



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/24015/2016

THE IMMIGRATION ACTS

Heard at Field House
On Tuesday 19 June 2018

Decision and Reasons Promulgated
On Friday 06 July 2018

Before

**THE HONOURABLE MRS JUSTICE MOULDER
UPPER TRIBUNAL JUDGE SMITH**

Between

**K D
[Anonymity Direction Made]**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer

For the Respondent: Ms S Ferguson, Counsel instructed by Ineyab solicitors

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

An anonymity direction was made by the First-tier Tribunal. The appeal involves a minor child. Accordingly, it is appropriate to continue that direction. Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State for the Home Department. For ease of reference, we refer below to the parties as they were in the First-tier Tribunal albeit that the Secretary of State for the Home Department is technically the Appellant in this particular appeal.
2. The Respondent appeals against a decision of First-tier Tribunal Judge Aujla promulgated on 17 April 2018 (“the Decision”) allowing the Appellant’s appeal against the Respondent’s decision dated 18 October 2016 refusing the Appellant’s human rights claim in the context of a decision to deport the Appellant to Jamaica.
3. The Appellant is a national of Jamaica. He came to the UK as a visitor on 19 August 2000 aged fourteen years. His leave in that category expired and he thereafter overstayed. He applied for further leave in 2002 which was refused in September 2007 and he was given notice of removal. His appeal against that decision was allowed in November 2007 based on his family life with his (now former) British citizen partner, TB and their daughter, TD, born 1 July 2006. TD is also a British citizen by reason of her mother’s nationality. On 19 February 2008, the Appellant was granted discretionary leave to remain until February 2011.
4. Between 15 July 2005 and 30 June 2009, the Appellant was convicted of a number of offences including possession of a controlled drug and with intent to supply, driving a motor vehicle whilst disqualified, without insurance and otherwise than in accordance with a driving licence. None of those offences culminated in any sentence of imprisonment.
5. On 4 March 2010, the Appellant was convicted of possession of controlled Class A and Class B drugs with intent to supply and facilitation of the acquisition/possession of criminal property. He was sentenced to thirty-three months in prison.
6. On 25 June 2010, the Appellant was served with notice of automatic deportation. The deportation order was issued on 7 February 2011. His appeal against that decision was allowed on human rights grounds in a decision promulgated on 6 May 2011. That was on the basis of his relationship with his partner, TB, and his child, TD. It is worthy of note that the Respondent’s decision and the Tribunal’s decision both pre-dated the introduction in July 2012 of the Immigration Rules (“the Rules”) relating to family and private life. Those also pre-dated the coming into force, following amendment by the Immigration Act 2014, of Section 117 Nationality, Immigration and Asylum Act 2002 (“Section 117”).
7. The Respondent granted the Appellant six months’ leave to remain in accordance with his policy, expiring 18 August 2012. The Appellant was granted further leave

in January 2014 until 9 June 2014. The Appellant then made an application for further leave based on the same relationships. His relationship with TB broke down after he had submitted the application.

8. At about the same time, the Appellant entered into his current relationship with KO (also a British citizen). The Appellant and KO have a daughter, ND, born 19 December 2015. It was common ground before the First-tier Tribunal Judge that, as a new matter, post-dating the claim which was the subject of the Respondent's decision under appeal and which factual issues had not been put before the Respondent, the Tribunal could not consider the Appellant's relationship with KO and ND. It was also common ground that the Appellant's Article 8 claim focussed on his parental relationship with TD rather than his relationship with TB, the previous appeals having succeeded based on that relationship. An issue also arose in relation to the impact on this appeal of the previous First-tier Tribunal decision allowing the Appellant's appeal against the Respondent's first deportation order ("the Tribunal's First Decision").
9. The Judge allowed the appeal, in part relying on the conclusions in the Tribunal's First Decision and in part on the basis that the impact of the Appellant's deportation would have an unduly harsh effect on TD. It was accepted that TD would remain in the UK with her mother. The Judge found that separation from her father would be unduly harsh.
10. Permission to appeal was granted by First-tier Tribunal Judge I D Boyes on 3 May 2018 in the following terms, so far as relevant:
 - "... [2] The grounds assert that the Judge erred in the assessment of the factual position bearing in mind the appellant is an ex-partner and the Judge has failed to detail what would be inordinately severe. In addition, insufficient weight is given to the public interest in deporting the appellant.
 - [3] The grounds are arguable. The Judge has, it is arguable, not gone into sufficient detail as to the consequences for the child so as to be able to reach the conclusions that he did. Public interest considerations always need ventilation in a judgment, it is arguable that there is insufficient herein.
 - [4] Permission is granted on all grounds."
11. The matter comes before us to decide whether the Decision contains a material error of law and, if so, to re-make the decision or remit the appeal for rehearing to the First-Tier Tribunal.

