



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/13275/2015

THE IMMIGRATION ACTS

Heard at Birmingham
On 13th August 2018

Decision & Reasons Promulgated
On 03rd September 2018

Before

UPPER TRIBUNAL JUDGE KING TD

Between

MR HENRY [G]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G O Cealleigh of Counsel instructed by TRP Solicitors

For the Respondent: Mrs H Aboni, Home Office Presenting Officer

DECISION AND REASONS

1. This matter has had a lengthy immigration history. The appellant arrived in the United Kingdom on 4th November 2002 and overstayed his leave as a visitor. In 2004 was sentenced to three years' imprisonment for a conspiracy to supply Class A drugs. Had it not been for his ill-health with leukaemia his sentence would have been longer.
2. A decision to make a deportation order was made in November 2005 but subsequently revoked. It was discovered that the appellant had been using the name Anthony Parmar who himself was a victim of identity fraud.

3. The respondent thought that the appellant had returned to Jamaica but that was not the case. In August 2013 the appellant sought leave to remain in the United Kingdom on the basis of his relationship with FB and with his son [W] a son born to a previous relationship.
4. On 23rd July 2015 the respondent decided to deport the appellant to Jamaica as a consequence of the conviction. On 17th August 2015 submissions were made as to why a deportation order should not be made, coupled with an application for leave to remain on the basis of private and family life. A significant feature of the application being that the applicant was suffering from chronic myeloid leukaemia and was in a parental relationship with his stepson and son in the United Kingdom both British citizens.
5. That application was refused and the decision to deport pursuant to Section 5(1) of the Immigration Act 1971 maintained.
6. The appellant sought to appeal against the decision of 14th October 2015, which appeal came before First-tier Tribunal Judge Grimmett on 13th June 2016. The appeal was dismissed.
7. Permission to challenge the appeal was refused by the First-tier Tribunal Judge on 30th October 2016 and also by the Upper Tribunal Judge on 10th January 2017. In particular it was said that the appellant's medical condition viewed cumulatively did not meet the threshold in D or in N.
8. Judicial review proceedings were instituted against that decision to refuse leave to appeal to the Upper Tribunal on the basis that it was unreasonable and in particular had taken no account of the recent decision of the European Court in Paposhvili.
9. The matter came before the Court of Appeal in due course and it was deemed arguable that the decision to refuse permission to appeal was unreasonable having regard to the said case. The text of that decision has not been placed before me but it is common ground that an order of the Court of Appeal of 6th December 2017 granting permission for judicial review the result being "the decision to refuse permission is quashed and the matter is remitted to the Upper Tribunal for a fresh decision upon the application for permission to appeal the decision of the First-tier Tribunal".
10. In light of that consent order permission to appeal to the Upper Tribunal was granted and thus the matter comes before me to determine the substantive issue as to whether or not the Judge of the First-tier Tribunal made any material error of law in her decision.
11. As the appellant was the subject of deportation proceedings the first and obvious issue which arose was whether or not he could bring himself within the exceptions as set out in paragraphs 399 and 399A, particularly whether the appellant was in a parental

relationship with his children such that it would be unduly harsh for them to return with him to Jamaica and it would be unduly harsh for them to remain in the United Kingdom without him.

12. The appellant has a stepson by one relationship and a son by another. The difficulty facing the Judge was to determine whether and when any of the two relationships with the Mothers had rekindled or indeed with the children. The Judge, for the reasons set out in the determination, found that not an easy question to be answered given various inconsistencies in the evidence as presented. It was somewhat complicated by the report of the social worker who had been told that the appellant moved back to home with Ms Waite in January 2013. However the appellant made an application in the same year for leave to remain with another woman. He stated to the Judge that in fact he had not been living with woman or had a relationship with her. That application had been supported by Ms Waite at the time. She now claims that she herself was living with him. Thus it is understandable that the Judge found there to be a lack of credibility both from the appellant and from her on this point.
13. In paragraph 26 of the determination it was noted that the children were still very young and had been living with the appellant for a period likely to be since at least 2015. At paragraph 35 of the determination the Judge was not satisfied that they had lived with the appellant from 2013 as claimed.
14. The Judge went on to consider firstly whether it would be unduly harsh for the children to return to Jamaica. the appellant's natural child [W] was still only 5 years of age. In relation to [D], although his natural father was not the appellant, there was very little input from the matter from his natural father merely that he was treated very much as a child of the family.
15. It was noted there was family support in Jamaica. It was the conclusion of the Judge that it would not be unduly harsh for the family unit to return. Criticism has been made of that decision by Mr O Cealleigh on the basis that the Judge failed to appreciate that both children were British citizens. For my part I find no error in that analysis.
16. The real difficult, however, it seems to me is in the analysis as to whether it would be unduly harsh for the children to remain without the appellant. In that regard there was a detailed report from a social worker dated 15th May 2016.
17. In some sense it was a fairly wide report, seeking to deal with the best interests of the children moving to Jamaica, although the author of the report gives little indication as to her knowledge of such matters. The Judge recognised however at paragraph 25 of the determination, that the social worker did deal with the children's best interests at the end of the report, indicating it was not in their best interests for their father to be removed as that would have a negative emotional impact on them. It was also the issue as to whether or not Ms Waite would need to choose between the appellant and [D], whether or not it would be unduly harsh to expect [D] to remain with his biological father and be separated from his mother.

