Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00573/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 July 2015	**On 17 August 2015**

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CH
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr L Tarlow, Senior Office Presenting Officer
For the Respondent: Mr R Singer, Counsel instructed by Bhattarai & Co solicitors

DECISION AND REASONS

Introduction

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties.

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Any failure to comply with this direction could give rise to contempt of court proceedings. We make this order because the case concerns the best interests of the claimant's daughter and she is entitled to privacy.

2. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal promulgated on 10 April 2015 allowing the respondent's appeal against the Secretary of State's decision to make a deportation order against him pursuant to section 32(5) of the UK Borders Act 2007. In this decision we refer to the respondent as "the claimant".

3. The claimant is a national of Jamaica. He was born on 31 October 1992 and is now 22 years old. He arrived in the UK in December 2001, aged nine, when he joined his mother who was already residing in the UK. He was granted indefinite leave to remain on 10 April 2006 as a dependent of his mother.

4. On 11 November 2009 his daughter, now 5 years old, was born. She is a British citizen. The claimant is not in a relationship with his daughter's mother, who is a British citizen.

5. On 10 August 2011 the claimant was convicted of burglary (which took place in January 2009) and theft (which took place in March 2011) and sentenced to eighteen months detention for the theft and six months detention for the burglary to be served consecutively in a Young Offenders Institute.

6. On 17 March 2014 a deportation order was made against the claimant. The Notice of Decision explained that this was an automatic deportation under section 32(5) of the UK Borders Act 2007 and that the claimant did not fall within any of the exceptions set out in section 33 of that act.

7. The claimant contended that deporting him would be in breach of Article 8 of the European Convention on Human Rights ("ECHR"). The Secretary of State disagreed. The Notice of Decision states that although it was recognised that deportation would interfere with the claimant's rights under Article 8, and that it may not be in the best interests of his daughter, it was nonetheless justified in light of the severity of the criminal offence. The claimant's position under paragraphs 399(a) and 399A of the Immigration Rules (as then in force) were considered and it was found that he could satisfy neither. In reaching its conclusion with respect to paragraph 399(a), the Secretary of State noted that although the claimant had a genuine and subsisting relationship with his daughter, her mother (who has parental responsibility) was able to care for her in the UK and the claimant could maintain contact from Jamaica. With regard to Paragraph 399A, the Secretary of State noted that the claimant's brother lived in Jamaica and could give him some support. The Secretary of State also commented that because of his academic achievements and employment history the claimant would be able to secure employment in Jamaica; and that because he had grown up in his

family he had maintained his cultural links with Jamaica. Furthermore it was not considered there were any exceptional circumstances which would outweigh the public interest.

8. The claimant appealed and the appeal was heard by First-tier Tribunal Judge Elson MBE on 12 September 2014. In a decision promulgated on 25 September 2014 Judge Elson allowed the appeal, finding that the appellant met the requirements of both paragraph 399(a) and 399A of the Rules and that in any event deportation would be contrary to Article 8 of the ECHR.

9. The Secretary of State appealed Judge Elson's decision and the appeal was heard by Upper Tribunal Judge Eshun and Deputy Upper Tribunal Judge Mailer. In a decision promulgated on 22 December 2014 they found that Judge Elson had erred in law by failing to consider the public interest question by reference to Section 117 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") and that the old Immigration Rules had been applied. They remitted the case for re-hearing before a different First-tier Tribunal judge.

10. The matter came before First-tier Tribunal Judge Buckwell on 18 March 2015. The judge heard evidence from the claimant, his mother, his step-brother and his step-father. It is apparent that the judge had a degree of sympathy towards the claimant. At paragraph 76, for example, he recorded that he found the claimant to be intelligent and sensible and was satisfied he had accepted responsibility for his own future and the role he should play in relation to his daughter.

11. The judge found that deporting the claimant would breach his human rights with reference to Article 8 ECHR. He was satisfied that the claimant met the requirements of both paragraph 399(a) and paragraph 399A of the Immigration Rules and that Exceptions 1 and 2 of section 117C of the 2002 Act applied.

12. Permission to appeal was granted by First-tier Tribunal Judge Reid on the basis that the judge made an arguable error of law in his assessment of 'unduly harsh' under paragraph 399(a) of the Immigration Rules and 'very significant obstacles' under paragraph 399A of the Rules.

Consideration

13. At the Hearing we heard submissions in relation to paragraphs 399(a) and 399A of the Immigration Rules and we will now consider each in turn.