GROUND OF APPEAL

12. The grounds of appeal relied upon in summary are as follows:
 - i. the First-tier Tribunal judge has failed to give clear reasons on why it would be unduly harsh if the Appellant was deported and TD remained in the United Kingdom;

- ii. although it is accepted that it is in the best interest for TD to remain in contact with the Appellant, the First-tier Tribunal judge has failed to identify the unduly harsh consequences if the Appellant were deported;
- iii. separation is rarely sufficient to outweigh the public interest in deportation and failure to give due consideration to the public interest (which is not restricted to risk of reoffending) following the change in circumstances is a material error in law.

ERROR OF LAW DECISION

13. As the Respondent accepts, the starting point for the Judge was the findings in the Tribunal's First Decision. Those are set out at [13] to [16] of the Tribunal's First Decision as follows:

"[13] We find from the evidence the appellant has established a family life with [TB] and their child and [TB's] family in the UK. His partner is a British citizen and in the event that he is deported to Jamaica, the child will be separated from a parent that the child loves and knows well. We find that the intrinsic importance of citizenship should not be played down. As a British citizen, the child has rights which she would not be able to exercise if she moved to another country. She would lose the advantage of growing up and being educated in her own country, her own culture and her own language.

[14] In making the proportionality assessment under article 8, the best interest of the child must be a primary consideration. That means that the child must be considered first. It is not reasonable to expect [TB] to abandon a stable environment in the UK, where she has her own flat, to leave close family members behind (to leave R for whom she provides a good standard of care) and to relocate with her child to Jamaica, a country with which she has no links because [TB]'s mother a [sic] Scottish and her late father was Burmese. In the case before us, the countervailing considerations are the need to maintain firm and fair immigration control coupled with the appellant's appalling record of offending and drug convictions. Although his immigration status was precarious when the Appellant met [TB], by 2007 he had obtained discretionary leave to remain until 19 February 2011.

[15] The child, however, cannot be blamed for the failings of the appellant and the inevitable result of removing the appellant would be that [TB] and the child would remain in the UK without him. Because of the youth of the child, it is not possible to consider the child's own view.

[16] Had there not been the best interests of the child that we must factor into the balancing exercise, and which best interests outweigh other considerations, we would not have hesitated to support the deportation order. It is only the presence of the child in the UK that has persuaded us to make the decision that we make now. We find that on the totality of the evidence, it would be disproportionate to remove the appellant to Jamaica. We find that to deport the appellant to Jamaica would be interfering with his private/family life and that the interference would be disproportionate."

14. Guidance as to the approach of a second Tribunal to the findings of a first Tribunal between the same parties is set out in the “Devaseelan” principles (arising from the case of Secretary of State for the Home Department v D (Tamil) [2002] UKIAT 00702) apply. Those principles apply as follows (taken from [39] to [41] of the judgment in that case):
- (1) The first Judge’s determination should always be the starting-point.
 - (2) Facts happening since the first Judge’s determination can always be taken into account by the second Judge.
 - (3) Facts happening before the first Judge’s determination but having no relevance to the issues before him can always be taken into account by the second Judge.
 - (4) Facts personal to the Appellant that were not brought to the attention of the first Judge, although they were relevant to the issues before him, should be treated by the second Judge with the greatest circumspection.
 - (5) Evidence of other facts may not suffer from the same concerns as to credibility, but should be treated with caution.
 - (6) If before the second Judge, the Appellant relies on facts that are not materially different from those put to the first Judge the second Judge should regard the issues as settled by the first Judge’s determination and make his findings in line with that determination.
 - (7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the Appellant’s failure to adduce relevant evidence before the first Judge should not be held against him.

The Tribunal in Devaseelan made clear that those guidelines are not intended to cover every eventuality.

15. Here, there were two main differences between the position at the time of the Tribunal’s First Decision and that pertaining at the time of the hearing before Judge Aujla. First, the Appellant’s relationship with TB had broken down. Whilst it is not disputed that the Appellant retains a genuine and subsisting parental relationship with TD, he no longer resides with her and TB as a family unit. His staying contact with TD is limited to every other weekend and part of the school holidays. There is therefore a qualitative difference in the family life which the Appellant enjoys with his daughter, albeit the extent of the difference depends on the evidence. Second, and in any event, there is a change in the legal landscape between the Tribunal’s First Decision and this appeal. Whilst the “Devaseelan” principles make no mention of changes in the law, the Tribunal must take into account such changes. It is bound to apply the law as it stands at the date of the hearing.