18. What is said is that the general approach to the question of unduly harsh in terms of the children being without the appellant is treated in a very general way by the Judge. The Judge at paragraph 27 is satisfied that the appellant has a genuine and subsisting parental relationship with the children, that their best interests are likely that that relationship should continue as they are close and have known him much of their lives. It is said that both appear to be happy and doing well at school on the evidence that has been produced. The Judge concludes at paragraph 34 of the determination that it would not be unduly harsh for the children to remain in the UK with their mother. What is said is that little consideration has been given to the real nature of the relationship which the appellant has had with his children since 2015. He has been their primary carer while Ms Waite is working. It is said that the analysis is somewhat brief and fails to engage with the detail of that relationship and of the importance which the appellant has to the lives of the children as mentioned in the social report.
19. It seems to me that the concerns expressed have some merit in that connection.
20. On the wider canvas of Article 8, it is submitted that that has not been fully considered. The illness of the appellant is a serious one and according to the recent jurisprudence it is a matter that is placed in the balance in considering proportionality of removal under Article 8.
21. It is clear that the Judge has borne in mind the medical condition of the appellant as being a feature to be borne in mind. He has viewed very much that condition of removal in the light of N. Mr O Cealleigh submits that in certain circumstances it is appropriate to look at the medical condition within the lens of Article 8 a consideration seemingly shared by the Court of Appeal in granting permission.
22. In fairness to the Judge she has considered other aspects as to the matters raised for example whether the appellant is rehabilitated and has engaged in no further criminality.
23. Such of course is a matter to be tempered by the fact that the appellant used a false identity and has seemingly made untrue applications in relation to whom he was claiming to live. The Judge has taken account of the serious nature of the offence for which the order was originally made. The Judge has had regard to Section 117 of the 2002 Act as to the maintenance of effective immigration control.
24. This is not a simple case. On the one hand the appellant's convictions are of some antiquity. That having been said, it was the finding of the Judge that deception and lack of candour had still been reflected in a number of the applications which were made to the authorities. Equally it is right to note a very significant delay in the making of the deportation order. However that was quite substantially occasioned by the use of a false identity by the appellant and a misunderstanding as to whether he was in the country or not. It could however be argued, as indeed it is, that the Judge was perhaps over rigorous or restrictive in her approach as to the relevance of the

appellant's illness in relation to proportionality, as perhaps might be reflected in the current jurisprudence.

25. Having heard the arguments as presented by both parties, I find that the determination of the First-tier Tribunal Judge is defective in two material respects namely the consideration as to whether it would be unduly harsh for the children to remain in the United Kingdom without the appellant. Also it may be argued that the approach on Article 8 outside of the Rules may have been defective or incomplete.
26. In those circumstances the determination of the First-tier Tribunal is set aside to be remade with particular reference to those matters.
27. I do not seek to preserve any of the findings of the First-tier Tribunal Judge but clearly on the operation of Devaseelan it would be open to a Judge hearing the matter to take account of the findings or not as may be appropriate.
28. I am also mindful that a number of years have gone by since matters were first canvassed before the First-tier Tribunal and it may be that an up-to-date social enquiry report as to the situation's circumstances of the children focused upon the issues in hand may be desirable. Up-to-date medical evidence may be required as to the appellant's health and prognosis.
29. Given that evidence is most likely to be required an assessment of credibility made it is appropriate, having regard to the Senior President's Practice Direction, for this matter to be reheard in the First-tier Tribunal hopefully without too much delay.

Notice of Decision

The appeal before the Upper tribunal is allowed. The decision is set aside to be remade by the First tier Tribunal upon a full rehearing.

No anonymity direction is made.



Signed

Date 23 August 2018

Upper Tribunal Judge King TD