring, in this regard, to DNA evidence, obtained after the decision against which the appellant had appealed. This indicated that the appellant was the biological father of three children born to CB. Interestingly, in his written application to the respondent, the appellant had stated that he "did not have any dependent children" ([6] of the determination). It was only when interviewed by the Entry Clearance Officer in 2012 that he had said he had three children.

5. Amongst other relevant information that came to light during the interview was that the appellant had obtained a Jamaican passport in the name of Byron Johnson in 2002 because, when he had come to the United Kingdom in 2001 in his correct name, he had been refused entry and returned to Jamaica. The appellant used his cousin's birth papers and applied using his own photograph. On that occasion he had stayed in the United Kingdom for a year and half before being picked up at the airport when he tried to travel to St Lucia. When he returned in 2006 he used a British passport in the name of John Edwards. He then stayed for four years with a sponsor, during which time he was twice picked up by the police. When this happened, he gave them the name Donovan Henry; but when at the police station he said that he was Byron Johnson.

6. At [17] to [22] of the determination, the First-tier Tribunal Judge recorded the evidence of the sponsor. She said that she had been extremely surprised when in 2006 the appellant had arrived at her house, since she had no idea he was coming. Their eldest child had been born in 2003. She visited the appellant regularly in Jamaica and said that the children missed the appellant. The judge also noted a statement from the sponsor's mother and letters from two of the children.

7. The judge's findings are set out in [26] to [48] of the determination. At [27] the judge described the provisions contained in paragraph 320(11) of the Immigration Rules, as they were at the date of decision. At that time, the provisions made reference to

guidance, setting out examples of circumstances in which a person would be regarded as having contrived in a significant way to frustrate the intentions of the Rules. I note that one such example (now set out in the current version of the rule itself) is "absconding".

8. At [28] the judge described the provisions contained in paragraph 320(18), whereby it is stated that, save where an official is satisfied that admission would be justified for strong compassionate reasons, conviction in any country including the United Kingdom of an offence which, if committed in this country, is punishable with imprisonment for a term of 12 months or more or, if committed outside the United Kingdom, would be so punishable if the conduct had occurred in this country, constitutes grounds on which entry clearance or leave to enter the United Kingdom "should normally be refused" (according to the heading which governs paragraph 320(A) to 22 of the Rules).

9. At [29] the judge recorded that the respondent "was not satisfied that the appellant was the father of [LB], [RB] or [AB]. The appellant has now provided DNA evidence which I am satisfied establishes paternity. The respondent concedes that this is the case."

10. So far as paragraph 320(11) was concerned, the judge made it plain that he had "no hesitation in finding that [the appellant] has contrived in a significant way to frustrate the intentions of these Rules." [31]

11. The judge set out the appellant's behaviour as follows:

> "30. The appellant has an appalling immigration history. He first came to this country as a visitor in 2000 and was refused entry. He then returned using a false identity and overstayed. Since then he has repeatedly and dishonestly breached the Immigration Rules. He absconded from temporary admission and went to ground. He failed to comply with reporting conditions and when coming into contact with the police twice gave false identities. He has used two false passports and made no attempt to regularise his situation in this country. He made no effort to leave the country and I have no doubt would still be here had he managed to avoid contact with the authorities. Even when making this application he chose not to 'come clean' and instead concealed his convictions for offences of dishonesty. He has not at any time, apart possibly from the 2004 settlement application, acted in good faith in his dealings with the authorities in this country."

12. At [32] the judge recorded as a matter of "no dispute", that in February 2012 the appellant had been convicted in Jamaica of uttering a forged instrument and obtaining a false passport by using a forged document. For these offences he had been fined a total of $80,000, with an alternative of six months' imprisonment (with hard labour as regards the first offence).

13. At [33] the judge recorded, unarguably correctly, that paragraph 320(18) was of potential relevance, where a person was convicted of an offence which, if committed in the United Kingdom, was punishable with imprisonment of a term of twelve months or more. Recognising the discretionary nature of paragraph 320(18), however, the judge noted at [34] that the appellant's case to have discretion exercised differently turned on his Article 8 rights and the provisions of section 55 of the Borders, Citizenship and Immigration Act 2009.

14. At [36] the judge noted the evidence regarding the appellant's children and at [37] he confirmed that he had given "careful consideration" to that evidence. In this regard, the judge noted that the Supreme Court Judge in ZH (Tanzania) [2011] UKSC 4 confirmed that the best interests of children must be a primary consideration in an Article 8 proportionality exercise. This meant that those interests should be considered first "although they could be outweighed by the cumulative effect of other considerations". The best interests of a child, broadly mean the wellbeing of the child. The children are of course innocent of all wrongdoing."

15. Having then set out the terms of section 55, the judge noted the requirement deriving from Beoku-Betts v SSHD [2008] UKHL 39, to consider the human rights of all those who may be affected by the decision under appeal.

16. At [42] to [44] the judge made detailed findings concerning the positions of the three children, together with another child of CB's from a previous relationship, including the extent to which the children had lived with the appellant and their mother. The findings also included that the children and CB had maintained contact since the appellant's removal and that they had visited him in Jamaica.