Paragraph 399(a)

14. Paragraph 399(a) of the Immigration Rules provides as follows:

> '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 be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

…'

15. In considering Paragraph 399(a) it is necessary to have in mind Exception 2 of section 117C of the 2002 Act, which applies where, as in this case, the foreign criminal has been sentenced to less than four years imprisonment:

> 'Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.'

16. The Secretary of State accepted that the claimant had a genuine and subsisting parental relationship with his daughter and that she was a qualifying child. The only issue for the judge to decide, therefore, was whether the effect of the claimant's deportation on his daughter would be "unduly harsh". Under paragraphs 399(a)(i)(a) and (b) of the Rules there are two parts to the "unduly harsh" test: it must be unduly harsh for the claimant's daughter to move to Jamaica with him *and* unduly harsh for her to remain in the UK without him.

17. The judge's decision does not, on its face, address undue harshness at all. At paragraph 79 the judge stated that he was satisfied the claimant's daughter had a subsisting relationship with the claimant and that accordingly paragraph 399(a)(i) applied. At paragraph 85 he concluded that Exception 2 of section 117C was satisfied. However, there is nothing in the decision to show that he in fact considered the question of how deportation would affect the claimant's daughter and whether the effect would be unduly harsh on her.

18. Mr Singer acknowledged the deficiency in how this part of the decision had been drafted but argued that there was no error of law as the facts support the finding that the undue harshness test has been met even if the judge has not clearly articulated his reasons. With respect to paragraph 399(a)(i)(a), his argument was that it is self evident it would be unduly harsh for the claimant's daughter to move with him to Jamaica. There is some force to this submission. We note in this regard that the Secretary of State's Notice of Decision states that it would be in the claimant's daughter's best interests to remain in the UK with her mother, who is her main carer. With regard to paragraph 399(a)(i)(b), Mr Singer pointed to the judge's findings about the relationship between

the claimant and his daughter and commented on the impediments to this being maintained if the claimant were to be deported.

19. Mr Tarlow did not disagree with any of the judge's factual findings but argued they were insufficient to draw the conclusion that deportation would be "unduly harsh" for the claimant's daughter. Mr Tarlow relied on the grounds of appeal which submit both that no circumstances have been raised that would suggest it would be unduly harsh for the claimant's daughter to move to Jamaica with him and that it would not be unduly harsh for her to remain in the UK without him as contact could be maintained.

20. Mr Tarlow emphasised that the judge had failed to give sufficient weight to the public interest in deportation. Mr Singer's response was that it is clear from the judge's decision that he had accorded due weight and deference to the public interest. He noted that the judge had recognised that the Immigration Rules (together with the provisions of Part 5A of the 2002 Act) constitute a complete code for considering Article 8 of the ECHR in deportation appeals and that the judge had referred to Court of Appeal case law – cited in his own skeleton argument – stressing the weight to be given to the public interest in deporting criminals.

21. The judge has completely failed to engage with the question of whether it would be unduly harsh for the claimant's daughter to remain without her father in the UK. This is not a straightforward question. Weighing on one side is that it is undoubtedly harsh on a young girl to be separated from her father, where, as is surely the case here, it is in her best interests to maintain regular contact with him and for him to be a part of her life as she grows up. She is already five years old and the loss of contact with her father may well be of great distress to her. Moreover, given the uncertain relationship between the claimant and his daughter's mother it also may prove difficult to maintain relations by telephone and visits as this will no doubt depend on the mother's cooperation, which cannot be guaranteed. This further weighs against deportation. On the other hand, this is not a case where a family unit will be broken up – the claimant only sees his daughter once a week or once every few weeks. The daughter lives with and is cared for by her mother. Moreover, it is necessary to reflect on the seriousness of the claimant's criminal offence bearing in mind the requirement under Section 117C(2) of the 2002 Act to take into account that the more serious the offence the greater the public interest in deportation.

22. The judge has failed to carry out the proportionality assessment required by the Rules and Part 5A of the 2002 Act and as described above. Indeed, he appears to have reached the conclusion that the requirements of paragraph 399(a) were met without even addressing whether it would be unduly harsh for the claimant's daughter to remain in the UK without him. We do not accept Mr Singer's submission that we can infer from the factual findings that the unduly harsh test was met such that it was not necessary for the judge to make explicit his analysis

and reasons. Although the judge correctly identified the relevant legal test he failed to carry out the assessment it required. This was an error of law.

Paragraph 399A

23. Paragraph 399A of the Immigration Rules provides as follows:

> '399A. This paragraph applies where paragraph 398(b) or (c) applies if –
>
> (a) the person has been lawfully resident in the UK for most of his life; and
>
> (b) he is socially and culturally integrated in the UK; and
>
> (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.'

