Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/10922/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 June 2018	**On 3 July 2018**

Before
UPPER TRIBUNAL JUDGE FINCH

Between
MARVIN HOLDER

Appellant

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A. Radford of counsel, instructed by Turpin & Millar LLP

For the Respondents: Mr. P. Duffy, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellant, who was born on 8 September 1974, is a national of Jamaica. He arrived in the United Kingdom, as a visitor, on 10 May 1998 and on 5 September 1998, he married a British

citizen. As a consequence, he was granted limited leave until 17 October 1999 and then indefinite leave to remain.

2. On 23 October 2001, the Appellant was convicted of common assault and a Community Punishment Order of 160 hours was imposed. On 22 November 2013, he was convicted of conspiracy to supply a Class A controlled drug and on 18 December 2014 he was sentenced to four years imprisonment.

3. He was served with a decision to deport on 1 June 2015 and a deportation order was signed on 14 January 2016. A certificate was also issued under section 94(1) of the Nationality, Immigration and Asylum Act 2002. He lodged an appeal which was subsequently struck out and a claim for judicial review was withdrawn by consent on 17 July 2016. A further decision to refuse his human rights claim on 29 November 2016 and his claim was once again certified under section 94(1). He made a further claim for judicial review, which was again withdrawn by consent and on 17 August 2017 the Respondent refused the Applicant's human rights claim but granted him an in-country right of appeal.

4. His appeal was heard by First-tier Tribunal Judge Thomas on 12 January 2018 and she dismissed his appeal in a decision, promulgated on 15 February 2018. The Appellant appealed against her decision and on 16 March 2018 First-tier Tribunal Judge Scott Baker granted him permission to appeal. The Respondent lodged a Rule 24 Response on 5 April 2018.

ERROR OF LAW HEARING

5. Both the counsel for the Appellant and the Home Office Presenting Office and I have referred to the content of these submissions, where relevant, in my decision below.

ERROR OF LAW DECISION

6. The Appellant had been sentenced to a period of four years imprisonment and, therefore, section 32 of the UK Borders Act 2007 applied and he was automatically subject to deportation unless he could show that his deportation would amount to a breach of his human rights for the purposes of section 33 of that Act.

7. However, paragraph 398 of the Immigration Rules states that:

"Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) The deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years…

The Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed where there are very compelling circumstances over and above those described in paragraphs 399 and 399A".

8. Paragraphs 399 and 399A do not apply to those who have been sentenced to at least four years imprisonment and, therefore, fall within paragraph 398(a). As a consequence, the public interest in the Appellant's deportation will only be outweighed if very compelling circumstances attach to his case, which are over and above the circumstances described in paragraphs paragraph 399 and 399A.

9. Section 117C(6) of the Nationality, Immigration and Asylum Act 2002 also states:

"In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in exceptions 1 and 2".

10. Therefore, it was necessary for the judge to consider the extent to which the Appellant would have met the criteria contained in paragraphs 399 and 399A so that she could establish the necessary benchmark on which to assess whether he had identified the very compelling circumstances to displace the public interest in his deportation. As he has a genuine and subsisting relationship with a daughter, who is a British national and resident here, the First-tier Tribunal Judge had to take into account that her best interests were a primary consideration when considering the proportionality of his proposed deportation.

11. In his grounds of appeal, the Appellant submitted that First-tier Tribunal Judge Thomas had failed to make any finding in relation to his daughter's best interests. However, in paragraph 84(vi) of her decision, the First-tier Tribunal Judge did find "that it is undoubtedly in the best interests of [C] that the Appellant remain with them as part of their family unit". Counsel for

the Appellant submitted that the Judge should also have gone on to consider whether it was in her best interests to move to Jamaica to live with her father there. However, the clear inference from the wording and the use of the phrase "remain with them" in paragraph 84(vi) was that the First-tier Tribunal Judge found that it would be in her best interests for the Appellant to remain with her in the United Kingdom, as opposed to moving to Jamaica with him.

