Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/03945/2014

THE IMMIGRATION ACTS

Heard at : IAC Birmingham	**Decision & Reasons Promulgated**
On : 30 June 2016	**On: 12 July 2016**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

JASON KIRLEW
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms U Sood of Trent Chambers
For the Respondent: Ms H Aboni, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Jamaica, born on 27 December 1976. He has been given permission to appeal against the decision of First-tier Tribunal Judge Colyer, dismissing his appeal against the respondent's decision to refuse to revoke a deportation order previously made against him on 1 December 2013.

2. The appellant's immigration history is lengthy and is summarised as follows.

Immigration History

3. The appellant first arrived in the United Kingdom on 11 August 2001 and was granted leave to enter as a visitor until 9 September 2001. He returned to Jamaica on 8 September 2001 and came back to the UK on 29 March 2003 in possession of a visit visa valid until 24 September 2003. On 26 July 2003 he married [CM] in the UK. He returned to Jamaica and came back to the UK on 23 November 2003 with entry clearance as a spouse valid until 21 November 2005. Applications for further leave to remain were refused.

4. On 11 November 2010 the appellant was convicted of possession of Class A drugs with intent to supply and on 26 November 2010 he was sentenced to three years and six months imprisonment, on four counts. On 1 February 2011 he was served with a Notice of Liability to Automatic Deportation. He responded with representations based on Article 8 of the ECHR. A Deportation Order was signed against him on 1 February 2013. On 8 February 2013 a decision was made to deport him.

5. The appellant appealed against that decision. His appeal was heard on 12 June 2013 and was dismissed in a determination promulgated on 28 June 2013. Permission to appeal to the Upper Tribunal was refused and the appellant became appeal rights exhausted on 13 August 2013. An application for permission to bring judicial review proceedings was refused in November 2013.

6. The appellant was detained on 16 January 2014 in order to facilitate removal and removal directions were then set for his removal to Jamaica on 3 February 2014. He made an application on 30 January 2014, though his current legal representatives, to revoke the deportation order previously made against him, on Article 8 grounds. On 1 February 2014 he made a claim for asylum in person, which was treated as an application to revoke the deportation order and was refused and certified on 2 February 2014, under section 96(1) of the Nationality, Immigration and Asylum Act 2002, with no right of appeal, on the basis that he was raising matters which he could have raised in his previous appeal (pages E22-26). On 10 February 2014 the appellant's representatives made further asylum and human rights representations (E27). On 10 February 2014 the respondent made a decision to refuse to revoke the deportation order and refused the appellant's human rights claim, for reasons set out in a letter dated 17 February 2014, in which his asylum and human rights claims were certified as clearly unfounded under section 94(2) of the 2002 Act.

7. The appellant lodged judicial review proceedings against the decision of 2 February 2014. Permission was refused on the papers on 21 February 2014 and the application was renewed to an oral hearing but then withdrawn at a hearing on 8 May 2014 on the basis that the appellant had since been removed from the UK, with an out of country right of appeal.

8. The appellant appealed, from outside the UK, against the respondent's decision of 17 February 2014 to refuse to revoke the deportation order and to refuse his asylum and human rights claims. His appeal was heard in the First-tier Tribunal on 14 October 2014

and was dismissed in a decision promulgated on 30 October 2014. Permission was sought to appeal to the Upper Tribunal and was initially refused on 11 December 2014, but was subsequently granted upon a renewed application on 9 April 2015.

The Appellant's Case

9. The appellant's case as follows. Following the breakdown of his marriage to [CM] and their divorce in July 2006, he began a relationship with [KP] with whom he had a son, [R], born on 23 September 2005. [R] is a British citizen and he shares the care of his son with [KP], despite their subsequent separation. He became, and remains, a father figure to [KP]'s daughter [C], now aged 9, from [KP]'s previous relationship with a man who was deported to Jamaica. In early 2007 he entered a relationship with [KR], a British citizen, who was at the time a law student but who now works as a commercial property solicitor for a large firm of solicitors, Eversheds LLP. [KR] did not know anything about his criminal activities until he was arrested. They lived together following his release in July 2012 until his deportation in February 2014.

10. The appellant said that he was forced into selling drugs by a drug dealer in Nottingham whom he knew only as [M], who used his precarious immigration status and threats to tell the immigration services and police about him, as a means of getting him to comply. When he was arrested he was in possession of a small amount of drugs as well as approximately £12,000 in cash which belonged to [M]. That money was confiscated with the drugs when he was caught and [M] wants the money and the value of the drugs back and has threatened to kill him if he does not return them. [M] is a dangerous man who has ordered killings of people and has killed two of his (the appellant's) friends when they returned to Jamaica. [M] was deported to Jamaica whilst he, the appellant, was in prison, in 2011, and he fears being killed by him if he were to return to Jamaica. Threats have already been made to him, whilst he was in detention as well as through his partner. He did not make an asylum claim previously on that basis, because his previous solicitors had advised him that it was more important to concentrate on his relationship with his child. He has since made a formal complaint to those solicitors. He instructed his current solicitors after his deportation appeal was dismissed and, upon their advice, made an asylum claim. That claim was refused and certified and he was deported to Jamaica on 23 February 2014. Since returning to Jamaica, he has been threatened whilst in a deportee shelter in Kingston, by [M]'s gang members, and has had to move around the island and lie low. He now lives in a tenement and remains indoors, afraid to go out. [KR] pays his rent and sends him money. The police in Jamaica have been unable to help him. [KP] will not allow his son to visit him in Jamaica as it is too dangerous and for the same reason [KR] is afraid to visit. [KR] has established a successful legal career in the UK as a solicitor and cannot move to Jamaica as she would have to retrain and would not be able to find equivalent work. The distress of the appellant's deportation and circumstances has caused her psychological problems.

11. The respondent, in her decisions of 10 and 17 February 2014, relied upon the findings of the First-tier Tribunal in the appellant's deportation appeal in June 2013 and the reasons

for refusing his asylum application on 2 February 2014, finding both asylum and human rights claims to be clearly unfounded.

Appeal before the First-tier Tribunal

12. The appellant's appeal was heard in the First-tier Tribunal on 14 October 2014 by First-tier Tribunal Judge Colyer, who had in fact been the judge who had heard the previous appeal against deportation in a panel with a lay member. The parties did not have any objection to Judge Colyer hearing this subsequent appeal. Judge Colyer noted that a previous request by the appellant's solicitors for the appellant to give evidence by video link had been refused by the Tribunal. There was therefore no live evidence from the appellant himself, but the judge heard from the appellant's partner, [KR], and another witness [CG], a minister of the church which she and the appellant had attended. It was noted that two other witnesses had attended a previous hearing which was adjourned and were not able to attend this hearing, but no adjournment request was made in that regard.

13. The judge did not accept the appellant's account of the threats from a person called [M] to be credible and he found that the appellant would be at no risk on return to Jamaica. With regard to Article 8 of the ECHR, he did not accept that the appellant could meet the criteria in paragraph 399(a) or (b) or 399A on the basis of his relationship with his child and his partner or on the basis of his private life, and concluded that his deportation would not be in breach of Article 8.

14. Permission to appeal that decision was sought on the following grounds: that the appellant had been denied a fair hearing owing to his inability to give live oral evidence via video-link, which in turn affected the credibility findings made by the judge; that the judge had failed to consider the immigration rules relevant to Article 8; and that the judge had failed to take into account the expert report dealing with potential risk of harm in Jamaica.

15. Permission was initially refused, but was then granted on 9 April 2015 on all grounds, but primarily with regard to the first and third grounds.

Appeal hearing

16. I heard submissions from both parties.

17. Ms Sood referred to the previous judicial review proceedings in which the respondent had conceded that the appellant ought to have had an in country right of appeal and submitted that Judge Colyer had failed to consider that. The appellant had been denied a fair hearing as he had not been able to give evidence by video-link, despite having agreed to organise all practical matters to enable that to take place. The judge had failed to make any reference to the expert report and his findings on the appellant's asylum claim were completely lacking. Ms Sood submitted that Judge Colyer's decision was too reliant upon the findings that he had previously made in the appellant's deportation appeal, whereas the appellant's situation had evolved, particularly in regard to his relationship with his

child and partner. The judge had failed to have regard to the immigration rules in paragraph 398 and 399, and had not considered the exceptions in section 117C of the 2002 Act. There had been inadequate consideration of the children. Ms Sood referred finally to the fact that there had been no respondent's appeal bundle.

18. Ms Aboni submitted that there was no error of law in the denial of a video link hearing as it was not always possible to arrange one. As far as she was aware there was a respondent's appeal bundle, but in any event there were no concerns raised about difficulties due to lack of documentation. Judge Colyer was entitled to take into account the findings of the previous Tribunal in the deportation appeal. He was entitled to find the appellant lacking in credibility and had clearly considered all the documents. He had properly considered the relevant immigration rules and the best interests of the children. There was no error of law in his decision.

19. In response Ms Sood reiterated the points previously made and submitted further that the judge had failed to make findings on the evidence of the witnesses.

Consideration and findings

20. It seems to me that Judge Colyer's decision is a detailed and comprehensive one, containing careful and cogent reasoning and addressing all relevant matters and I find no errors of law.

21. With regard to the issue raised by Ms Sood as to the lack of a respondent's appeal bundle, it seems to me that that bundle, which appears to have been before the Tribunal, was in fact for the most part a reproduction of the appellant's appeal bundle, together with the relevant immigration decisions. Therefore there was nothing of which the appellant's solicitors were not already aware and clearly that did not give rise to any difficulties at the appeal and do not now give rise to any concerns.

22. As to the matter raised by Ms Sood in regard to the judicial review proceedings, it seems to me from a careful reading of the papers at E74 to E93, that the challenge was to the decision of 2 February 2014, the certification of the appellant's asylum claim under section 96(1) of the 2002 Act, which deprived the appellant of any right of appeal. Upper Tribunal Judge Lane's Order and Judgment at E93 and E94 makes it clear that the proceedings were withdrawn not only because the appellant had already been removed, but also because it was recognised that he had been given a right of appeal, albeit from outside the UK, in the subsequent decision refusing and certifying his asylum and human rights claims under section 94 of the 2002 Act. It seems to me that the only concession made by the Secretary of State was in regard to the section 96(1) certificate and that there was no concession as to an in-country right of appeal, as Ms Sood appeared to suggest.

23. That an out of country right of appeal is an adequate remedy has been accepted by the Court of Appeal in Kiarie, R (On the Application Of) v The Secretary of State for the Home Department [2015] EWCA Civ 1020, and whether or not permission has been granted to appeal that judgment to the Supreme Court does not go anywhere near demonstrating

that the appellant was denied a fair hearing by not being able to attend and give oral evidence at his hearing. Neither is the fact that he was denied an opportunity to give evidence at the hearing by video-link a reason to conclude that there was a denial of justice or of a fair hearing. Contrary to Ms Sood's submission, the Tribunal provided reasons for refusing the request for a video link, referring the appellant's representatives to the guidance in Nare (evidence by electronic means) Zimbabwe [2011] UKUT 00443, in particular paragraphs 19, 20 and 21(d) and providing further reasons in a letter of 8 August 2014.

24. In Nare the Tribunal stated at [19]:

> "Fourthly, it is for the Tribunal to decide whether to allow evidence to be given by electronic link, and to give the appropriate directions. The Tribunal needs to bear in mind the interest of all parties, and the overriding objective of the rules. The decision will not be taken lightly, and no party has a right to call evidence by electronic link. If specific directions are given, they will be given in order to secure the interests of the parties and of justice, and it is therefore very unlikely that the Tribunal will allow the evidence to be given by electronic link if the directions have not been complied with. "

25. and gave the following guidance on video linking requests, stating at [21(d)]:

> "If the proposal is to give evidence from abroad, the party seeking permission must be in a position to inform the Tribunal that the relevant foreign government raises no objection to live evidence being given from within its jurisdiction, to a Tribunal or court in the United Kingdom. The vast majority of countries with which immigration appeals (even asylum appeals) are concerned are countries with which the United Kingdom has friendly diplomatic relations, and it is not for an immigration judge to interfere with those relations by not ensuring that enquiries of this sort have been made, and that the outcome was positive. Enquiries of this nature may be addressed to the Foreign and Commonwealth Office (International Legal Matters Unit, Consular Division). If evidence is given from abroad, a British Embassy, High Commission or Commonwealth may be able to provide suitable facilities."

