Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00125/2013

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 17 July 2014	**On : 23 July 2014**

Before

UPPER TRIBUNAL JUDGE KEBEDE
UPPER TRIBUNAL JUDGE KOPIECZEK

Between

EAG
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Behbahani, instructed by Oaks Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Jamaica, born on 23 December 1969. Following a grant of permission to appeal against the decision of the First-tier Tribunal allowing his appeal against the respondent's decision to deport him from the

United Kingdom, it was found, at an error of law hearing on 7 May 2014, that the Tribunal had made errors of law in its decision. Directions were made for the decision be set aside and re-made by the Upper Tribunal with respect to Article 8 of the ECHR.

2. The appellant arrived in the United Kingdom on 10 September 1992 as a visitor, at the age of 22 years, and was subsequently granted leave to remain as a working holiday maker. In September 1995 he made an application for leave to remain on the basis of his common-law relationship. That application was refused on 22 December 1997 and a decision to deport him was made the same day as a result of his conviction and sentencing, on 19 August 1994, to three years' imprisonment for supplying Class A controlled drugs (crack cocaine). The decision was upheld on appeal, but the appellant was subsequently granted leave to remain as a spouse on 16 April 2001 followed by indefinite leave to remain on the basis of his marriage, granted on 15 April 2002.

3. On 31 July 2010 the appellant was convicted of the index offence, namely possession with intent to supply a Class A controlled drug - crack cocaine, for which he was sentenced to five years imprisonment. On 9 December 2010 he was notified of his liability to deportation. He responded to that notice and subsequently claimed asylum. His claim was refused. A deportation order was signed on 14 January 2013 and a decision made the same day that section 32(5) of the UK Borders Act 2007 applied.

4. The respondent decided to exclude the appellant from the protection of the Refugee Convention by virtue of Article 33(2), on the basis that he had failed to rebut the presumption under section 72(2) of the Nationality, Immigration and Asylum Act 2002 that he constituted a danger to the community. He was also excluded from humanitarian protection. His Article 3 human rights claim was rejected as lacking in credibility and it was not accepted that he faced any risk on return to Jamaica. With regard to Article 8, paragraphs 399(a) and 399A of the immigration rules did not apply to the appellant as a result of the length of his sentence. The respondent did not accept that there were exceptional circumstances such that the appellant's right to family and/or private life outweighed the public interest in his deportation. Whilst it was accepted that he had a genuine and subsisting parental relationship with his five children from four different women and that family life therefore existed, it was not considered that there were exceptional circumstances with regard to that family life. It was also accepted that he had a genuine and subsisting relationship with his partner AR but again it was not considered that there were exceptional circumstances arising. It was accordingly concluded that his deportation would not breach Article 8.

5. The appellant's appeal against that decision was heard in the First-tier Tribunal on 6 February 2014, before a panel consisting of First-tier Tribunal Judge Cameron and Mrs L R Schmitt. The panel heard from the appellant and his current and former partners, the mothers of his five children. With respect to his asylum claim, they found that he had failed to rebut the presumption

that his offence was a particularly serious one and that he was a danger to the community and they accordingly found that he was excluded from the protection of the Refugee Convention and excluded from humanitarian protection. They rejected his Article 3 claim as lacking in credibility. However, with regard to Article 8 they concluded that, because of the appellant's relationship with his children and the role he played in those relationships, he had demonstrated that his case came within the exceptional circumstances envisaged under paragraph 398 of the immigration rules and they accordingly allowed his appeal on that basis.

6. Permission was granted to the respondent to appeal that decision to the Upper Tribunal and at an error of law hearing on 7 May 2014 the First-tier Tribunal's determination was found to be materially flawed, for the following reasons:

