



Upper Tribunal  
Immigration and Asylum Chamber

Appeal Number: DA/02350/2014

THE IMMIGRATION ACTS

Heard at Field House  
On 22 October 2014

Promulgated on:  
On 23<sup>rd</sup> Oct 2014

Before

Upper Tribunal Judge Kekić

Between

Owen Augustus Smith  
AKA Eazy Wayne

Appellant

and

Secretary of State for the Home Department

Respondent

Determination and Reasons

Representation

For the Appellant: Mr T Bobb, Solicitor  
For the Respondent: Ms A Holmes, Senior Home Office Presenting Officer

**Details of appellant and basis of claim**

1. On 30 June 2014 I granted permission to appeal to the Secretary of State in respect of the determination of First-tier Tribunal Judge Cockrill of 14 May 2014 allowing the appellant's deportation appeal. The matter now comes

before me for hearing. For convenience, I continue to refer to the Secretary of State as the respondent and to Mr Smith as the appellant.

2. The appellant is a Jamaican national born on 10 November 1969. He first entered the UK in November or December 1999 as a visitor. He claims to have then varied his leave in order to study until 20 June 2000. He then overstayed until early 2003 when he left the country. On 15 May 2003 he sought to return but his passport was found to contain a counterfeit ILR endorsement. He was also in possession of a counterfeit letter from the Home Office notifying him of a grant of indefinite leave to remain. As a result he was refused leave to enter. The appellant claimed he knew nothing of the falsity of the documents, that he had met someone whom he thought was a Home Office employee who had offered to process his application for him, and that he had travelled back and forth between the UK and Jamaica several times using that passport without any problems until 2003.
3. On 12 April 2004 he married Lorna Cummings in Jamaica. Her date of birth is 29 July 1962. They had met previously in the UK and she travelled to Jamaica in July 2003, March 2004 and January 2005 to spend time with him and to marry him. Although her parents were originally from Jamaica, she herself was born and brought up in the UK.
4. On 19 May 2005 the appellant's application for entry clearance as a spouse was refused. The ECO was not satisfied that the relationship was genuine or subsisting or that the appellant could be maintained without recourse to public funds. An appeal was lodged but was dismissed by a judge on 4 February 2006 following a hearing. Challenges to the Upper Tribunal and the High Court proved unsuccessful.
5. On 5 September 2006 the appellant made a further application for entry clearance but this was also refused on 28 February 2007. His appeal was dismissed on 14 November 2007 and a High Court review refused on 4 December 2007.
6. On 8 December 2008 the appellant was granted a visa to join his wife on compassionate grounds following her stroke earlier that year. He entered the UK on 9 January 2009 with leave to enter until March 2011. He then sought ILR which was granted on 19 December 2011.
7. On 28 November 2011 the appellant was convicted at Croydon Crown Court of two counts of being knowingly concerned in fraudulently evading prohibition/restriction on the importation of controlled drugs (Class B) on 19 August 2010 and 9 September 2010 and sentenced to three and four years in prison to be served concurrently. He is currently on licence until 27 November 2015.

8. On 26 January 2012 the Secretary of State notified the appellant of his liability to deportation under section 32(5) of the UK Borders Act 2007 and sought information from him as to why he should not be deported. There is written confirmation that the papers were received by the appellant on 30 January 2012 but he refused to sign for them. Nevertheless, a completed copy of the questionnaire dated 14 February 2012 is to be found at Annex U. The appellant maintained that his wife worked as a probation officer but had heart problems, that he was the only one supporting her and that he had no family in his country of origin. There is no reference to Mrs Smith's diagnosis of Cardio Vascular Dementia some two years earlier. Representations from his solicitors were also made on 6 August 2012 (Annex V). Whilst they refer to the appellant being unable to return to Pakistan (V2), they also argue that return to Jamaica would interfere with his private and family life.
9. An undated NOMS report (requested on 3 October 2013) assesses the appellant as posing a low risk of serious harm to others and a low risk of reoffending (S6) but notes his behaviour as reckless and questions whether he was ever involved of such activity in the past or whether it was a single incident of such offence (S4). The author of the report also expresses concern that the appellant had expressed his wish to travel to other countries after his release to pursue his musical career. The appellant was told that he was not permitted to travel whilst on licence and that his request for such a privilege was not supported (S8). The appellant was also questioned on how he could care for his wife if he was travelling for his work; no explanation was offered. The appellant maintained this was the only way he could earn money (S9).
10. On 11 November 2013 a deportation order was signed by the Secretary of State. This was served on the appellant on 15 November 2011. In the accompanying notice of decision, the Secretary of State considered the appellant's immigration history, his criminal convictions, the public interest and the Article 8 factors that had been put forward.
11. The appellant challenged the decision and his appeal was allowed by First-tier Tribunal Judge Cockrill who found that the appellant's wife's condition was an exceptional factor which took priority over the public interest.