26. There is further guidance in the "Upper Tribunal Immigration and Asylum Chamber Guidance Note 2013 No 2: Video link hearings" which makes it clear at [6] that the decision whether to conduct a hearing by video link is a matter for the judge and states at [13] and [14]:

> "**Video links in overseas cases**
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> 13. An application to receive oral evidence from an appellant6 or witness who is overseas is unlikely to be granted unless it is established to UTIAC's satisfaction by the party making the application that:
> a. the time and effort involved in making those arrangements are likely to be reasonable and proportionate, given the nature of the case (see paragraphs 2, 4 and 5 above);
> b. technological and logistic arrangements are in place so that the evidence can be received at the time required;

> c. The appellant or witness will be giving evidence from a location at which arrangements are in place to satisfy the Tribunal that the circumstances in which the evidence is given are appropriate;
> d. the identity of the appellant or witness can be established satisfactorily;
> e. the Tribunal can be satisfied as to who else will be present while that evidence is being given;
> f. the costs of hearing the evidence will be borne by the party making the application; and
> g. all such inquiries as may be required by paragraph 14 below have been made and that no objection has been forthcoming from the foreign government concerned.
>
> 14. It should not be presumed that all foreign governments are willing to allow their nationals or others within their jurisdiction to be examined before a tribunal in the United Kingdom by means of video link. If there is any doubt, the party making the application should make appropriate enquiries with the Foreign and Commonwealth Office (International Legal Matters Unit, Consular Division), with a view to ensuring that no objection will be taken at diplomatic level."

27. In all of these circumstances, considering also that the appellant had given live evidence at his deportation appeal only a year previously before the same judge, and that he was able to provide written evidence, I find no error of law in the judge's decision to proceed with the appeal without the appellant's oral evidence. Neither do I find that that undermined his findings on the appellant's credibility, given in particular the weight that was, properly, attached to the circumstances and timing of the appellant's asylum claim, a primary reason for finding against him in that respect.

28. With regard to the assertion that the judge failed to take account of the evidence of the witnesses and the statement of the appellant's cousin in making the adverse findings that he did about the credibility of the appellant's account in relation to [M], it is clear that he did consider that evidence. He set out [CG]'s evidence at [15]. At [9] to [11] and [14] of his decision, Judge Colyer recorded [KR]'s evidence about the threats from [M] in some detail. It is clear from his findings at [113] that he had reservations about her credibility as a witness, and in particular her evidence as to her knowledge of the appellant's criminal activities. Although he did not set out the appellant's cousin [D]'s evidence, it is clear that he had regard to it, and specifically mentioned [D]'s statement at [79]. After giving various cogent reasons for rejecting the appellant's account of the previous and ongoing threats from [M], not least the fact that he had failed to mention the matter in any of his previous applications and appeals and raised it only two days before his proposed removal to Jamaica, the judge, in summing up his conclusions on credibility, referred to the fact that he had, in so doing, had regard to the accompanying accounts. That was referred to at [68], [71] and [72], and it is clear from that that he considered all the accounts relating to the matter to be lacking in credibility.