> "11. As I informed the parties, the grounds of appeal appear on first glance to be little more than a disagreement with the panel's conclusions on the existence of "exceptional circumstances" pursuant to paragraph 398 of the rules. Indeed, had there been no findings on asylum and humanitarian protection, and had the findings commenced at paragraph 156 of the determination, that may arguably have been a proper conclusion.
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> 12. However those findings followed detailed and relevant findings commencing at paragraph 113 and it seems to me that the panel's findings from paragraph 156 onwards appear to ignore those previously made, in particular those relating to the section 72 certificate. I find particular merit in Mr Saunders' submission, reflecting paragraph g) of the grounds, in that regard. Although the findings on the section 72 certificate were relevant to the appellant's asylum claim, they were plainly also relevant to the question of "exceptional circumstances" for the purposes of Article 8 and the immigration rules, given that they related to the question of risk, which in turn was an essential aspect of the public interest considerations.
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> 13. It does not seem to me that it could reasonably be argued that the panel had those findings in mind when considering the appellant's circumstances for the purposes of paragraph 398, given that the findings appear if anything to be contradictory. As Mr Saunders submitted, the finding that the appellant had failed to rebut the presumption under section 72, in particular the presumption that he was a danger to the community (and I refer in particular to paragraphs 135 and 136), does not sit well with the findings under Article 8, in particular those at paragraphs 181, 198 and 190.
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> 14. Clearly, that is a matter that directly affects the assessment of weight given to the public interest. In such circumstances, and considering in particular that the panel found the appellant's case to be a borderline one (paragraph 188), their conclusions in regard to paragraph 398 and Article 8 cannot be considered to be safe.
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> 15. Accordingly I conclude that the panel made material errors of law such that its decision has to be set aside and re-made, with respect to Article 8.
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> 16. Mr Behbahani requested that, in the event an error of law was found and the decision set aside, the appeal remain in the Upper Tribunal for the decision to be

re-made, preserving the First-tier Tribunal's findings of fact. I see no reason why the findings of fact as to the family relationships should not be preserved, as there has been no challenge to them. It is also the case that the panel's decision on the section 72 certificate has not been challenged, but it may be that that is a matter to be considered by the Upper Tribunal in the light of the contradictory findings identified above. Accordingly submissions are invited from both parties in advance of the hearing as to which of the panel's findings ought to be preserved."

Appeal hearing and submissions

7. The appeal then came before us for a resumed hearing on 17 July 2014.

8. Mr Walker sought to adduce further documentary evidence relating in particular to one of the appellant's children. Mr Behbahani objected to the production of the document at such a late stage, given in particular that its contents were challenged by the appellant and would thus necessitate a further adjournment in order to obtain rebutting evidence. Having carefully considered the matter we decided not to admit the document, on the basis that there had been plenty of opportunity for it to have been produced earlier and given the lack of any satisfactory explanation as to why it was only being produced at the last minute. We have therefore had no regard to the document or its contents.

9. Mr Walker advised us that he was content to accept the most recent witness statements produced for the appellant and his four ex-partners and therefore did not need to cross-examine the witnesses. It was agreed that there was therefore no need for any further oral evidence and the appeal proceeded on the basis of submissions only.

10. Having sought initially to clarify the views of the parties on the findings of the First-tier Tribunal that were to be preserved, we agreed with Mr Behbahani that the decision with respect to the section 72 certificate had to be re-made in light of the contradictory findings identified in the error of law decision. Whilst the Tribunal's findings of fact on the relationship between the appellant and his children were to be preserved, we considered that the question of the children's best interests was dependent to an extent upon the assessment of risk and therefore had to be re-visited.

11. Mr Behbahani then made submissions before us. With regard to the presumption under section 72 he accepted that the appellant's crime was a particularly serious one. However he submitted that the appellant did not constitute a danger to the community of the United Kingdom, given the remorse he had demonstrated by way of his conduct in prison (as evidenced by letters from prison officers) and since his release, as evidenced by his relationship with his children and in the letter from the London Probation Trust at page 528 of the main appeal bundle. Mr Behbehani referred us to the evidence relating to the appellant's children, including school reports, evidence from his ex-partners and the evidence of prison visits, in submitting that the best interests of the children lay in him being able to remain in the United

Kingdom where he continued to be the main steer in the family, keeping the family unit together.

12. Mr Walker, in his submissions, referred to the appellant's current and previous convictions and a previous deportation decision made against him, and asked us to find that he constituted a danger to the community. He submitted that the appellant retained a propensity to re-offend and it was not accepted that he posed a low risk of re-offending. Mr Walker referred to the Court of Appeal judgment in Lee v Secretary of State for the Home Department [2011] EWCA Civ 348 in submitting that deportation resulted in families being split up. In this case, the best interests of the children lay in remaining with their mothers in the United Kingdom.

13. In response, Mr Behbahani sought to reiterate the crucial role the appellant played in the lives of his children.

Consideration and findings

14. We turn first of all to the presumption under section 72. It is not in dispute that the appellant has been convicted of a particularly serious crime. The serious nature of the crime was referred to by the Judge when sentencing him, on 22 October 2010, to five years' imprisonment for his involvement in the supply and production of crack cocaine. Mr Behbahani does not challenge that part of the section 72 certification.

15. The question before us is whether or not the appellant has rebutted the presumption that he constitutes a danger to the community of the United Kingdom. We find that he has not done so.