### **Appeal hearing before the Upper Tribunal**

12. Ms Holmes relied on the Secretary of State's grounds. These can be summarised as under:
  - 1) The appellant's circumstances do not establish exceptional circumstances that would outweigh the pressing public interest in deportation and the judge misdirected himself in allowing the appeal on this basis because

- i) The severity of the appellant's wife's condition is unclear from the determination; there are imprecise and contradictory findings on her ability to drive, to care for herself and the extent of care she requires from others;
  - ii) Mrs Smith has access to professional care and has an extensive network of family members who have provided care and could continue to do so. Her desire to be looked after by the appellant does not amount to an exceptional circumstance;
  - iii) It has not been established that it is unjustifiably harsh for the appellant and his wife to make a choice about whether they would live in Jamaica or would continue a relationship via modern means of communication.
- 2) The judge did not adequately deal with the public interest element in that
- i) The severity of the offence and the legitimate aims that deportation engages were not afforded the appropriate weight;
  - ii) The judge did not consider the circumstances of the offences and why the appellant offended;
  - iii) The correct approach to the public interest was not followed;
  - iv) The assessment of the public interest was fundamentally flawed.
13. Ms Holmes expanded on the grounds. She referred to paragraphs 118 and 74 and argued that the appellant's wife's driving ability was unclear and that the appellant only had a provisional driving licence. She submitted that the findings on the Mrs Smith's health were unfocused and did not clearly spell out the nature of her problems. The clinical needs mentioned in paragraph 129 were unidentified. Mrs Smith's evidence failed to suggest any cognitive impairment. She could dress and shower herself and she was able to care for her grandchildren. The judge should have made clear and full findings and he failed to do so. Whilst of course Mrs Smith would prefer to be cared for by her husband, there were others who could look after her. The judge failed to take account of the fact that the appellant had relatives in Jamaica. Although he found that Mrs Smith's needs could all be met by the appellant in the UK, he failed to explain why the same care would not be provided by the appellant in Jamaica. With regard to the public interest issue, the judge had not properly grappled with the SS Nigeria principles (at paragraphs 51-54). There was no acknowledgment of the weight accorded by legislation to the policy of deporting foreign criminals. That warranted far more serious consideration that was found in the determination. The circumstances of the offence had not been considered either. Fresh findings were necessary and the matter should be remitted to the First-tier Tribunal.
14. Mr Bobb replied. He submitted that the determination was well balanced and that the judge had set out the reasons why he considered the case to be exceptional. The judge had a great deal of medical evidence with respect to the appellant's wife. She had suffered two strokes, had dementia and

problems with mobility and memory. She would not have mobility aids available to her in Jamaica. The judge accepted her evidence that she could not and would not go to Jamaica. That meant there would be a nullification of family life as her illness progressed. Mrs Smith's daughter had her own life and could not give her full attention to her mother. Nor could Mrs Smith's siblings. The findings were open to the judge. They were not perverse and so could not be dislodged. The right test was set out in the determination. The judge found that the appeal succeeded only because of Mrs Smith's ill health. There were insurmountable difficulties in the continuation of life outside the UK. The question was whether it would be unjustifiably harsh to deport the appellant in circumstances where it was unreasonable to expect his wife to accompany him. The judge had had regard to the public interest. Despite the strong public interest in deporting foreign criminals, there were cases where this was not justified. The appellant's case was one such example. The respondent's grounds were no more than a disagreement with the judge's findings and the decision should be upheld.

15. Mr Holmes responded. She submitted that the grounds were not a disagreement. The judge's findings on the sponsor's health were unclear and the decision lacked a consideration for the public interest in the wider sense.
16. At the conclusion of the hearing I reserved my determination which I now give.