12. As this finding in relation to her best interests mirrored that of the independent social worker, it cannot be said that insufficient weight was given to this report.

13. In her decision the First-tier Tribunal Judge also gave detailed consideration to the Appellant's daughter's medical condition under the heading 'The child's best interests'. Having considered the evidence, including the medical evidence in some detail, she concluded at paragraph 65 of her decision that:

"As stated at the outset I must consider the evidence as at the date of this hearing. At today's date [C's] neurofibromatosis condition is effectively inactive. She is not requiring treatment from the NHS other than she has what can only be described as an annual check-up. This is not disputed by either the Appellant or Mrs Holder. In relation to the potential diagnosis of ADHD, I did seek clarification on this, this has not been investigated any further despite the letter written by [C's] previous school. In [C's] new school even after Mrs Holder has spoken to the SENCO no steps were taken to expedite an assessment…The reality is the neurofibromatosis does not require treatment and albeit there was a suggestion of potential ADHD, no further concerns or investigations have been raised".

14. There is nothing in the medical evidence to suggest that these findings are incorrect and the First-tier Tribunal Judge is correct to find that she has to base her decision on the evidence before her.

15. However, permission to appeal was also granted on the basis that it was arguable that First-tier Tribunal Judge Thomas had misdirected herself in law in paragraphs 47 and 48 of her decision. In paragraph 47 she found that "The Rules as they currently stand constitute a '*complete code'* for consideration of Article 8 claims by foreign criminals faced with deportation (**MF (Nigeria) [2013] EWCA Civ 119).** Such claims are therefore determined within the framework of the Rules and not by a freestanding Article 8 assessment…"

16. In **Hesham Ali v Secretary of State for the Home Department** [2016] UKSC 60, the Supreme Court found that this was not the correct approach. Giving the leading judgment, Lord Reed noted in paragraph 15 that:

"Decision-making in relation to immigration and deportation is not exhaustively regulated by legislation. It also involved the exercise of discretion, and the making of evaluative judgments, by the Secretary of State and her officials…Firstly, discretionary powers must be exercised in accordance with any policy or guidance indicated by Parliament in the relevant legislation…Secondly, decision-makers should not shut their ears to claims falling outside the policies that have adopted…"

17. He also stated in paragraph 25 that:

"The question whether the deportation of a foreign offender would be incompatible with article 8 has been considered by the European court in numerous judgments…"

18. In addition, in paragraph 26 he stated that:

"In a well-known series of judgments the court has set out the guiding principles which it applies when assessing the likelihood that the deportation of a settled migrant would interfere with family life and, if so, its proportionality to the legitimate aim pursued. In **Boultif v Switzerland** (2001) 33 EHRR 50, para 48, the court said that it would consider the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in the country from which he or she is to be expelled; the time elapsed since the offence committed and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; whether there are children of the marriage; and, if so, their age; and the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled. Two further factors were mentioned in **Uner v Netherlands** (2006) 45 EHRR 14, para 58: the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and the solidity of the social, cultural and family ties with the host country and with the country of destination…"

19. This approach was not explicitly referred to by the First-tier Tribunal Judge and the substance of her judgment did not refer to the factors referred to in **Boultif** and **Uner.** Instead her approach was similar to that criticised in paragraph 52 of **Hesham Ali** where Lord Reed held that "the idea that the new rules comprise a complete code appears to have been mistakenly interpreted in some later cases as meaning that the Rules, and the Rules alone, govern appellate decision- making.

20. As a consequence, I find that the First-tier Tribunal Judge made a material error of law in her decision.

DECISION

(1) The Appellant's appeal is allowed

(2) The appeal is remitted to the First-tier Tribunal to be heard before a First-tier Tribunal Judge other than First-tier Tribunal Judge MM Thomas with findings made in paragraphs 33, 34 and 35 of First-tier Tribunal Judge Thomas' decision being preserved.

Nadine Finch

Signed Date 2 July 2018

Upper Tribunal Judge Finch