16. The evidence relied upon by the appellant in seeking to rebut the presumption under section 72 consists of various letters from prison officers produced at pages 441 to 446 of the main appeal bundle and evidence of training courses undertaken and qualifications achieved whilst in prison, at pages 447 to 482, as well as the evidence of his ex-partners in their statements and before the First-tier Tribunal. We have considered all that evidence, including the appellant's detailed statements of 24 October 2013, 27 January 2014, 6 May 2014 and 4 July 2014 in which he expresses his remorse for his past behaviour and his intention to move on with his life, particularly for the sake of his children. We also take account of the fact that he has not offended again since the index offence, although we note that it was only in March 2014 that he was released from prison, on immigration bail.

17. With regard to the time spent by the appellant in prison, we have had regard to the positive comments made by some prison officers and note that he sought to improve himself through attending courses and training sessions. However, it is also relevant to note that he received two adjudications whilst in prison. The incidents are detailed in the OASys report at page 500 of the main bundle, and include one in 2010 when a saw-blade was found concealed behind a pipe which he claimed to have used to hollow out his table in order to hide a

mobile telephone and another in 2012 in which he was found with a substance containing alcohol in his possession.

18. We have also had regard to the OASys report prepared on 21 August 2013, several months after the appellant's conditional release date (but whilst he remained in immigration detention) in which the risk he posed was assessed. We note from page 514 that he was assessed as presenting a medium risk of harm to the public and at page 512 as a medium risk of serious harm in the community. "Medium risk of serious harm" is explained as meaning "there are identifiable indicators of risk of serious harm. The offender has the potential to cause serious harm but is unlikely to do so unless there is a change in circumstances, for example failure to take medication, loss of accommodation, relationship breakdown, drug or alcohol abuse." We do take account of the constantly changing circumstances in the past with respect to the appellant's relationships and to his past history of drug abuse and consider these to be relevant factors in assessing his potential to cause serious harm.

19. We note that the report also concluded, on the basis of his scores following a statistical analysis of various factors, that the appellant posed a low risk of re-offending and of re-conviction. However, we are not prepared simply to import that conclusion into our findings for the purposes of an assessment of risk in relation to the section 72 presumption, given the basis upon which the assessment was made and in light of what we consider to be some inconsistency in the report, as well as in the light of our observations above. It is relevant to note that the OASys report, at page 489 of the appeal bundle, concludes that in view of the length of time elapsed since the commission of an offence leading to a conviction for the supply of a class A drugs in 1994, a pattern of offending is not assessed as being in existence. Yet later in the report, at section 2.12 on page 491 of the bundle, under the heading of "Pattern of Offending" various other convictions are referred to and reference is made to the appellant's history of drug offences and to his latest offence being an "escalation". We do not see how it can be concluded at one stage that there is no pattern of offending when at a later stage reference is clearly made to an escalation in the nature of his offending. We note from the appellant's PNC record that, aside from his conviction in 1994 which led to a three year prison sentence, a caution in 1996 related to drugs, a caution for public disorder offences in 2001 and convictions in 2006 and 2008 apparently unrelated to drugs, the appellant was also convicted in May 2004 and sentenced to six months in prison, for possession of cocaine. Accordingly we approach the assessment in the OASys report of low risk of re-offending with some caution.

20. The only other evidence relating to risk, other than the appellant's own views and those of his family, consists of a letter dated 16 September 2013 from a probation officer on behalf of the London Probation Trust advising of the lack of concerns with him being released into the community. We note the officer's view that the appellant did not have the potential to cause serious harm, but we are also mindful of the fact that that view appears to be based upon the conclusions of the statistical analysis in the OASys report rather than

upon personal contact with and knowledge of the appellant. For the reasons given above, we have concerns about the conclusions in the OASys report. It is, furthermore, of some relevance to note that there is no other and more recent evidence from the probation services since the appellant was released on bail in March 2014, despite the fact that he remains on licence until July 2015.

21. In all of these circumstances, whilst considering the evidence relied upon by the appellant as supporting his claim to be "a changed man" as he states in his most recent statement, but having had regard to his criminal history, the escalation in offences, his adjudications whilst in prison and the seriousness of the index offence, we are not prepared simply to accept the assessment in the OASys report of low risk of reoffending and do not reach such a conclusion ourselves. We are aware, from the Upper Tribunal's decision in Vasconcelos (risk - rehabilitation) Portugal [2013] UKUT 378, that we are not bound by the conclusions following statistical assessment of re-offending and we consider such circumstances exist in the appellant's case. On the basis of the evidence before us, and having regard to the assessment of medium risk of serious harm in the community, we conclude that the appellant poses at the very least a medium risk of re-offending. In the light of that conclusion, and considering the devastating effect of drugs on society, we conclude that the appellant does constitute a danger to the community and that he has failed to rebut the presumption under section 72 of the 2002 Act.

22. Having made such a finding, we now turn to our assessment of Article 8, in which the only relevant issue is whether exceptional circumstances exist such that the public interest in the appellant's deportation is outweighed by other factors, for the purposes of paragraph 398 of the immigration rules. With regard to the question of "exceptional circumstances", the Upper Tribunal in Kabia (MF: para 398 - exceptional circumstances) (Gambia) [2013] UKUT 569, said in the head-note to the case:

> *"3. The new rules speak of "exceptional circumstances" but, as has been made clear by the Court of Appeal in MF (Nigeria), exceptionality is a likely characteristic of a claim that properly succeeds rather than a legal test to be met. In this context, "exceptional" means circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that a deportation would not be proportionate"."*

23. The "unjustifiably harsh consequences" relied upon by the appellant are the destruction of the extended family unit in which it is said that he is the focal point and the "steer", ensuring that his children from his various former partners maintain a relationship amongst themselves and with him. However, as the Court of Appeal in Lee found, that (ie the splitting up of families) is what deportation does and is the tragic consequence of the appellant's bad behaviour. We find nothing unusual about the appellant's circumstances. It is the case that he has five children from four different women. He is not currently in a relationship. His relationship with AR has now ended and he has returned to live with his ex-wife AG and their two sons in accordance with the conditions of his bail. Whilst it is accepted that he maintains a close relationship with his children and that he did so whilst in prison, it is also the

case that his involvement in their lives has been limited due to his imprisonment and that he has never been a permanent fixture in their lives in terms of living circumstances. The children's mothers have so far maintained an interest in sustaining the inter-relationships between the children and there is no reason why that would not continue in the appellant's absence.

24. Whether it is in the children's best interests for the appellant to remain in the United Kingdom is questionable, given the influence he brings to bear as a result of his criminal history. However, proceeding on the basis that it is in the children's best interests to have their father living nearby and being able to visit him and spend time with him, particularly given the close ties that it is accepted exist between them and the supporting evidence in that regard, including letters from the children's schools, we conclude that those interests, albeit a primary consideration, are nevertheless outweighed in this case by the public interest in preventing disorder and crime. We find no factors weighing in the appellant's favour other than his children and his length of residence in the United Kingdom. We note that he committed the index offence at a time when he had all five of his children and thus had no regard to the implications of his actions on them at the time. He has contributed little to society thus far and, whilst he has commenced work with Foundation 4 Life with the intention of becoming a youth mentor, we note from the letter of support at page 24 of the most recent bundle that is only a recent development and is in the very early stages, with training and other requirements yet to be met. The crime that he committed was, as we have already said, a serious one, with potentially serious adverse effects on society. We have not agreed with the OASys assessment as to him posing only a low risk of re-offending, but in any event note from relevant jurisprudence that that is not the most important public interest factor (N (Kenya) v Secretary of State for the Home Department [2004] EWCA Civ 1094). We take note of the strength of the public interest consideration, as emphasised by the Court of Appeal in SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550.

25. In all the circumstances, we do not consider that the appellant's deportation would result in unjustifiably harsh consequences for the appellant or his children or their respective mothers. Whilst it would no doubt cause some initial distress to the children, there is no reason why they would not able to continue their lives as previously, meeting each other with the support of their respective mothers and, whilst not an ideal substitute for regular direct contact, maintaining contact with the appellant through occasional visits (albeit with regard to the reservations stated in the social worker's letter of 8 July 2014), telephone calls and other means. It is always open to the appellant to seek to persuade the respondent, in the future, that his presence in the United Kingdom is no longer contrary to the public interest, in order that he may return and join his children. We find that there are no exceptional circumstances outweighing the public interest in the appellant's deportation and that his deportation would not be in breach of his Article 8 human rights.

26. We find, accordingly, that the appellant has failed to establish that he falls within the exceptions set out at section 33 of the UK Borders Act 2007 and his

appeal must be dismissed under the immigration rules and on human rights grounds.

DECISION

27. The making of the decision of the First-tier Tribunal involved an error on a point of law and the decision has accordingly been set aside. We re-make the decision by dismissing the appeal on all grounds.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. We continue that order, pursuant to pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, in view of the fact that children are involved who may not be named or identified in any published proceedings or reports.

Signed

Date

Upper Tribunal Judge Kebede