Grounds (i) and (ii): failure to give clear reasons/failure to identify the unduly harsh consequences if the Appellant is deported

16. We turn then to the Respondent's grounds that the Judge has failed to give clear reasons for finding that the deportation of the Appellant would have an unduly harsh effect on TD and/or to identify the unduly harsh consequences upon TD.

17. Having recited the facts and accepted, based on the Tribunal's First Decision, that it would be unduly harsh for TD to go to Jamaica with her father (which finding is not disputed by the Respondent), the Judge went on as follows:

"[40] I have considered whether it would be unduly harsh for TD to remain in the United Kingdom without the Appellant. TD was born on 01 July 2006 and was now 11 and a half years old. The Appellant has been a part and parcel of her life since she was born. He is in regular contact [with] the child. The child came to visit him every other weekend and had built up a relationship with him, his partner and his daughter ND who was born on 19 December 2015. The Appellant provided photographic evidence of all of them being together. In my view it would be highly upsetting for TD suddenly not to have the Appellant, his partner and his second daughter as part of her life anymore. The Appellant's absence, and therefore also the absence of his partner and daughter ND, from her life would be psychologically devastating for TD. I therefore find that it would be unduly harsh for TD to remain in the United Kingdom without the Appellant. It would be in TD's best interests for her to continue to have the Appellant's personal involvement in her upbringing. I therefore find that the Appellant satisfied the requirements in paragraph 399 of the Immigration Rules."

18. There are two errors of law disclosed by that passage. First and foremost, the Judge has no regard to Section 117C which provides that deportation is in the public interest.

19. The Judge has also failed to give adequate reasons for the finding that the impact on TD would be unduly harsh. Although the Judge makes reference to the fact of contact between the Appellant and TD, he does not refer expressly to the evidence which founds his conclusion that deportation of the Appellant would lead to unduly harsh consequences for TD.

20. As regards his relationship with TD, the Appellant's statement says this:

"[7] ... I continue to see my daughter [TD] regularly and play an active role in her life, attending parents evenings, having her every fortnight for overnight visits and engaging in social activities with her. I also support her financially with regular payments to her mother as agreed between ourselves.

...

[10] ... We also see [TD] regularly at weekends and I am pleased that my daughters [TD] and [ND] have developed a loving relationship as sisters due to this. They are both always very excited to see each other and despite the age gap spend quality time together."

21. The Appellant's current partner says this about the relationship between the Appellant and TD:

"[9] The bond that [ND] and [TD] have with their father is very strong [TD] looks up to her father and loves him very much as [the Appellant] plays a key role in [TD]'s life. He helps her build confidence, as [TD] has issues at school with social skills for which she gets extra support. Without [the Appellant] it would be difficult for the girls to build their relationship and see each other regularly which are important to me as family is everything."

22. A Family court order confirms the level of contact between the Appellant and TD (which is not disputed). There is reference to TD wishing to have contact with her father (although not wishing to be left in the care of his current partner). It appears from the order (dated 10 November 2017), that the Appellant had broken off contact at some point since there is reference to the Appellant seeking "to reinstate the alternate weekend contact". We note in that regard that, when the appeal first came before Designated First-tier Tribunal Judge Campbell on 6 April 2017, he was informed that the Appellant was seeking a contact order and mediation was ongoing between the parties to agree contact. The application to the Family Court was made at some point between then and the next hearing on 5 July 2017.

23. There is though no evidence from TB in relation to the contact which her daughter has with the Appellant or as to the extent and nature of the relationship. There is no evidence from TD herself. There is no evidence to support KO's statement that TD has issues at school and nothing from the school concerning the extent of the Appellant's involvement with TD's schooling. There is no report from a social worker or psychologist concerning the impact of deportation of the Appellant on TD. That is of particular importance here given the findings of the Judge that deportation of the Appellant would be "highly upsetting" and "psychologically devastating" for TD.