### **Findings and Reasons**

17. I have had careful regard to the submissions made, the determination of the First-tier Tribunal and the evidence to which I was referred. My decision has not been taken lightly but only after consideration of all the evidence and I have given thought to the submission forcefully made by Mr Bobb on the appellant's behalf that the respondent's grounds amount to no more than a disagreement with the findings and decision of the judge. After much deliberation, I reach the conclusion that the judge's finding that Mrs Smith's ill health was an "exceptional" factor which displaced the public interest in deportation was not adequately reasoned and did not properly engage with the pressing public interest in the deportation of foreign criminals.
18. Whilst it was argued for the appellant that there was nothing in the nature of the offence for the judge to have had regard to other than the conviction itself, the respondent was entitled to maintain that the circumstances surrounding the offences were a matter that should have been considered. The appellant continues to maintain his innocence in the involvement of the importation of drugs; his explanation is that he unwittingly became involved whilst doing some friends some favours. As can be seen from the sentencing remarks, the appellant was found to have been part of the organisation behind a

commercial operation to import two significant shipments of cannabis valued at £100,000, controlling the couriers involved, fetching and carrying them, providing them with tickets and hotel accommodation. This led the judge to deal with him more harshly than the couriers, having noted that he had no mitigation to put forward, no plea and no remorse (O2-3). This raises issues over what the appellant has done to take responsibility for his behaviour and address his offending behaviour (it may be seen from the NOMS assessment that nothing has been done and from the OASys report that no responsibility has been taken and that he does not recognise the impact and consequences of offending on the community) and entirely conflicts with the claim in his grounds of appeal that he is remorseful for his actions (at paragraph 9). These are matters which should have factored into the judge's assessment.

19. Also relevant is the appellant's previous conduct with regard to the deception practised with regard to a false Home Office letter and vignette. The appellant's claim that he did not know the endorsement or the letter were forgeries, that he had met a man whilst socialising who purportedly worked for the Home Office and offered to process a student renewal application for him which turned into a grant of ILR, apparently for no charge (A1, B1; respondent's bundle) is contradicted by his entry clearance interview on 19 May 2005 where he is recorded as stating to the ECO that "a guy at the school got me the forged thing" (D).
20. Given the appellant's conduct, his criminality and the substantial weight to be given to public policy, the Article 8 put forward for the appellant had to be very compelling indeed in order to succeed. It is plain from the determination that the only factor which the judge found "exceptional" was Mrs Smith's ill health. He failed to consider whether the appellant and his wife should be separated despite the latter's condition based on the public interest factors and given the focus on Mrs Smith, there is merit in the respondent's submissions that his findings in that respect needed to be clearer. I accept that there was medical evidence before the judge albeit the majority of it was some two years out of date. It is not disputed, however, that Mrs Smith suffered two strokes and was diagnosed with cardio vascular dementia in 2010 or thereabouts. What the respondent finds lacking in the determination are clear and non conflicting findings on, for example, the extent of help Mrs Smith requires, the activities she is able to undertake on her own, the extent of her memory problems and the care available to her from others. It has to be said that the 'findings' made on these matters could be clearer. There is also some concern expressed over the appellant's intentions which could usefully be addressed. The Secretary of State's decision letter cites the concern of the Probation Officer and questions whether the appellant had used his wife's ill health in order to obtain his release when his intention was to travel Europe to pursue his music career. As the entire appeal rests on Mrs Smith's ill health, the respondent is entitled to expect a determination which addresses

the issue in a more focused and thorough way. Whilst I have sympathy with Mrs Smith's situation, there needs to be better engagement with why that single factor overrides all the other very compelling public interest factors.

21. For these reasons, I find that the Secretary of State's complaint is more than simply a disagreement with the outcome of the appeal. Both parties agreed that if an error of law were found, then the matter should be remitted to the First-tier Tribunal for a hearing afresh and that is what I have therefore decided to do.

### **Decision**

22. The First-tier Tribunal made errors of law which require the decision to be set aside. The matter shall be heard by a panel of the First-tier Tribunal which shall be tasked with making fresh findings and re-making the decision.

### **Anonymity**

23. The First-tier Tribunal did not make an anonymity order and I see no reason to make one.

**Signed:**

**Upper Tribunal Judge Kekić**

23 October 2014