24. In considering Paragraph 399A it is necessary to have in mind Exception 1 of section 117C of the 2002 Act, which applies where, as in this case, the foreign criminal has been sentenced to less than four years imprisonment:

> 'Exception 1 applies where -
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.'

25. The first question is whether the claimant has been lawfully in the UK for most of his life. This requirement is clearly met.

26. The second question the judge was required to consider under paragraph 399A was whether the claimant was socially and culturally integrated into the UK. The Secretary of State, in its grounds of appeal, submitted that the claimant, because of his criminality and disregard for societal norms, was not integrated into the UK. This argument, which was not developed by Mr Tarlow at the hearing, is not a strong one. The judge's findings about the claimant's education, training and employment, as well as his command of English and the length of time he had been in the UK, made it undoubtedly open him to conclude that the claimant was socially and culturally integrated in the UK.

27. The third, and more difficult, question is whether the judge erred in finding that there would be very significant obstacles to the claimant's integration into Jamaica. This was dealt with by the judge at paragraph 80, where he found that if the claimant were deported to Jamaica he would be left to fend for himself and would find living very difficult. He took into consideration that the claimant had come to the UK as a child, had not been back to Jamaica since, and lacked knowledge and experience of Jamaica. In those circumstances, he concluded that there

were very significant obstacles to integration such that the requirement of paragraph 399A(c) was satisfied.

28. Mr Tarlow, relying on the grounds of appeal, submitted that there was nothing before the judge to suggest the claimant could not establish and enjoy, albeit with some difficulty, a private life in Jamaica, and that in reaching his conclusion the judge had relied on matters that went no way to demonstrating the very significant obstacle test was satisfied.

29. Mr Singer's response was that the judge had provided sufficient reasoning for his conclusion that there would be "very significant obstacles" to integration into Jamaica. He referred to the judge's findings at paragraph 80 on the length of time the claimant had been in the UK and the lack of support he would receive in Jamaica.

30. It is clear, from the judge's findings of fact, which were accepted by the Secretary of State, that the claimant would face obstacles integrating into Jamaica. It is less clear, however, whether these obstacles meet the threshold of being "very significant" as is required by the Rules.

31. We remind ourselves that the issue before us is whether the judge made an error of law and not whether we, or a differently constituted Tribunal, might have reached a different conclusion based on the same facts. The judge has reached a particular view of the facts but that does not make his finding an error of law. The question we must decide is whether his finding that there were very significant obstacles was one that was open to him on the evidence for the reasons given.

32. The judge had the benefit of hearing the claimant and other witnesses give evidence. He heard the claimant describe his relationship (or lack thereof) with family members in Jamaica. At paragraph 30 he recorded the claimant as saying he did not know about other family members and that he would not know how he would integrate into Jamaica. At paragraph 34 the judge recorded the claimant's comments about finding work in Jamaica and the difficulties he anticipated he would face. The judge also heard the claimant's mother who commented on the difficulty the claimant might face in Jamaica. He recorded her as saying her son in Jamaica is like a stranger to the claimant and would not be able to help him or make available a place for him to stay. At paragraph 80 the judge summarised his factual findings that lead him to the conclusion that there would be very significant obstacles to integration: that the claimant lacked knowledge and experience in Jamaica; that he would have to fend for himself; that he had been in the UK since he was nine and had not been back to Jamaica since.

33. The judge has given reasons for his findings which demonstrate the correct legal test, having regard to the Rules and 2002 Act, has been applied. His factual findings show that in making his decision he has had regard to, and considered, the relevant evidence before him. In these circumstances, although the judge's finding that the claimant would

face significant obstacles integrating into Jamaica might be considered somewhat generous to the claimant, we are satisfied that it was a finding that was properly open to him based on the evidence and therefore that he has not made an error of law.

Conclusion

34. The First-tier Tribunal erred in law in its assessment of whether the claimant met the requirements of paragraph 399a of the Rules.

35. The First-tier Tribunal did not make an error of law in its consideration of whether the requirements under paragraph 399A were satisfied.

36. In order to establish that his deportation would be contrary to the UK's obligations under Article 8 of the ECHR the claimant was only required to satisfy *either* paragraph 399a *or* paragraph 399A.

37. As no error has been identified with respect to paragraph 399A, the error with respect to paragraph 399a was not material to the outcome of the claimant's appeal. Accordingly, the decision of First-tier Judge Buckwell shall stand and I dismiss the Secretary of State's appeal.

38. An anonymity order is made.

Notice of Decision

The Secretary of State's appeal is dismissed.

Signed Dated: 12 August 2015

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN