



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05999/2017

THE IMMIGRATION ACTS

Heard at Birmingham
On 8 February 2018

Decision and Reasons promulgated
On 6 April 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

P K R
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Bradshaw instructed by Rashid & Co Solicitors.

For the Respondent: Mr Mills Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission against a decision of First-tier Tribunal Judge P J Holmes ('the Judge') who in a decision promulgated on 6 September 2017 dismissed the appellant's appeal on human rights grounds.

Background

2. The appellant, a citizen of Jamaica born on [] 1992, claims to have entered the United Kingdom aged 6. The appellant was granted indefinite leave to remain in 2001 but was subsequently convicted in the United Kingdom on six occasions between 2009 and 2016 for a variety of offences including wounding, possession of a prohibited weapon and possession of cannabis. On 11 February 2016 the applicant pleaded guilty at Wolverhampton Crown Court to two counts of possessing a controlled drug with intent to supply. The appellant was sentenced to 45 months imprisonment on 5 May 2016 for the first offence and a concurrent sentence of 8 months on the other count. The first count related to cocaine with a street value of £1,200 the second account to cannabis.
3. In view the latest convictions a decision was made to deport the appellant. The appellant opposed the deportation decision asserting his removal from the United Kingdom will breach the rights of his family and private life under article 8 ECHR.
4. The Judge sets out findings of fact between [19] and [41] of the decision under challenge. Those findings can be summarised, inter alia, in the following terms:
 - i. The appellant is not entitled to a derivative right of residence under the EU treaties for the reasons set out in the decision letter [19].
 - ii. The appellant has committed criminal offences; the offence leading to the deportation order representing an escalation in his criminality. Whilst evidence was provided showing the appellant's conduct improved significantly since he had been imprisoned and that he has been good for the past year the Judge found that does not deal with the damaging discrepancies between "the appellant's fine words in his letter and his bad behaviour continuing at the time when he wrote the same" which was found to cast doubt upon the sincerity of the insight he claims [20].
 - iii. It is not in issue that the appellant has lived in the United Kingdom from sometime before 6 April 2001 as at the age of 8 he was granted indefinite leave to remain. The Judge did not accept, however, that the appellant was entirely estranged from Jamaica having visited it as recently as 2014. Close relatives live in Jamaica in addition to the appellant's father. No satisfactory evidence of any sustained attempts to trace the family or reason why they would not welcome contact or be unwilling to provide at least emotional support for the appellant, in the event that he is deported, was made out [22].
 - iv. In light of the case made by the appellant and his witnesses on the subject of conditions in Spanish Town, enquiries might also have been made in relation to other places in Jamaica to which the appellant could return which might not suffer from the acute social problems he claims exist in Spanish Town. The Judge found no evidence of any such practical enquiries having been made [23].
 - v. The Judge found it had not been suggested that any of the avenues of support for deportees in Jamaica discussed by the respondent at the bottom

of the decision letter would not be available or that for any reason the appellant would not be able to gain access to the same [23].

- vi. The appellant has been assessed as posing a 'medium risk' to the public in the community and 'low' in other areas. The Judge accepted the appellant had made attempts to rehabilitate by improving his behaviour in prison and that he provided evidence of an offer of re-engagement with the apprenticeship that he partially served prior to his conviction, although the Judge noted the offer was from a close relative who, by virtue of having been the appellant's employer in 2014-15, demonstrated an inability to exercise sufficient positive influence over the appellant's behaviour. The Judge would also have been "distinctly more impressed" had the author of the letter attended the appeal hearing in order to support what was stated. Accordingly, the Judge attached little weight to that evidence [24].
- vii. The appellant's partner has been granted a Residence Permit in her capacity as the mother of a British Citizen child. The Judge noted her letter in support but concluded she was clearly aware of the appellant's conduct but could not, or chose not, to exercise sufficient influence to prevent his bad behaviour continuing. The Judge noted the letter had nothing to say about the example that the appellant chose to give, four years after their child was born, of his criminal behaviour which was found to demonstrate plainly that the appellant had not genuinely "turned his life around". The Judge noted in reply to cross examination that the appellants partner seemed to indicate she was unaware of any crime committed by the appellant although did admits later that she was aware of his conviction leading to a finding by the Judge that the witness was "clearly in a state of denial as to the seriousness of the appellants crime" [25].
- viii. The Judge found the appellant's partner's mother's evidence reflected the approach taken by the appellant's partner in praising the appellant's relationship with his child and in downplaying his criminal behaviour. The Judge finds she is unable to attach weight to the claim by this witness of massive change in the appellant and regret for committing criminal offences due to confirmation in oral evidence by the witness that she had not visited the appellant in prison and when asked to explain how she could have seen any changes in him referred to matters that clearly predated his serious offending [26].
- ix. The Judge found only the appellant's mother, of all the witnesses, demonstrated some insight into the appellant's failures both as a father and a son which are manifested in his criminal conduct. The Judge accepted the evidence of this witness [27].
- x. The Judge considered evidence not only from family members but also the letter from Handsworth Day Care Centre. The Judge accepted a parental relationship was established and has been maintained by the appellant and his child; but did not find the evidence supported the claim by the appellant that he was the main carer of his daughter. The Judge did not accept that the

evidence from the Day Care Centre, or any other evidence before the Judge, led to the conclusion that the parental relationship is “extraordinary” in the sense that it involves anything more than the normal emotional ties between a parent and child. The Judge did not find it extraordinary for a father to be concerned about his child’s education and development and to take an interest in his daughter’s welfare [28].

- xi. The Judge noted the appellants claim that the bond between him and his daughter is so strong that his absence whilst in prison had a significant detrimental impact on the child. The Judge finds the evidence discloses there had been other problems in the child’s life which could in themselves fully account for the observations of the Day Care Centre, although the author of the letter from the Centre had not seen the child since an unspecified date in 2016. The Judge found the evidence provided did not properly explain the assertion by the appellant’s partner that she struggled to maintain herself financially, become homeless, was being housed with her daughter in council funded hotel accommodation, leading the Judge to conclude that the appellants partner had such a falling out with her mother that she was unable to continue living in her mother’s home and had to seek assistance from social services. The Judge concluded “upon the evidence before me it is regrettably not at all clear how long the situation continued in which [Ms S] and her daughter were living in a hostel but evidently by the date of the appeal hearing the rift had been mended they are now back living with [Mrs W]” [29].
- xii. In relation to the best interests of the child, the Judge noted if the appellant is deported and the child remains in the United Kingdom the child would lose any opportunity for regular personal contact with her father. The Judge accepted the respondents point that the child’s mother is available to care for her in the United Kingdom and that there was no evidence the appellant’s presence was required to prevent ill-treatment and that he could remain in contact with his partner and daughter, but finds these points insufficiently recognise that the child’s welfare involves not only material but also emotional considerations and did not feel able to say that a child of nearly 6, deprived of direct personal contact with the father, would not be at any risk of detriment to her well-being or development. The Judge was satisfied that the removal of the appellant would be against the child’s best interests [30].
- xiii. The Judge was satisfied that the length of sentenced imposed brought the case with in paragraph 398 (b) which meant it appropriate to consider paragraph 399 and 399A of the Immigration Rules [31].
- xiv. The Judge notes it is not disputed the appellant has a subsisting parental relationship with his daughter who is under eighteen and that it was therefore necessary to consider of the question of whether it be unduly harsh for the child to live in Jamaica or whether it be unduly harsh for her to remain in the United Kingdom without the appellant. It was recognised that both questions must be answered in the affirmative if 399 (a) is to be applicable [32].

- xv. The Judge noted no party was suggesting the appellant's daughter ought to go to live in Jamaica. The Judge did not feel able to find, in all the circumstances, that it would be unduly harsh for the child to live in Jamaica [33].
- xvi. The Judge finds when considering 399(a)(ii) that it would not be unduly harsh for the appellant's daughter to remain in the United Kingdom without him [34].
- xvii. Considering 399(b), is not disputed the appellant has a genuine and subsisting relationship with his partner although she is neither a British Citizen or settled in the United Kingdom. The Judge finds that even if the requirements of condition 399(b)(i) were satisfied, as they were conceded in the decision letter, she would not have been satisfied that conditions (ii) and (iii) would have been satisfied save only that the immigration status of the appellants partner is no longer pending [35].
- xviii. The Judge finds the appellant's offending demonstrates a lack of respect for the United Kingdom's laws and social norms but is satisfied on the basis of the evidence that the appellant is socially and culturally integrated in the United Kingdom [36 - 37].
- xix. The Judge was satisfied there will be no very significant obstacles to the appellant's integration into Jamaica, if returned [38].
- xx. The Judge finds as the appellant had not shown either paragraph 399 or 399A are applicable the First-tier Tribunal was required to look for very compelling circumstances over and above those described in those paragraphs [39].
- xxi. The Judge considered the requirements of section 117 of the Nationality Immigration and Asylum Act 2002 before finding, for the reasons given, that the effect of the appellants deportation on his daughter would not be unduly harsh [40].
- xxii. The Judge sets out the conclusions in relation to the proportionality of the decision at [41] in the following terms:

"Taking account for the evidence before me, I finally consider the question of proportionality. I allow due weight to the British nationality of the appellant's daughter, the existence of a genuine and subsisting parental relationship, the detriment to the daughter's well-being that is likely to be involved in separation from her father for a long time; also to his genuine and subsisting relationship with his partner and the probable impact on the partner if the family is separated; but also his wider family social relationships in this country; I take into account the practical difficulties and uncertainties which (as the respondent conceded) are likely to face the appellant in Jamaica; but I find that none of these, individually or cumulatively, amount to very compelling circumstances which outweigh the public interest in his deportation. Something more is required to weigh in the balance and I find nothing of substance has been offered. I therefore conclude that the respondent's

decision to refuse the appellant's human rights claim is proportionate and should be upheld.

Error of law

The Submissions

5. Mr Bradshaw behalf of the appellant submitted that although the Judge had made some findings the Judge had not embarked on a proper legal analysis. The Judge found removal of the appellant will be against the child's best interests but stated there were no findings in relation to the child's best interests if the child was in Jamaica which it was argued the Judge was required to consider.
6. It was put to Mr Bradshaw by the Tribunal that in reality this was a family splitting case in that the Judge clearly accepted that the reality was that the child will remain in the United Kingdom with her mother if the appellant was removed. In response Mr Bradshaw submitted that the Judge did not carry out the required balance assessment regarding the impact of the appellant's removal which was required in the context of the unduly harsh test.
7. Mr Bradshaw further submitted that the reasons given by the Judge were not sufficient and that there were no findings indicating an identification of the factors or realisation of the impact on the child. It was submitted that at [34] the Judge adopts the refusal letters reasons but does not engage with relevant argument.
8. It was submitted the Judge failed to consider the positive and negative elements of the case. In relation to the private life aspects, it was argued the appellant had been in the United Kingdom for more than half his life and been granted ILR prior to the deportation order. The Judge was required to consider these aspects of the private life claim and the integration question. It was submitted the findings at [37] required a broad evaluative approach as the Judge is set out at [6], yet the Judge failed to undertake this evaluative judgment.
9. Behalf of the Secretary of State Mr Mills submitted it was permissible for the Judge to look at the individual parts of the case and then reach conclusions. In this appeal the Judge sets out findings and conclusions throughout the decision, dealing with various elements, and accordingly it was submitted no error is made as asserted by the appellant when the decision is read as a whole.
10. It is submitted the Judge considered the impact on the child and whether the decision would be unduly harsh, factoring this into a proportionality exercise, which concluded that it is proportionate. The Judge found for the appellant in relation to the best interests of the child but balanced the same with the other evidence and the public interest in deportation.
11. Mr Mills submitted the reasons go beyond only looking at the fact the appellant had committed a serious crime and refers to relevant case law such as that at [39]. It was submitted it is perfectly acceptable to find the best interests of the child may

be for the appellant to remain in the United Kingdom yet to find the deportation decision is proportionate on the evidence.

12. In relation to the issue of whether the decision is unduly harsh, Mr Mills submitted the appellant would have received a four-year sentence but this was reduced due to his guilty plea. There was still a strong public interest in this case. The Judge's findings that the matters relied upon by the appellant did not outweigh the public interest does not disclose arguable legal error.
13. The Judge accepted, in relation to the appellant's private life, that he had spent most of his life in the United Kingdom and had integrated and went on to consider significant obstacles to integration into Jamaica which had not been made out. The Judge arguably conducted the broad evaluative judgment required when considering this issue before finding as he did.
14. In relation to the assertion the Judge only relied upon the reasons for refusal letter; Mr Mills submitted such claim has no arguable merit. The reasons for refusal had been served on both the parties and the Judge explains why he accepted some of the points made by the respondent in that document.

My Findings

15. The fact the appellant claims to be a reformed character is not a determinative factor but one aspect of the proportionality assessment that had to be undertaken.
16. It is clear from reading the decision under challenge that the Judge considered the evidence with the required degree of anxious scrutiny and was fully aware of the competing arguments and the composition of the appellant's family unit.
17. The Judge rejected the appellant's arguments in part, for which adequate reasons have been given, include the weight the Judge was prepared to give to the evidence of some witnesses which was found not to pay appropriate regard to the nature of the appellant's criminality.
18. There is no arguable error in the conclusion of the Judge that the offences which led to making of the deportation order represented an escalation in the appellant's conduct. There is no arguable error in the conclusions by the Judge that the claim to be a reformed character was contradicted by other aspects of the evidence.
19. It is not disputed that the appellant was convicted as a drug dealer. The Sentencing Judge's remarks clearly show this is the basis on which the appellant possessed the cannabis and cocaine and other paraphernalia he was caught with by the police. It is known that the impact of drugs on society is incredibly damaging and those who engage in dealing such prohibited substances should not be surprised if the consequences are not only the passing of a considerable sentence of imprisonment but also, for foreign criminals, their removal from the United Kingdom.

20. The appellant is the subject of a lawful order for his deportation from the United Kingdom. The appellant seeks to rely on an exception set out in the UK Borders Act 2007, namely that his removal from the United Kingdom will breach his rights under the European Convention on Human Rights based upon his article 8 family and private life.
21. The deportation regime reflects not just the Secretary of State but also Parliaments view of what should happen to foreign criminals who receive a sentence of imprisonment. The length of such sentence will determine the factors that have to be taken into account by a decision-maker. The conclusion by the Judge that the appellant is unable to succeed under the Immigration Rules, for the reasons given, has not been shown to be infected by arguable legal error as it is within the range of decisions reasonably open to the Judge on the evidence. The finding by the Judge when weighing on the one hand the nature of the appellant's offending and the strong public interest in his removal from the United Kingdom and, on the other hand, the impact of his removal upon the appellant, his daughter, and other members of family in the United Kingdom, that it had not been shown that the decision to remove will result in consequences that satisfied test of being 'unduly harsh' has not been shown to be outside the range of findings reasonably open to the Judge on the evidence.
22. We have been reminded in cases such as *Hesham Ali* in the Supreme Court that the jurisdiction of the Tribunals in such matters is a human rights jurisdiction requiring an assessment of the proportionality of any decision made. The Judge makes no error in approaching the decision in the structured manner revealed in the determination when considering the position under the Rules first but thereafter outside the Rules.
23. The Judge was required by section 117C of the 2002 Act, which is reflected in paragraph 398, to consider whether 399 or 399A applied and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraph 399 and 399A. This is the test recognised and properly applied by the Judge.
24. In relation to the meaning of "very compelling circumstances over and above those described in Exceptions 1 and 2 as found in section 117 C (3)" the Court of Appeal in *NA (Pakistan) v Secretary State the Home Department [2016] EWCA Civ 662* considered the meaning of this phrase and concluded in paragraph 29 that a foreign criminal facing deportation is "*entitled to rely on such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paragraph 399 or 399A of the 2014 rules), or features falling outside those circumstances described in those exceptions and those paragraphs, which make his claim based on article 8 especially strong*".
25. The Judge clearly considered the connection of the appellant to the United Kingdom and the question of insurmountable obstacles to rehabilitation. The