24. It was submitted for the Appellant that the conclusions of the judge at [40] were clearly reasoned with reference to the facts. However, in our view the reasons given by the Judge at [40] were not sufficient on their face to evidence his conclusion that the absence of the Appellant from his daughter's life would be "psychologically devastating". We note that there is no report from a social worker or psychologist concerning the impact of deportation of the Appellant on TD upon which the judge relies in reaching that conclusion. The only evidence referred to by the Judge is as follows:

"The Appellant has been a part and parcel of her life since she was born. He is in regular contact [with] the child. The child came to visit him every other weekend and had built up a relationship with him, his partner and his daughter ND who was born on 19 December 2015. The Appellant provided photographic evidence of all of them being together."

25. Accordingly, in our view the Judge has failed to provide adequate reasons for his finding that deportation of the Appellant would have unduly harsh consequences for TD.

Ground (iii)- failure to give due consideration to the public interest (which is not restricted to risk of reoffending) following the change in circumstances is a material error in law.

26. It was submitted for the Respondent that the First-Tier Tribunal Judge had failed to take into account the Appellant's offending and immigration history and failed to give due consideration to the public interest that is not restricted to the risk of reoffending.
27. For the Appellant it was submitted that the Judge expressly took into account the offending and immigration history and the Judge having given due regard to all relevant factors found that the Article 8 rights of the Appellant and his daughter outweighed the public interest in deportation.
28. In our view, in circumstances where the relationship with TB had broken down, and there had been a change in the statutory regime, the First-tier Judge failed in carrying out the balancing exercise both to have regard to the change in circumstances and to have regard to Section 117C which provides that deportation is in the public interest.
29. Accordingly, the Judge in our view failed to give due consideration to the public interest and was in error in his approach.

Conclusion on error of law

30. For the reasons set out above we find that the Judge fell into error and we therefore set aside the Decision.
31. The parties agreed that, if we found a material error of law, we could proceed to re-make the decision on the papers. There was no application by the Appellant to adduce further evidence. We therefore now turn to re-make the decision.

RE-MAKING OF THE DECISION

32. We have set out at [3] to [8] above, the essential facts of the case. We set out at [13] above the findings in the Tribunal's First Decision. We have regard to the findings there made but, as indicated at [15] above, there are two changes in circumstances since the Tribunal's First Decision. First, the Appellant is no longer part of the family unit with TB and TD. Whilst we accept that the Appellant retains contact with TD (although may have resumed that contact quite recently), we reject Ms Ferguson's submission that this is not a change in the factual circumstances. The relationship between the Appellant and TD is necessarily altered to some extent by the fact that they no longer live together and he has staying contact with her only every other weekend and for part of the school holidays. Nonetheless, we accept that he maintains a genuine and subsisting parental relationship with her.

33. We accept the finding made in the Tribunal's First Decision that it would be unduly harsh for TD to return to Jamaica with her father. She lives with her mother, TB. TB is estranged from the Appellant and has her own family and life in the UK. There is no suggestion that she should go with the Appellant to Jamaica.
34. The essential question is whether it would be unduly harsh for TD to remain in the UK without the Appellant. We have no difficulty in accepting that it is in the best interests of TD to retain physical contact with both parents. The order of the Family Court reflects that. We also accept that TD may benefit from retaining contact with her half-sibling, ND. We note however that the order of the Family Court reflects a reinstatement of arrangements in November 2017. It is not clear to what extent the Appellant has retained contact throughout the period from about 2014 when the relationship between the Appellant and TB broke down (according to the Appellant's chronology, the Appellant entered into his relationship with KO in May 2014). It is also not clear whether the Appellant's current partner and ND would relocate to Jamaica with the Appellant were he to be deported. If they did not do so, there is of course no reason why TD could not retain at least some contact with her half-sibling (although it appears from the Family Court order that she might not do so by way of staying contact because TD herself appears reluctant to be looked after by her father's partner alone).
35. Whilst TD's best interests are a primary consideration, they are not paramount. In this case, those interests may be outweighed by the public interest in deportation given her father's criminal offending. As we have already noted, the question is whether the impact on TD is unduly harsh and whether, particularly when balanced against the strength of the public interest, the decision to deport the Appellant is disproportionate as a result of that impact.
36. We have set out at [20] to [22] above, the evidence relating to the relationship between TD and her father. There is no independent evidence of what the impact on her might be if he is deported. There is no evidence of any adverse impact on her when her father was in prison until 2011. There is nothing from TD herself or from TB as her mother providing any evidence as to the effects which that separation had on TD.
37. We are quite prepared to accept, even without such evidence, that TD will be upset by separation from her father. Even if it is the case that contact has only been resurrected recently, the Appellant is still her father and she would undoubtedly prefer to retain that contact as she grows up. However, there is simply insufficient evidence to show that the impact on her would be harsh, let alone unduly harsh.
38. Further and in any event, the impact on TD and what her best interests require has to be balanced against the public interest. It is right to note that there has apparently been no offending since the last (index) offence which led to deportation action. That was though a serious offence involving the possession with intent to

supply of Class A drugs. It led to a sentence of thirty-three months. As Section 117C states, not only is it the case that deportation of foreign criminals is in the public interest but also, the more serious the offence, the greater the public interest in deportation.