17. This drew the conclusion at [45] that the decision under appeal would amount to an interference with the right to enjoy family life and that, accordingly, proportionality was the key issue. At [46] to [48] the judge concluded as follows:

> "46. I find the appellant's appalling immigration history and disregard of the law to be a significant factor. This is not a case where an overstayer has voluntarily left the country in order to legitimatise himself by making a proper application for leave to enter. The appellant in this case hehas deliberately, dishonesty and repeatedly contrived to frustrate the Immigration Rules. He left the country only when removed after absconding and lying low for four years.
>
> 47. The family life that is currently enjoyed can continue.. I accept that the children would like the appellant to be with them and that is preferably for them, like all children, to be with both parents. I do however find the decision to be proportionate to the need to maintain immigration control. Whilst I have regarded the best interests of the children as a primary consideration I am not persuaded that they should outweigh the cumulative effect of the other factors in the case or the need for the state to control its borders.
>
> 48. Therefore on the totality of the evidence before me, I find that the appellant has not discharged the burden of proof and the reasons given by the respondent do

justify the refusal. Therefore the respondent's decision is in accordance with the law and the applicable Immigration Rules. I have made an anonymity order because of the involvement of the children."

Discussion

18. So far as concerns the matter raised in the Upper Tribunal's grant of permission, I find that there is no legitimate basis for concluding that the determination of the First-tier Tribunal Judge should be set aside and a decision re-made to allow the appellant's appeal, to the extent that the Entry Clearance Officer should be compelled to make a decision on the present application, based on the DNA evidence. Given the way in which the appellant chose to tell the Entry Clearance Officer about the children (see above), it is entirely understandable why the respondent's decision is as set out in the decision notice. In any event, I agree with Mr Wilding that, having regard to the judgments of the Court of Appeal in AJ (India) [2011] EWCA Civ 1191, it was perfectly proper for the First-tier Judge to engage with the evidence, including that relating to the children, which had not been put forward by the appellant to the Entry Clearance Officer, and for the judge to make findings by reference to that evidence, so far as it bore on the Immigration Rules and Article 8 of the ECHR.

19. It is, accordingly, to those findings that I now turn. It is perfectly apparent from the determination that the judge made proper and sustainable findings in respect of the question as to whether discretion under paragraph 320(11) and (18) of the Immigration Rules should be exercised differently. Plainly, the judge concluded that it should not. He was fully entitled to that view. The appellant's immigration history had undoubtedly been appalling. In the circumstances of the present case, it was appropriate for the judge to approach the issue of whether discretion should be exercised differently under the Immigration Rules, by considering whether, on Article 8 grounds, exclusion of the appellant from the United Kingdom would be a disproportionate interference with his rights or those of others (in particular, the children). For the appellant, Mr Ahmed has not pointed to any factor which might be said to compel a different conclusion under the Rules which is not also a factor falling to be taken into account as part of the Article 8 exercise.

20. Thus, I find that the First-tier Judge was fully entitled to conclude that the public interest in excluding the appellant outweighed the interference with his and/or others' rights, such that the appeal fell to be dismissed under the Rules. So far as paragraph 320(18) is specifically concerned, Mr Ahmed drew my attention to the recent determination in F (Paragraph 320(18); type of leave) [2013] UKUT 00309 (IAC). In that case, the Upper Tribunal drew attention to the fact that paragraph 320(18) does not apply at all where the official concerned is satisfied that admission would be justified for strong compassionate reasons. On the facts of the present case, however, I do not consider that this takes the appellant's case anywhere. Neither the respondent nor (more particularly) the judge considered that there were such strong compassionate reasons for admission. As a result, the judge at [28] was correct to observe that the paragraph 320(18) "provides that an application should normally be refused". That is what the heading above paragraph 320(8) says. It cannot be properly contended that [28] of the determination contains an incorrect self-direction,

to the effect that, where no such reasons exist, the discretion in paragraph 320(18) must be applied against an applicant.

21. Insofar as Mr Ahmed might be said, at the hearing, to have maintained an earlier submission, to the effect that there is conflict between paragraphs 320(1) to (7D) and paragraph 320(11), I agree with Mr Wilding that that submission is misconceived for the simple reason that paragraph 320(1) etc is mandatory; whereas paragraph 320(11) is discretionary. The same is true of paragraph 320(18).

22. Mr Ahmed also sought to pray in aid PS (Paragraph 320(11) discretion: care needed) [2010] UKUT 00440 (IAC). However as I have observed earlier, unlike that case, one of the factors set out in the relevant guidance was undoubtedly present in the present case: namely, absconding for some four years, whilst the appellant was in the United Kingdom.

23. Mr Ahmed appeared to assert that the appellant should have been given credit for not attempting to thwart removal, by making an Article 8 human rights claim before he was most recently removed from the United Kingdom; and that he should also find favour because he had seen fit to permit himself to be removed. This submission is devoid of merit. It amounts to saying that a person should be rewarded for not behaving even more badly than he has.

24. Finally, it is quite wrong to say that the interests of the children in the present case compelled the grant of entry clearance, despite the appellant's dreadful criminal record and, in particular, his compete disregard for the laws of the United Kingdom and of Jamaica, prohibiting the use of false documentation for the purposes of international travel and other matters. On the evidence, the judge was fully entitled to find that the children's best interests, whether alone or in combination with other factors, did not outweigh the public interest in maintaining exclusion of the appellant.

25. Mr Ahmed asked rhetorically how long it might be before the appellant could expect to be allowed to re-enter the United Kingdom. An answer to that question is, however, unnecessary for the purposes of the present proceedings.

Decision

26. The making of the decision by the First-tier Tribunal did not involve the making of an error on a point of law. The appellant's appeal is dismissed.

Signed Date

Upper Tribunal Judge Peter Lane