conclusion no such obstacles had been made out on the evidence is a finding within the range of those available to the Judge.

26. In *Hesham Ali*, at paragraph 38, Lord Reed explained:

“The implication of the new rules is that paragraph 399 and 399A identify particular categories of case in which the Secretary of State accepts that the public interest in the deportation of the offender is outweighed under article 8 by countervailing factors. Cases not covered by those rules (that is to say, foreign offenders who have received sentences of at least four years, or who have received sentences of between 12 months and four years but his private or family life does not meet the requirements of paragraph 399 and 399A) will be dealt with on the basis that great weight should generally be given to the public interest in the deportation of such offenders, but that it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed, as Laws LJ put in the *SS (Nigeria) case* [2014] 1 WLR 998. The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State. The Strasbourg jurisprudence indicates relevant factors to consider, and paragraph 399 and 399A provide an indication of the sort of matters which the Secretary of State regards as very compelling. As explained at para 26, they can include factors bearing on the weight of the public interest in the deportation of a particular offender, such as his conduct since the offence was committed, as well as factors relating to his private or family life. Cases falling within the scope of section 32 of the 2007 Act in which the public interest in deportation is outweighed, other than those specified in the new rules themselves, are likely to be a very small minority (particularly in non-settled cases). They need not necessarily involve any circumstance which is exceptional in the sense of being extraordinary (as counsel for the Secretary of State accepted, consistently with the *Huang* case [2007] 2 AC 167, para 20), but they can be said to involve ‘exceptional circumstances’ in the sense that they involve a departure from the general rule.”

27. The finding of the Judge, having examined all the relevant aspects, was that the appellant had not made out that the circumstances of his case were sufficiently strong to warrant departure from the general rule that as a convicted foreign criminal who is subject to a deportation order he is to be removed from the United Kingdom.

28. The Judge was entitled to find the best interests of the child are for the child to remain in the United Kingdom with both her mother and father but that is not the determinative factor. The Judge clearly weighed that finding in the balance together with all other factors relied upon by the appellant and respondent but did not find, on the evidence, that the impact of the appellants removal would either be unduly harsh or tip the balance in the appellant’s favour in relation to the child or any other family member.

- 29. The Judge undertook a properly structured assessment of the evidence and has given adequate reasons in relation to the findings made, and in light of the fact it has not been shown the Judge failed to consider any material aspect of the evidence adequately, or has made a decision not reasonably available to the Judge on the evidence when applying the relevant law, the weight to be given to the evidence was a matter for the Judge. It is settled law that a properly conducted proportionality exercise is only challengeable on public law grounds of which none of been made out in relation to this case.
- 30. The Court of Appeal have recently reminded us again that the challenge in an appeal of this nature is to the decision made by the Judge. In this case the decision is that the appellants deportation is proportionate and the dismissal of his human rights claim. Having considered the submissions evidence and determination, I do not find the appellant has established arguable legal error material to the decision to dismiss the appeal sufficient to warrant the Upper Tribunal interfering with this decision.

Decision

- 31. **There is no material error of law in the Immigration Judge’s decision. The determination shall stand.**

Anonymity.

- 32. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 4 April 2018