39. We accept that this is the first offence which has led to a period of imprisonment but it is worthy of note that it was not the first offence committed by the Appellant (see [4] above). Furthermore, it marks an increase in the level of offending from the previous offences. We take into account that there have been no further offences since the offence which led to the conviction in 2010. We also note that the offences were committed by the Appellant when he was in his late teens and early twenties and we accept that he may have grown older and wiser. However, we have no evidence about the level of risk which the Appellant may pose.
40. We note the evidence in the Appellant's witness statement that he is a reformed character as reflected in both his current employment status and his church attendance. We take into account the evidence that he undertook rehabilitative educational courses whilst in prison and is now successfully self-employed.
41. In particular, we have considered the letter dated 17 March 2017 at [AB/19-20] which is effectively a character reference for the Appellant written by a person who is a solicitor and was regional coordinator for the Prison Fellowship. The person's name is not included in the letter but the index to the bundle indicates that the letter is written by a Mr Gitanjali Vijeratnam. That letter speaks of the Appellant's volunteering for the Prison Fellowship which takes the form of speaking about his own experiences at events which that charity organises and supporting fundraising activities. Mr Vijeratnam also speaks of the Appellant as a friend and committed churchgoer. He says that the Appellant is a "wonderful role model to his children and to all of us" and confirms that, in his view, the appellant is rehabilitated and would be a benefit to the UK if entitled to remain here.
42. We take into account all that is said in the Appellant's favour. We also take into account that he has lived in the UK now for nearly eighteen years and has not lived in Jamaica since the age of fourteen. Part of his period of residence was unlawful (until 2007). However, he was given permission to remain thereafter based on his family life.
43. For the reasons given at [23] of Judge Aujla's decision, we are not required to take into account the Appellant's relationship with his current partner or second child. The Appellant has made no claim to the Respondent based on that relationship. The Respondent has not given consent for the Tribunal to consider that as a "new matter"; indeed, the Appellant has not requested such consent.
44. The exercise which we have to undertake is to balance the interference with the Appellant's private and family life with the public interest. In so doing, we take account of Section 117C which sets out the Respondent's view of where the public

interest lies in deportation cases. In deportation cases, as laid down by statute, the public interest requires deportation unless either of the exceptions set out in Section 117C(4) are met or unless there are very compelling circumstances over and above those exceptions capable of outweighing the public interest (see also NA (Pakistan) and others v Secretary of State for the Home Department [2016] EWCA Civ 662).

45. The most important aspect of the Appellant's family life is now as it was at the time of his last appeal, his relationship with TD. We have set out what we make of the evidence about the impact on her and have found that the evidence does not establish that the effect on her will be unduly harsh. We have regard to what is said in Section 117C about the importance to the public interest of deportation of those who commit crimes in the UK. That public interest is heightened by the seriousness of the offence. Here, the index offence is one involving drugs. The supply of such drugs is, we accept, particularly harmful to society. Whilst we accept that there is some evidence that the Appellant has learnt from his mistakes in the past, and may have rehabilitated, the public interest in deportation involves not only a consideration of the risk of reoffending but also the need to deter others (see for example paragraph [11(6)] of the Court of Appeal's judgment in Secretary of State for the Home Department v AJ (Zimbabwe) [2016] EWCA Civ 1012 referring to the previous authorities of OH (Serbia) v Secretary of State for the Home Department [2008] EWCA Civ 694 and N (Kenya) v Secretary of State for the Home Department [2004] EWCA Civ 1094).
46. Having carried out the balance of the various factors at play in this appeal, and for the reasons given above, we have formed the conclusion that the rejection of the Appellant's human rights claim and his deportation are not unlawful as contrary to Article 8 ECHR. It follows that the Respondent's decision is not unlawful as in breach of the Human Rights Act 1998 and we dismiss the Appellant's appeal.

DECISION

We are satisfied that the Decision contains material errors of law. The decision of First-tier Tribunal Judge Aujla promulgated on 17 April 2018 is set aside.

We re-make the decision. We dismiss the appeal.



Signed
Upper Tribunal Judge Smith

Dated: 4 July 2018