29. As regards the assertion that the judge had failed to consider the expert report from Rochelle McFee, I would make two points. Firstly, the judge did not need to refer to each and every piece of evidence, particularly as the amount of evidence contained in the appellant's appeal bundles was substantial, consisting of several lever-arched files. It is clear from the references he did specifically make – and I refer by way of example to [79] and [108] to [110] - that he had careful regard to all the evidence before him and that he

took it all into account in making his decision. Secondly, having had regard to the report myself, I find nothing in it which could have materially assisted the appellant. The report is an overview of gang violence in Jamaica and, whilst it does specifically refer to the appellant's circumstances, that is on the basis that his account of the problems he faced as a result of his involvement with [M] was true. The reasons given by the judge for disbelieving the appellant's account were not based on plausibility, but on specific matters including the timing of his asylum claim and lack of previous mention of the matter, which are not issues that the report could explain or redress.

30. It is also claimed that the appellant had provided a proper explanation for having failed to mention a fear of persecution in Jamaica, namely that his previous solicitors, against whom a complaint had been made, had advised him not to pursue that matter but to focus on his relationship with his child. That was clearly a matter considered by the judge and he recorded [KR]'s evidence in that respect at [5]. However, the judge was nevertheless perfectly entitled to conclude that if the appellant had genuinely faced such threats and had such a fear, he would have referred to that on the many opportunities that he had had and to consider that that undermined the credibility of his claim. Furthermore, the timing of the appellant's claim was not the only reason given by the judge for disbelieving his account. Further cogent reasons were given at [56] to [62] of his decision.

31. Accordingly, for the reasons cogently given by the judge, and on the basis that he clearly had regard to all the relevant evidence in making his findings, his conclusion, that the appellant's account of the threats from [M] was not a genuine and credible one, was one that was entirely and properly open to him on the evidence before him. He was entitled to conclude that the appellant was not at risk in Jamaica and to reject his asylum claim and grounds.

32. With regard to the challenge to the judge's findings on Article 8, I find again that the decision is a detailed and comprehensive one containing a careful assessment of all the evidence and cogently reasoned findings. Contrary to the submissions made by Ms Sood, I find no basis for considering that the judge erred by relying on findings previously made in the appellant's deportation appeal. The judge was perfectly entitled to rely on the findings previously made and indeed that was in accordance with the principles in Devaseelan. It is clear that the judge took those findings as a starting point, but then went on to consider circumstances arising since the decision in the deportation appeal.

33. Contrary to Ms Sood's submission, it is clear that the judge considered and applied the criteria in paragraphs 399(a) and (b) and 399A before going on to consider the appellant's circumstances outside those provisions. At [80] to [94] he gave detailed consideration to the appellant's child and the child of his former partner, considering their best interests and the effect that his deportation would have on them, concluding at [94] that the criteria in paragraph 399(a) had not been met. I agree that he considered the rules as they were at the time of the respondent's decision and therefore did not specifically consider the relevant provisions of "undue harshness" as appeared in the rules and section 117C at the time of the hearing. However there can be no doubt, from the findings carefully made, that he considered that it would not be unduly harsh for the children to remain in the UK

without him, and that nothing material arises from such an omission. The same can be said for the judge's findings in regard to the appellant's relationship with [KR], where extensive consideration was given to the question of her relocation to Jamaica and the problems that would entail, and to the effects of separation if she did not elect to relocate, with the conclusion at [117] that the criteria in paragraph 399(b) were not met.

34. The judge went on to consider the appellant's private life under paragraph 399A and again, whilst considering that in the context of the rules as they were at the time of refusal, it is clear from his findings that he concluded that there would be no significant obstacles to the appellant integrating in Jamaica. Having found that the appellant could not meet the criteria in paragraph 399 and 399A the judge did not specifically refer to the test in paragraph 398 or to the factors in section 117, but is clear from his findings from [121] to [132] that he considered all relevant matters and found nothing about the circumstances of the appellant to outweigh the public interest in his deportation. Accordingly, in light of the findings fully and properly made by the judge in regard to the appellant's circumstances in terms of his family and private life, and to the circumstances to which he would return in Jamaica, I find that his Article 8 assessment was one that was lawfully made.

35. Accordingly, I find no errors of law in the judge's decision such that it should be set aside, and I uphold his decision.

DECISION

36. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeal stands.

Signed
Upper Tribunal Judge Kebede Dated: 12 July 2016